No. 24-10139

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRUCE HENRY,
Appellee,

v.

ATTORNEY GENERAL OF THE STATE OF ALABAMA, ET AL.,
Appellants.

On Appeal from the United States District Court
For the Middle District of Alabama
Case No. 2:21-cv-00797-RAH-JTA

EN BANC BRIEF OF *AMICI CURIAE* PROFESSOR SHANTA TRIVEDI AND SCHOLARS OF FAMILY AND CONSTITUTIONAL LAW IN SUPPORT OF APPELLEE BRUCE HENRY AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case and were omitted from the Certificates of Interested Persons in briefs that were previously filed:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are professors and scholars who study, teach, and write about family law, the child welfare system, and the constitutional rights of parents and children. The individual amici are listed in Appendix A at the end of this brief.

STATEMENT OF THE ISSUES

Amici argue that Alabama Code § 15-20A-11(d)(4) infringes on a child's right to family integrity and inflicts great harm on both children and parents when it unconstitutionally mandates their separation. *Amici* further argue that to sufficiently protect the child's right and avoid this harm, a child and parent should be given a hearing at which the state must prove the necessity of child-parent separation, based on an individualized analysis of the facts and circumstances of the family, by clear and convincing evidence.

SUMMARY OF THE ARGUMENT

The panel correctly affirmed the District Court's holding that Alabama Code § 15-20-A-11(d)(4) "impermissibly burdens Henry's fundamental rights to

[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for *Amici Curiae* certifies that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *Amici* and their counsel have contributed money for this brief.

'establish a home and bring up children.'" *Henry v. Sheriff of Tuscaloosa Cnty.*, 135 F.4th 1271, 1279 (11th Cir. 2025). As this Court considers the matter *en banc*, *Amici* write in support of Mr. Henry to explain how this provision of the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA") also violates a fundamental constitutional right held by Mr. Henry's now-four-year-old son: the right to family integrity and, more specifically, his right to live with his father. This right is supported by a long line of Supreme Court jurisprudence and has been explicitly recognized by many lower courts, including a large majority of the federal circuits and state courts within the Eleventh Circuit. This right helps to protect against the well-documented harm of separation to both children and parents. Ultimately, the application of procedural due process requires that a child be given an opportunity to contest separation from their parents, and that the state be required to justify that separation with clear and convincing evidence.

ARGUMENT

I. CHILDREN POSSESS A CONSTITUTION RIGHT TO FAMILY INTEGRITY, AND ASORCNA VIOLATES THAT RIGHT.

A. The fundamental right to family integrity is reciprocal and applies equally to children and parents.

The right to family integrity is fundamental and deeply ingrained in this country's history and tradition. Many courts, including some courts in the Eleventh

Circuit, have recognized that children hold a fundamental right to family integrity equivalent to that of their parents. Likewise, while the United States Supreme Court has never explicitly found a child's right to family integrity, the right is supported by the Court's dicta and broader jurisprudence with respect to family integrity. *See* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 Harv. C.R.-C.L. Rev. 267, 277–80 (2021).

1. The Supreme Court

Early cases articulating the fundamental right of family integrity emphasized parental rights while acknowledging that a parent's liberty to direct the education and upbringing of children carried benefits for those children, too. Later, the Court became clearer that the right protects the family unit as a whole, with children holding interests in the intact family.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court reversed the conviction of a teacher who taught German in violation of a Nebraska statute prohibiting foreign language education. The Court held that the Fourteenth Amendment Due Process Clause protects (among other things) the right "to establish a home and bring up children" and ultimately the plaintiff's "right . . . to teach and the right of parents to engage him so to instruct their children." *Id.* at 399, 400. While *Meyer* is framed primarily in terms of parental rights, the Court hinted at concern for children's rights

as well. For example, the Court acknowledged the right "to acquire useful knowledge," *id.* at 399, later noting that "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child," *id.* at 403.

Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court relied on *Meyer* to hold that an Oregon statute requiring public schooling "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35. Again, the Court noted that protecting the rights of the family benefitted children's interests, stating that "[t]he 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." *Id.* at 535.

This trend continued in *Prince v. Massachusetts*, 321 U.S. 158 (1944), where the Court upheld a mother's conviction under Massachusetts' child labor laws after she supplied her daughter with religious magazines to sell on the street. *Id.* at 160. The Court affirmed that "[i]t is cardinal with us 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." *Id.* at 166.

Although the Court held that "the family itself is not beyond regulation in the public interest," *id.*, this latter language planted the seeds for the idea that the constitutional interest in the familial relationship is owed in part because a child, and therefore society, ultimately benefits from a relationship with their parents.

The Court broadened its notion that children are protected from intrusion into families by the state in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), a case in which the Court reversed the conviction of a grandmother (who lived with her son and grandson as well as a second grandson who came to live with her after his mother had died) under an Ohio city zoning ordinance that limited the occupancy of a dwelling unit to only certain recognized family members. *Id.* at 495–96. A plurality of the Court called the ordinance an "intrusive regulation of the family," explaining that "when the government intrudes on choices concerning family living arrangements," a court must carefully examine the state's proffered interests. *Id.* at 499. The plurality observed that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503.

And in *Troxel v. Granville*, 530 U.S. 57 (2000), the Court again centered the interest children have in family integrity when it held that a Washington statute that authorized a court to grant visitation rights to "[a]ny person," if in "the best interest

of the child," unconstitutionally interfered with "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 60, 66 (cleaned up). The Court noted that since there is a "presumption that fit parents act in their children's best interests, . . . there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children." *Id.* at 58. In dissent, Justice Stevens noted that "it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Id.* at 88.

The Court's first clear application of the principle of family integrity with respect to children, rather than their parents, was in *Stanley v. Illinois*, 405 U.S. 645 (1972). There, the Court invalidated an Illinois statute that placed children of unwed mothers into foster care upon their mothers' death, regardless of their fathers' fitness or the children's relationship with them. *Id.* at 658. At the outset, the Court rejected as irrelevant Stanley's ability to "regain" custody after separation, observing that "[s]urely, in the case before us, if there is delay between the doing [of a wrong] and the undoing[,] the petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation." *Id.* at 647. The Court noted that

the state "spites its own articulated goals" of protecting "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" when it "needlessly separates" a child from their fit parent. *Id.* at 652–53 (citation omitted). The Court also recognized that "[t]he integrity of the family *unit* has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment." *Id.* at 651 (emphasis added) (citing *Meyer*, 262 U.S. at 399; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)).

Five years later, in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), the Court denied a challenge by foster parents to New York's procedures for the removal of foster children from their foster care placements. *Id.* at 818–19. In discussing the special liberty interest belonging to biological parents, the Court acknowledged the rights of the larger family unit, stressing that the "importance of the familial relationship, to the *individuals involved* . . . stems from the emotional attachments that derive from the intimacy of daily association." *Id.* at 844 (emphasis added).

In concurrence, Justice Stewart (joined by Justices Burger and Rehnquist) wrote that:

> [I]f a State were to attempt to force the breakup of a natural family, over the objections of the parents *and their children*, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest, I should have little doubt that the State would have intruded impermissibly on the private realm of family life which the state cannot enter.

Id. at 862–63 (emphasis added) (citation omitted).

The Court unanimously adopted Justice Stewart's position the next term in *Quilloin v. Walcott*, 434 U.S. 246 (1978). There, the Court denied a challenge by a biological father (who never previously sought custody of his daughter) to his daughter's adoption by her stepfather. *Id.* at 256. But the Court noted that it had "little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents *and their children*.'" *Id.* at 255 (alteration in original) (emphasis added) (quoting *Smith*, 431 U.S. at 862–62 (Stewart, J., concurring)). Four years later, in *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court explained that "until the State proves parental unfitness, *the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760 (emphasis added). This line of cases demonstrates a recognition that the Court has found family integrity to be equal and mutual between parents and children.

2. Lower Courts

At present, the First,[2] Second,[3] Fourth,[4] Fifth,[5] Seventh,[6] Ninth,[7] Tenth,[8] and D.C.[9] Circuits have recognized that a child possesses an independent right to family integrity. For example, the Second Circuit, in a widely cited opinion, has held that "[t]his right to the preservation of family integrity encompasses the reciprocal rights of both parent and children." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). While the Third, Sixth, and Eighth Circuits appear silent on the issue, some

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[2] *See Suboh v. Dist. Att'y's Off. of Suffolk Dist.*, 298 F.3d 81, 91 (1st Cir. 2002).

[3] *See Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977); *Southerland v. City of New York*, 680 F.3d 127, 142 (2d Cir. 2012).

[4] *See Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994); *D.B. ex rel. R.M.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016).

[5] *See Wooley v. City of Baton Rouge*, 211 F.3d 913, 921 (5th Cir. 2000).

[6] *See Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002); *Brokaw v. Mercer County*, 235 F.3d 1000, 1018–19 (7th Cir. 2000).

[7] *See Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc); *United States v. Wolf Child*, 699 F.3d 1082, 1091 (9th Cir. 2012).

[8] *See J.B. ex rel. L.B. v. Washington County*, 127 F.3d 919, 927 (10th Cir. 1997); *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1253 (10th Cir. 2009); *see also de Robles v. Immigr. & Naturalization Serv.*, 485 F.2d 100, 102 (10th Cir. 1973).

[9] *See Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983); *see also Butera v. District of Columbia*, 235 F.3d 637, 655 (D.C. Cir. 2001).

district courts in those circuits have recognized the right. *See, e.g.*, *Kovacic v. Cuyahoga Cnty. Dep't of Children & Fam. Servs.*, 809 F. Supp. 2d 754, 776 (N.D. Ohio 2011), *aff'd and remanded*, 724 F.3d 687 (6th Cir. 2013) ("The Court finds, therefore, that the Kovacic children have met their burden of demonstrating a constitutionally protected interest in their family integrity.").[10]

While this court has not explicitly found a child's right to family integrity, it has acknowledged the importance of the family unit and the rights flowing from it, including the fundamental right to "make decisions concerning the care, custody and control of [one's] children." *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1221 (11th Cir. 2023) (alteration in original) (quoting *Troxel*, 530 U.S. at 66).

This court has further recognized a biological parent's right to family integrity. *See Foy v. Holston*, 94 F.3d 1528, 1536 (11th Cir. 1996) (analyzing plaintiffs' claim that their "rights to preserve their family unit have been violated"); *see also Lofton v. Sec'y of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 812–15 (11th Cir. 2004); *Riley v. Camp*, 130 F.3d 958, 986 (11th Cir. 1997) (Birch, J., concurring in denial of rehearing en banc).

[10] *See also Doswell v. City of Pittsburgh*, No. 07-0761, 2009 WL 1734199, at *14 (W.D. Pa. June 16, 2009); *O'Donnell v. Brown*, 335 F. Supp. 2d 787, 820 (W.D. Mich. 2004).

District courts in this Circuit have also recognized a broad right to family integrity. For example, one court explained that "[t]he right to family integrity generally refers to a family members' [sic] right to reside with other family members, such as parents' right to live with their children." *Pennington v. Taylor*, 776 F. Supp. 3d 1118, 1158–59 (M.D. Ala. 2025). *See also Loftus v. Clark-Moore*, No. 09-14019-CIV, 2009 WL 1956319, at *5 (S.D. Fla. July 7, 2009); *Kenny A.* ex rel. *Winn v. Perdue*, 218 F.R.D. 277, 296 (N.D. Ga. 2003).

Finally, states in the Eleventh Circuit, including Alabama, have recognized a right to family integrity and the importance of the family. *See T.D.K. v. L.A.W.*, 78 So.3d 1006, 1011 (Ala. Civ. App. 2011) ("Parents and their children share a fundamental right to family integrity that does not dissolve simply because the parents have not been model parents."); *see also In re C.G.*, 506 So.2d 1131, 1134 (Fla. Dist. Ct. App. 1987); *In re K.M.*, 897 S.E.2d 521, 525–26 (Ga. Ct. App. 2024).

B. The children of parents convicted of sex offenses, like all children, possess the right to family integrity, and ASORCNA infringes on that right.

At its core, this case is about the fundamental right of a child to live with his father absent an individualized finding about the father's fitness to parent him. Under ASORCNA, individuals convicted of certain sex offenses are prohibited from "resid[ing] or conduct[ing] an overnight visit with a minor." Ala. Code § 15-20A-

11(d). Parents are covered by this provision if their conviction is for a "sex offense involving a child"—including, as relevant here, "offense[s] involving child pornography." *Id.* § 15-20A-4(27).[11] Thus, even though the child of a parent with a sex offense conviction has not been accused of any crime, ASORCNA infringes on that child's right to family integrity by denying the child any opportunity to live with that parent—a cornerstone of the parent-child relationship. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). That a child's parent has been convicted of a sex offense does not change the nature of the child's right but rather calls into question whether and how the government may infringe on that right.

In effect, the child is punished for their parent's offense—a punishment that can extend long after the parent has served their sentence and reintegrated into the community. This separation can lead to permanent damage to the child, which does

[11] Alabama Code § 15-20A-11(d) also casts a broader net than may be apparent. For example, victims of sex trafficking are sometimes prosecuted for crimes related to their own trafficking; those crimes can include sex trafficking of minors when the minors are working with them. *See* Kate Mogulescu & Leigh Goodmark, *Surveillance and Entanglement: How mandatory sex offender registration impacts criminalised survivors of human trafficking*, 14 Anti-Trafficking Review 125 (2020), https://doi.org/10.14197/atr.2012201410. Mothers convicted under this statute would also be denied the right to parent their children, despite their own victimization.

not serve the goals of the criminal legal system, including the goal of rehabilitation, or the goals of child protection. *See* Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 Houston L. Rev. 759, 814 (2009). To honor a child's right to family integrity, courts must always consider that an individual who has been convicted of a sex offense is still a parent, and may hold great importance in the life of a child.

II. FORCIBLY SEPARATING FAMILIES IS HARMFUL FOR CHILDREN AND PARENTS.

A. Family separation is harmful to children.

There is no singular "harm" when a child is removed from their parents, but rather, numerous independent and overlapping "harms." *See* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. L. & Soc. Chang 523, 527–541 (2019); Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq. L. Rev. 1161, 1165–70 (2019). It is unsurprising, then, that the new Restatement of Children and the Law instructs courts to consider the harms of family separation at various points in child welfare proceedings. *See* §§ 2.10–2.17 (Am. L. Inst. 2024); *see also* Shanta Trivedi, *Using the Restatement of Children and the Law to consider the harm of removal*, 63 Fam. Ct. Rev. 446 (2025)[12]. Indeed, courts have relied on scientific research and expert

[12] https://doi.org/10.1111/fcre.70004.

testimony in finding that children's physical and mental health are seriously damaged by separation from their primary caretakers. *See, e.g.*, *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1146–47 (S.D. Cal. 2018); *de Nolasco v. U.S. Immigr. & Customs Enf't*, 319 F. Supp. 3d 491, 503 (D.D.C. 2018).

ASORCNA's absolute prohibition on a parent living with a child, including any future child, removes from a child one of the typically two possible key adults in their life, placing the child in a vulnerable position. The result is not only the painful separation from one parent, but the increased likelihood that this child could end up without a nuclear family or in state foster systems, should the remaining parent become in any way unable or unwilling to care for the child.

Research shows that when two parents have chosen to raise a child—especially when, as here, the parents are married—their child experiences more positive life outcomes than children deprived of one of those parents. For example, one study found that children who did not live with both biological parents were roughly twice as likely to be poor, to have behavioral and psychological problems, and to not graduate high school. *See generally* Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (1994). Another study found that children who only lived with one parent were more likely to experience health problems like accidents, injuries, and poisonings. *See generally* Deborah A.

Dawson, *Family Structure and Children's Health: United States, 1988* (1991). Thus, depriving a child of one of their two committed parents and caretakers, as ASORCNA does, undermines their well-being.

Substantial evidence also supports the notion that children suffer considerable trauma when they are separated from their parents. Indeed, studies show—and some courts have agreed—that the damage caused by the separation from one's parent "may be 'more damaging to the child than doing nothing at all.'" Lynn F. Beller, *When in Doubt, Take Them Out: Removal of Children from Victims of Domestic Violence Ten Years After* Nicholson v. Williams, 22 Duke J. Gender L. & Pol'y 205, 216 (2015) (quoting *Nicholson v. Williams*, 203 F. Supp. 2d 153, 204 (E.D.N.Y. 2002)).

The concept that separating children from their families has adverse developmental and biological consequences is hardly new. As early as the 1940s, studies exposed negative effects on children separated from their parents. *See, e.g.*, Lawson G. Lowrey, *Personality Distortion and Early Institutional Care*, 10 Am. J. Orthopsychiatry 576, 585 (1940); *see also* Frank C. P. van der Horst & René van der Veer, *Loneliness in Infancy: Harry Harlow, John Bowlby and Issues of Separation*, 42 Integrative Psychol. & Behav. Sci. 325, 326–27 (2008).

"Attachment theory" suggests that emotional distress and later problems such as aggression and depression can be attributed to early childhood disruption of the parent-child bonding process. *See* Miriam R. Spinner, *Maternal-Infant Bonding*, 24 Canadian Fam. Physician 1151, 1151 (1978). One of the earliest studies showed that foster children placed in institutional settings showed high rates of "hostile aggressiveness," "temper tantrums," "enuresis [bedwetting]," "speech defects," "attention demanding behavior," "shyness and sensitiveness," "difficulties about food," "stubbornness and negativism," "selfishness," "finger sucking," and "excessive crying." Lowery, *supra*, at 579. Even where children have been mistreated by their biological families, they may long to return to those families. *See* Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 Juv. & Fam. Ct. J. 1, 1–2 (2004). They may also benefit from maintaining their familial connections. *See* Susan L. Brooks, *The Case for Adoption Alternatives*, 39 Fam. Ct. Rev. 43, 47 (2001).

Newborn children are particularly vulnerable, suffering significant negative effects when taken from their parents and especially from their mothers. *See generally* Kimberly Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head-Start Families*, 13 Attachment & Hum. Dev. 5

(2011). Studies show that newborns prefer the sound of their mothers' voice over those of other females, which doctors see as evidence that the period after birth is critical for bonding. *See* Anthony J. DeCasper & William P. Fifer, *Of Human Bonding: Newborns Prefer Their Mothers' Voices*, 208 Sci. 1174 (1980). It is also now widely accepted that skin-to-skin contact between parents and their babies in the first hours of life has significant health benefits for the infant. *See, e.g.*, Jennifer T. Crenshaw, *Healthy Birth Practice #6: Keep Mother and Baby Together—It's Best for Mother, Baby, and Breastfeeding*, 23 J. Perinatal Educ. 211 (2014). The record in this case reflects that ASORCNA kept Mr. Henry separated from his son at this crucial time in his son's development. *See Henry v. Abernathy*, No. 2:21-cv-00797-RAH-JTA, Dkt. No. 101-10 at 3 (98:10–13) ("When [Mr. Henry's son] was an infant and there were feedings during the night and getting up during the night, Bruce was not able to be there and be a part of that . . . .").

Children may also experience feelings of grief and ambiguity when they are separated from their families. *See* Trivedi, *The Harm of Child Removal*, at 532 (citing Monique B. Mitchell, *The Neglected Transition: Building a Relational Home for Children Entering Foster Care* at 5 (2016)). Dr. Monique Mitchell has identified "guilt, post-traumatic stress disorder, isolation, substance abuse, anxiety, low self-esteem, and despair" as just some of the consequences that result from a failure to

deal with this grief. *Id.* (quoting Mitchell, *supra*, at 5). She concludes that children who are separated may mourn the loss of their parents as much as if they had died. *See id.* (citing Mitchell, *supra*, at 3).

For some children, separation may also mean alienation from their extended families and the broader communities to which they are connected through a parent convicted under ASORCNA. Being unable to reside with a parent may result in considerable disruption, such as having to relocate, transfer schools, and lose access to familiar places, all of which compounds feelings of loss and isolation. Children who have been separated from a parent because they were placed in the foster system provide insight, as they report sadness not only about losing their immediate families but also about losing contact with other relatives, friends, pets, and possessions, and the same disruption upon children can result from ASORCNA's blanket denial of a parent to a child. *Id.*

Children who have been separated from their families and placed in foster care may experience "ambiguous loss," or a "lack of clarity about the psychological and/or physical presence of members of one's psychological family" (usually the biological family). *Id.* at 81; *see also* Sankaran, *supra*, at 1169 (citing Pauline Boss, *Ambiguous Loss: Learning to Live with Unresolved Grief* at 5–8 (1999)). One can infer a similar sense of loss for children denied their biological parent by

ASORCNA. The experience can cause anxiety, confusion, despair, and other negative mental health experiences. *See id.* (citing Boss, *supra*, at 23–24).

Ultimately, separating a family is a deeply harmful physical experience. When a child is separated from their parents, "a monsoon of stress hormones (like cortisol) floods the brain and the body." Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*, NOVA NEXT (June 20, 2018).[13] "[I]n high doses, these chemicals—if hyperactive for a prolonged period of time—can increase the risk of lasting, destructive complications like heart disease, diabetes, and even some forms of cancer." *Id.* The harm extends long into the future: "[u]nlike other parts of the body, most cells in the brain cannot renew or repair themselves." William Wan, *What Separation from Parents Does to Children: 'The Effect Is Catastrophic,'* Wash. Post (June 18, 2018);[14] *see also* Stephanie Carnes, *The Trauma Of Family Separation Will Haunt Children For Decades*, HuffPost (June 22, 2018,

[13] https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting.

[14] https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html.

8:52 AM).[15] "[A]rchitectural changes" to the brain can result, meaning that those children "might end up with serious learning, developmental and health problems." Sara Goydarzi, *Separating Families May Cause Lifelong Health Damage*, Sci. Am. (June 20, 2018);[16] *see also* Press Release, Colleen Kraft, Am. Acad. of Pediatrics, *AAP Statement Opposing Separation of Children and Parents at the Border* (May 8, 2018)[17] ("[H]ighly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health."). As one pediatrics professor told the *Washington Post*, "There's so much research on this that if people paid attention at all to the science, they would never do this." *See* Wan, *supra*.

B. Family separation is harmful to parents.

Separation is not just harmful to children; it takes an immense toll on parents as well. *See* Shanta Trivedi, *The Hidden Pain of Family Policing*, 49 N.Y.U. Rev.

[15] https://www.huffpost.com/entry/opinion-carnes-family-separation-trauma_n_5b2bf535e4b00295f15a96b2.

[16] https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage.

[17] https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf.

Law & Soc. Change (last revised June 6, 2025).[18] For example, research shows that when a parent loses a child to death, the parent experiences physical, emotional, and psychological consequences like "elevated risks of psychiatric symptoms, psychiatric hospitalizations, cardiovascular disease, and some cancers." Unnur A. Valdimarsdóttir et al., *The mother's risk of premature death after child loss across two centuries*, 8 eLife e43476 (2019).[19] Fathers have described the loss of their children as analogous to losing a limb or organ, or even like being sentenced to death or murdered. Nehami Baum & Irit Negbi, *Children Removed from Home by Court Order: Fathers' Disenfranchised Grief and Reclamation of Paternal Functions*, 35 Child. & Youth Servs. Rev. 1679, 1681 (2013).

Parents whose children have been separated from them compare that loss to the death of a child and experience similar symptoms. *See* Kathleen S. Kenny, *Mental Health Harm to Mothers When a Child Is Taken by Child Protective Services: Health Equity Considerations*, 63 Canadian J. Psychiatry 304 (2017).[20] Some parents find separation from one's child worse than death. *See* Kendra L.

[18] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4715550.

[19] https://pmc.ncbi.nlm.nih.gov/articles/PMC6850766.

[20] https://pmc.ncbi.nlm.nih.gov/articles/PMC5912303.

Nixon et al., *"Every Day It Takes a Piece of You Away": Experiences of Grief and Loss Among Abused Mothers Involved with Child Protective Services*, 7 J. Pub. Child Welfare 172, 180–81 (2013).[21]

Like their children, parents may experience "ambiguous loss." *See* Monique B. Mitchell, *"No One Acknowledged My Loss and Hurt": Non-death Loss, Grief, and Trauma in Foster Care*, 35 Child & Adolescent Soc. Work J. 1, 2 (2018); *see generally* Boss, *supra*. Parents may also experience "disenfranchised grief," in which they endure a loss "that is not openly acknowledged, sanctioned, or supported within wider society." Emma Geddes, *"Some days it's like she has died': A qualitative exploration of first mothers' utilisation of artefacts associated with now-adopted children in coping with grief and loss*, 21 Qualitative Soc. Work 811, 814 (2022).[22] Parents may further experience a loss of identity and self-worth. *See* Baum & Negbi, *supra*, at 1681–82. All these experiences can lead to social isolation and feelings of total aloneness. *See* Kenny, *supra*, at 305. Indeed, ASORCNA has forced Mr. Henry to live a different house than his wife and son, which has undermined his

[21] https://doi.org/10.1080/15548732.2012.715268.

[22] https://doi.org/10.1177/14733250211039008.

marriage and significantly reduced his bonding time with his son. *See Henry*, Dkt. No. 101-10 at 4–5 (99:2–100:7).

Separation from one's child can even increase the risk of death. *See, e.g.*, Elizabeth Wall-Weiler, *Losing children to foster care endangers mothers' lives*, Conversation (Mar. 29, 2018, 2:28 PM)[23] (noting one study's finding that "mothers whose children were placed in care were 3.5 times more likely to die from avoidable causes (e.g. unintentional injury and suicide), and 2.9 times more likely to die from unavoidable causes (e.g. car accidents and heart disease)"). All this evidence shows that separation of parent and child causes enormous physical, tangible harm to both parties.

III. DUE PROCESS REQUIRES THAT CHILDREN HAVE A MEANINGFUL OPPORTUNITY TO CONTEST THE COMPLETE LOSS OF THEIR FAMILY.

As discussed above, a child possesses a fundamental right to child integrity. *See supra* Section I. Therefore, an intrusion on this right—especially the permanent separation of a parent and child who can no longer reside together—requires the application of strict scrutiny. *See Eknes-Tucker*, 80 F.4th at 1220.

[23] https://theconversation.com/losing-children-to-foster-care-endangers-mothers-lives-93618.

Due process requires that the child's right to family integrity be considered whenever a child and parent will be separated by ASORCNA's requirements—by providing the child an opportunity to be heard, and requiring the state to justify the child-parent separation by clear and convincing evidence. An individualized hearing to determine the fitness of a parent as to that child (and each additional child) is necessary to ensure that the child's right is protected.

The Supreme Court's landmark ruling in *Stanley* provides crucial guidance. *See* Josh Gupta-Kagan, Stanley v. Illinois*'s Untold Story*, 24 Wm. & Mary Bill Rts. J. 773 (2016). There, Illinois presumed an unwed father was unfit, and his claim of parental interest in dependency proceedings was irrelevant. 405 U.S. at 649–50. After recognizing that "[t]he integrity of the family unit" is entitled to constitutional protection, the Court examined the state's child-removal procedures, noting that "the State spites its own articulated goals" when it separates a child from their fit parent. *Id.* at 653. In holding that the state's procedures were invalid under the Due Process Clause of the Fourteenth Amendment, the Court reasoned:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needless risks running roughshod over the important interests of both parent and child. It therefore cannot stand. . . .

> The State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father. It insists on presuming rather than providing Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

Id. at 656–58. The Court concluded that parents "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."[24] *Id.* at 658.

Making an individualized determination is within the traditional province of the courts. *Stanley* makes clear that ASORCNA's categorical denial of the family rights of all children of parents with certain criminal convictions without a hearing or other opportunity to be heard is a violation of the Due Process Clause. Thus, a hearing is required, despite inconvenience to the state and despite the state's goal of protecting children from harm. *See id.* at 656 ("[T]he Constitution recognizes higher values than speed and efficiency.") Even where the parent has a criminal conviction, a court must make a determination of fitness *as to each child*.[25] Indeed, Stanley

[24] The Court further held that "denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." *Stanley*, 405 U.S. at 658.

[25] For example, under New York law, where a parent has been found to have abused or neglected one child, a court must make a separate finding of abuse or neglect as to each child, though it may consider evidence of the first child's abuse

himself was the father of three children and had previously been found to have neglected his oldest child. *See* Gupta-Kagan, *supra*, at 781. Yet the *Stanley* case concerned only the state's separate intervention regarding his other two children, which was premised solely on Stanley's marital status. 405 U.S. at 782.

Moreover, where a child's right to family integrity is infringed and a child is at risk of separation from their parents because of ASORCNA's application, the child is entitled to an opportunity to be heard. Under the *Mathews v. Eldridge* three-prong framework for procedural due process, a child is entitled to such protections because the private interests are strong, there is great value to be gained from a hearing, and the government's interests are shared or weak. 424 U.S. 319 (1976).

First, the "private interest" at stake is enormous. *Id.* at 335. Just as a parent has a "commanding" and "extremely important" interest in "the accuracy and justice of the decision to terminate his or her parental status," *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27, 31 (1981), so too does a child have a commanding interest in a law that separates them from their parents and inflicts enormous consequences. *See Kenny A.* ex rel. *Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005). Indeed, the child's interest is arguably greater than that of the

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or neglect. *See, e.g.*, *In re Monica C.M.*, 107 A.D.3d 996, 997 (N.Y. App. Div. 2013).

parents, given their relatively greater vulnerability and the likely harm to their physical, mental, and emotional development. *See supra* Section II.A. While not a complete termination of a child's right to family integrity, separation is a severe encroachment on that right that begins to approximate termination. Separation would thus work "a unique kind of deprivation." *Lassiter*, 452 U.S. at 27.

Second, the "risk of erroneous deprivation" of the child's right "through the procedures used" is enormous, and "the probable value . . . of additional or substitute procedural safeguards" is equally great. *Mathews*, 424 U.S. at 335. ASORCNA plainly does not include *any* procedures for a child to vindicate their right to family integrity.

Third, "the Government's interest," *id.*, is in "the welfare of the child." *Lassiter*, 452 U.S. at 27; *see also Prince*, 321 U.S. at 166–67. "It is well established that states have a compelling interest in 'safeguarding the physical and psychological wellbeing of minor[s]." *Eknes-Tucker*, 80 F.4th at 1225 (alteration in original) (quoting *Otto v. City of Boca Raton*, 981 F.3d 854, 868 (11th Cir. 2020)). In its en banc brief, Alabama acknowledges its "primary governmental interest of protecting . . . children." Dkt. No. 66 at 45 (quoting Alabama Code § 15-20A-2(5)). The state also has an interest in "an accurate and just decision" to separate child from parent. *Lassiter*, 452 U.S. at 27. And the state has an interest in preserving family integrity.

See Santosky, 455 U.S. at 766–67. All these interests are shared by the child. While the state may have "a fiscal and administrative interest in reducing the cost and burden" of any proceeding, *id.* at 766, that interest is too slight to outweigh the child's enormous interest in separation from their parents and the value gained by additional procedural safeguards. *See Kenny A.*, 356 F. Supp. 2d at 1361. Thus, the *Mathews* factors support a hearing before an ASORCNA separation is approved.

Finally, the evidentiary standard underlying any legal proceeding that can result in permanent intrusion on the fundamental right to one's family should be at least "clear and convincing evidence"—the same standard applied in proceedings for the termination of parental rights. *See Santosky*, 455 U.S. at 769 (applying the *Mathews* test). As in civil commitment proceedings and termination proceedings, "[t]he [child] should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 768 (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)). "Thus, . . . a near-equal allocation of risk between the [child] and the State is constitutionally intolerable." *Id.* Still, a court will likely be required "to evaluate medical and psychiatric testimony, and to decide issues difficult to a prove to a level of absolute certainty." *Id.* at 769. A "clear and convincing evidence" standard may thus "strike[] a fair balance between the rights of the [child] and the State's

legitimate concerns." *Id.* Of course, the state would be free to determine "the precise burden equal to or greater than that standard." *Id.*

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the District Court's ruling and hold that Alabama Code § 15-20A-11(d)(4) unconstitutionally violates a child's right to family integrity.

SUBMITTED this 7th day of November, 2025.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2025, I electronically filed the foregoing with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

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APPENDIX A

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