No. 05-974

In The

Supreme Court of the United States

_____ ♦ _____

PAGE BRITAIN,
Petitioner

v.

SUE ELLEN "MIAN" CARVIN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION
in support of the *Petitioner*

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Legal Foundation, is a public interest law firm that defends religious liberties, parental rights, and pro-life causes. *Amicus* has been involved in the defense-of-marriage movement since 1995 and has assisted various states in drafting their defense of marriage laws. *Amicus* has also worked on a variety of family law issues involving parental rights, and believes that its expertise will assist the Court in its disposition of the Petition for a Writ of Certiorari now before it.

SUMMARY OF THE ARGUMENT

The Washington Supreme Court improperly ignored this Court's guidance in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), concerning the factors relevant to determining the due process rights of *de facto* parents. In *Smith*, the parties thoroughly briefed, and this Court thoughtfully considered, how courts should reconcile the competing claims of *de facto* parents and the legitimate due process rights of a child's natural parents. The factors articulated in *Smith* were not mere *obiter dicta.* They were judicial *dicta*, or at the least much closer to judicial *dicta* than to *obiter dicta*, and should therefore be given precedential or near-precedential weight. Proper application of the factors articulated in *Smith* would yield a result different from that reached by the court below. This Court should therefore review that decision and remand for further consideration consistent with *Smith*.

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[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

ARGUMENT

I. THE QUESTION RAISED IN *L.B.* IS A NATURAL EXTENSION OF ISSUES ADDRESSED IN *SMITH V. ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM*.

In *Smith*, 431 U.S. at 438-47 and 857-63, this Court considered a challenge by an organization of foster parents (appellees) to procedures governing the removal of children from their homes under New York law. The organization alleged that those procedures violated the privacy rights of foster parents under the Due Process Clause of the Fourteenth Amendment. Although the Court ultimately rejected appellees' argument on more narrow grounds, it carefully considered the question whether foster parents whose interests conflicted with those of a fit natural parent could claim due process protection in a continuing relationship with the child. *Id.* at 847 (concluding that, even if appellees could assert a Fourteenth Amendment liberty interest, the procedures followed by the State in the pre-removal process were sufficient to pass constitutional muster).

While declining to resolve that question definitively, this Court articulated a set of factors applicable to making such a determination. Justice Brennan, writing for the Court, suggested that the due process rights of a party who is not the biological parent of a child should be based upon (1) whether the purported quasi-parent relationship "stems from the emotional attachments that derive from the intimacy of daily association"; (2) the degree to which the relationship is created, and its contours determined, by state law; and (3) whether the asserted right would derogate from the

substantive liberty interest of the child's natural parent. *Id.* at 843-47.

At least three federal circuits and the California state courts have found *Smith* applicable in determining the relative rights of biological parents and other caregivers. The Seventh, former Fifth, and Eleventh Circuit Courts of Appeal have all followed *Smith* in evaluating the competing legal claims of foster parents and natural parents. *Procopio v. Johnson*, 994 F.2d 325, 329 (7th Cir. 1993); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1206 (5th Cir. 1977) (en banc); *Lofton v. Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 812 (11th Cir.2004).

In *Procopio*, the Seventh Circuit considered an appeal by foster parents of the state's decision to return a child born to an active drug addict to the child's natural parents. In holding that the foster family did not have a liberty interest under the Fourteenth Amendment, the court—citing *Smith*—emphasized that whatever interest foster parents might claim under state law "must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." 994 F.2d at 328 (*quoting Smith*, 431 U.S. at 846-47).

In *Drummond*, the Fifth Circuit likewise addressed a challenge by foster parents to the removal of a child from their home for permanent placement. The Fifth Circuit, citing this Court's "helpful" discussion in *Smith*, held that the foster parents did not have a cognizable liberty interest in maintaining their relationship with the child. *Drummond*, 563 F.2d at 1206.

More recently, in *Lofton*, the Eleventh Circuit Court of Appeals considered the claims of homosexual foster parents who were denied the right to adopt under Florida

law. In its extensive discussion of *Smith*, the Eleventh Circuit noted this Court's historic emphasis on biological family relationships and rejected the assertion that foster parents can claim a liberty interest in the preservation of the foster family unit. *Lofton*, 358 F.3d at 812-15.

The guidance in *Smith* is not limited in its relevance to foster family relationships. California state courts, for example, have considered *Smith* in resolving the claims of adoptive and *de facto* parents. *Bridget R. v. Cindy R.*, 41 Cal. App. 4th 1483, 1505-06 (1996); *Jamie G. v. Hazel G.*, 196 Cal. App. 3d 675, 681-83 (1988). These decisions—both federal and state—demonstrate that courts have found *Smith* relevant in determining the due process claims of a variety of non-biological parents.

II. THE *SMITH* FACTORS REPRESENT MORE THAN MERE *OBITER DICTA* AND THUS SHOULD BE GIVEN PRECENTIAL OR NEAR-PRECEDENTIAL WEIGHT.

Even though the factors articulated in *Smith* were not necessary to the Court's decision, they should be given deference as precedential or near-precedential because the passage in which they were discussed is arguably judicial *dicta* rather than *obiter dicta*; at a minimum, the passage is much closer to the former than to the latter. *Dictum* has been defined as "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi-Kent L. Rev. 655, 710 (1999). *Dicta* are often divided into *obiter* and judicial *dicta* in assessing their precedential value. *Id.* at 712-13. *Obiter*, or mere, *dicta* are opinions expressed in passing and carry less persuasive weight. *Id.* at 713. Judicial *dicta*, by contrast, reflect a "court's reasoned consideration and

elaboration upon a legal norm" and thus have much greater persuasive value. *Id.* at 73-14.

The distinction between *obiter dictum* and judicial *dictum* is not a bright line, and the two are probably better thought of as being on a continuum. Quinn, *supra*, at 717-18, 740. The Third Circuit Court of Appeals has explained that the degree of deference given *dicta* by later courts depends upon the extent to which the issue involved was argued and evaluated. "A . . . distinction has been drawn between 'judicial *dictum*' and '*obiter dictum*': Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to a decision. A judicial *dictum* may have great weight." *Cerro Metal Products v. Marshall*, 620 F.2d 964, 978 n. 39 (3d Cir. 1980) (citation omitted).

Judicial *dicta* are of sufficient consequence that they can be, and sometimes have been, given precedential value. Indeed, some courts consider judicial *dicta* issued by supreme courts to be binding precedent. As the Third Circuit Court of Appeals noted, "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.'" *Id.* This Court has also given considerable weight to judicial *dicta* in its previous decisions. As the Court stated in *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989), the "principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."

The discussion by this Court in *Smith* regarding factors determinative of due process rights for non-biological "parents" should be considered judicial *dictum*, and thus be

accorded substantial weight, because the issue was thoroughly briefed and carefully considered. The Court's analysis, as reflected in both the opinion of the Court (431 U.S. 838-47) and Justice Stewart's concurring opinion (*Id.* at 857-63 (Stewart, J., concurring (joined by the Chief Justice and Justice Rehnquist)) clearly demonstrates the significance this Court attached to its consideration of this issue.

Examination of the briefs submitted to the Court by the parties and *amici* confirms that the Court's thoughtful analysis in *Smith* followed an equally thorough and careful briefing of the issue by the parties. *See, e.g.*, Motion of the Puerto Rican Family Institute, Inc. and the Puerto Rican Association for Community Affairs, Inc. for Leave to File Brief Amici Curiae 19-28 (Nov. 26, 1976) (arguing that "the foster parent-child relationship under the circumstances presented [was] not a protected interest within the meaning of the Due Process Clause of the Fourteenth Amendment"); Amicus Curiae Brief of the National Juvenile Law Center 7-16 (Nov. 27, 1976) (addressing the contours of rights protected by the Fourteenth Amendment in the context of foster family relationships); Brief for the Legal Aid Society of New York 19-33 (Dec. 17, 1976) (claiming that the foster care relationship was a liberty interest giving rise to due process protection); Motion of a Group of Concerned Persons for Children for Leave to File Brief Amici Curiae and Brief Amici Curiae 5-9 (Jan. 17, 1977) (also asserting that "the relationship between foster children and their long term foster parents [was] a liberty interest protected by the Due Process Clause"); Reply Brief of Appellants Naomi Rodriguez, *et al.* (March 15, 1977) (asserting that a hearing requirement prior to removal of a child from foster care would "impermissibly infringe on the constitutionally protected family unit"); and Reply Brief for State Appellants 7-10 (March 15, 1977) (summarizing the disparate positions argued by the parties and *amici* on the issue of due process

rights, and arguing that "no liberty interest [in a continuing foster family relationship] can co-exist with society's long held belief in the primacy of the natural family").

Though the factors articulated in *Smith* were not essential to the Court's ultimate decision, the issue of due process rights for non-biological parents was thoroughly briefed in that case and this Court intentionally took up the issue and discussed it at length. The Court explicitly articulated a set of factors that it then applied in assessing appellants' assertion that they "ha[d] a constitutionally protected liberty interest." 431 U.S. at 842. The Court's discussion of those factors constitutes judicial *dictum* or, at the least, lies at a point along the spectrum very close to judicial *dictum*. Thus, the factors articulated in *Smith* should be accorded precedential or near-precedential weight.

III. THE DECISION OF THE WASHINGTON SUPREME COURT IN *L.B.* IS INCONSISTENT WITH THE GUIDANCE THIS COURT PROVIDED IN *SMITH*.

A. The "emotional attachments" factor in *Smith* cuts against the Washington Supreme Court's decision in the instant case because L.B.'s relationship with Carvin lacks any compelling emotional tie.

With regard to the first *Smith* factor, this Court stated that "biological relationships are not the exclusive determination of the existence of a family," and observed that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association." 431 U.S. at 843-44. The Eleventh Circuit Court of Appeals, in *Lofton*, followed this reasoning and carefully considered an assertion by foster parents "that theirs was a 'psychological family'" based upon "mutual

feelings of love and dependence." *Id.* at 813. Although the Eleventh Circuit correctly understood that the other *Smith* factors also had to be considered, it acknowledged that the degree of intimacy among the individuals involved was an important factor in determining the rights of non-biological parents.

A number of state courts, in considering the issue of *de facto* parent status, have likewise given substantial weight to the factor of family intimacy. Among the decisions recognizing this factor as relevant or controlling are *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004); *Robinson v. Ford-Robinson*, __ S.W.3d ___, 2005 WL 1041158 (Ark. May 5, 2005); *Bridget R. v. Cindy R.*, 41 Cal. App. 4th 1483 (Ct. App. 1996); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004); *S. F. v. M..D.*, 751 A.2d 9 (Md. Ct. Spec. App. 2000); *E.N.O. v. L.M.M*, 711 N.E.2d 886 (Mass. 1999), *cert. denied*, 528 U.S. 1005 (1999); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), *cert. denied*, *Knott v. Holtzman*, 516 U.S. 975 (1995). Many of those courts have, unfortunately, focused exclusively on this factor and have read *Smith* overly broadly to extend parental and familial rights to an array of individuals other than biological or legal parents based solely on the parties' alleged emotional bonds. Decisions in which the courts have discussed *Smith* but focused largely or exclusively on the first *Smith* factor include *In re E.L.M.C.*, 100 P.3d at 556 (concluding that a fit legal parent's constitutional rights could be subordinated to the claim of a non-biological caregiver based upon the child's emotional ties to the caregiver and rejecting the natural parent's contention that a showing of unfitness was required before parental responsibilities could be allocated to a non-parent); *V.C. v. M.J.B.*, 748 A.2d at 550 (noting the importance of "emotional bonds" as a basis for determining the rights of

psychological parents); *Rubano v. Rubano*, 759 A.2d 959, 972-73 (R.I. 2000) (emphasizing the emotional attachments of family life as key to determining *de facto* parent rights); and *Custody of H.S.H.-K.*, 533 N.W.2d at 429 (citing *Smith* solely for the proposition that a family may include parties with non-biological relationships). While the Eleventh Circuit rightly questioned such a broad reading of *Smith* (*Lofton,* 358 F.3d at 812-13), these courts at least have recognized that *de facto* parent status requires a significant psychological attachment among family members at a minimum.

In the instant case, the Washington Supreme Court failed to give sufficient weight even to *Smith's* first factor. Apparently ignoring *Smith* altogether, [2] the court designated Carvin a *de facto* parent of L.B. despite the lack of any compelling emotional bond between the two. As noted in Petitioner's brief, L.B. was only "five years old when Britain ended her relationship with Carvin" (Petition for a Writ of Certiorari 2 (Feb. 1, 2006), and L.B.'s therapist concluded that the child quickly adjusted to Carvin's absence after Carvin left the home. (*Id.* at 3.) Indeed, L.B. has explicitly asked not to be returned to Carvin's home nor to be left alone with Carvin during their court-imposed visits. (*Id.* at 4.) Although Carvin did live in the home with L.B. during the child's early years, and jointly cared for the child during that time (*id.* at 2), Carvin never attempted to adopt the child while she and Briatin were living together, and L.B. clearly has no need to remain in contact with Carvin at this point (*id.* at 4.) Thus, to the extent that family-like emotional attachments are relevant to the question of Carvin's rights as

[2] In discussing the issue of *de facto* parent status and Fourteenth Amendment liberty interests in the instant case, the Washington Supreme Court did not even cite *Smith* as relevant, let alone expressly consider the factors discussed by this Court. *See In re the Matter of the Parentage of L.B.*, 155 Wash.2d 679, 702-12 (2005).

a *de facto* parent, that factor cuts against Carvin's claim and calls into question the decision by the Washington Supreme Court.

B. The status of *de facto* parent, and the rights accorded to that status, are fundamentally a creation of state law.

Turning to the second *Smith* factor, there is a clear distinction between the ancient and abiding bonds of biological family ties and the recent creation by the courts of *de facto*, or "psychological," family relationships. It is no coincidence that "[h]istorically, this Court's family and parental-rights holdings have involved biological families." *Lofton,* 358 F.3d at 812. As noted in *Smith*, the privacy rights associated with natural families are "older than the Bill of Rights," 431 U.S. at 845 (*quoting Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)), and has its source, "not in state law, but in intrinsic human rights." *Id.* "[B]iological parentage . . . precedes and transcends formal recognition by the state," *Lofton,* 358 F.3d at 809, and "exist[s] independent of [state] power," *id.* at 814, because "the natural family . . . has 'its origins entirely apart from the power of the State,'" *id.* at 809 (*quoting Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989)).

Although a *de facto* parent-child relationship may not be a creature of state law in the same sense as a foster family unit created entirely by contract, the concept of *de facto* relationships is still essentially a product of state common law. While *Smith, Procopio, Drummond* and *Lofton* all involved the rights of foster parents, whose rights arose from and were determined by their contractual relationship with the state, nothing in *Smith* suggests that the factors this Court articulated apply only to foster family relationships. Indeed, as previously noted, the California state courts have

explicitly applied *Smith* more broadly to claims by *de facto* parents.

That *de facto* parent status is fundamentally a creation of state law is evident from the split among the states regarding its legitimacy. As Petitioner has found, "[a]t least 12 states and the Eleventh Circuit . . . reject *de facto* parenthood altogether" or apply "the *Troxel* presumption that fit parents act in their child's best interests." Petition for a Writ of Certiorari at 14-15. A minimum of 18 states, in direct contrast, "grant rights to a *de facto* parent over the objection of the child's fit parent." *Id.* at 20.

Not only is *de facto* parent status itself a creation of state law, but its precise contours are defined by state law. Even among jurisdictions that recognize *de facto* parent status, the rights of such parties vis-à-vis natural or adoptive parents vary considerably. California courts, for example, have expressly declined to accord *de facto* parents the same rights as a child's fit natural parents. In *Jamie G. v. Hazel G.*, 196 Cal. App. 3d 675 (1988), for example, the California Court of Appeals for the Sixth District rejected the argument of *de facto* parents that they should be afforded the same rights as a child's biological parents in disposition hearings regarding reunification. Citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), the state court noted that biological relationships involve essential, or fundamental, rights, and held that a *de facto* parent was not entitled to rights equal to those of either a biological or adoptive parent.

At the other end of the spectrum, the Massachusetts courts have held that the "best interests of the child" determination "must include an examination of the child's relationship with both his legal and *de facto* parent." *E.N.O. v. L.M.M.*, 429 Mass. 824, 829 (1999). In a suit brought by the birth mother's former lesbian partner seeking specific performance of the parties' joint custody agreement, the

court rejected the biological parent's argument that a joint custody award violated her fundamental right as a fit natural parent.

In contrast to both California and Massachusetts, the Arkansas and Maryland state courts seem to have adopted a third, "intermediate" position. Those courts have held that natural parents benefit from the *Troxel* presumption in cases of adoption, but that a court may grant visitation rights to a *de facto* parent over the objection of a fit natural parent. *Robinson v. Ford-Robinson*, ___ S.W.3d ___, 2005 WL 1041158 (Ark. May 5, 2005); *S.F. v. M.D.*, 132 Md.App. 99 (2000).

The disparate treatment of *de facto* parent status among the states clearly demonstrates that *de facto* parenthood and its correlative rights are fundamentally creatures of state law, in contrast to biological parenthood, which originates independently of the state and whose rights are simply recognized—not created—by state law. The fact that her status as a *de facto* parent is essentially a creation of state law further diminishes Carvin's claim in comparison with the liberty interest of L.B.'s natural parents, and demonstrates that the decision below by the Washington Supreme Court conflicts with the principles enunciated by this Court.

C. The interest asserted by Carvin is in direct conflict with, and would derogate from, the substantive liberty interest of a fit natural parent.

Turning to the third *Smith* factor, it is clear that the Washington Supreme Court's award of visitation rights to Carvin directly conflicts with the interests and desires of L.B.'s natural parents and thus derogates from their substantive liberty interests.

In *Smith*, this Court questioned whether it was possible to reconcile the asserted liberty interest of foster parents, on the one hand, with the "constitutionally recognized liberty interest" of natural parents, whose rights "derive from blood relationship, state-law sanction, and basic human right," 431 U.S. at 846, on the other hand. The Court concluded that "[w]hatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." *Id.* at 847. Consistent with the reasoning of *Smith*, the California courts have likewise refused to elevate the rights of *de facto* parents to a level equal to that of biological parents. *Jamie G. v. Hazel G.*, 196 Cal. App. 3d at 680-84.

In the instant case, L.B.'s natural parents strenuously object to Carvin's further contact with the child. Britain has become "increasingly concerned about Carvin's choice of activities and care for L.B.", and she believes that Carvin's association with L.B. has a negative impact on the child. (Petitioner's Brief at 3). Britain and Auseth are now married and want to provide a stable family environment for L.B. (*Id.*) Auseth "continues to play a vital role in L.B.'s life," and Britain believes that L.B. needs her father. (*Id.* at 3-4.) Accordingly, Britain desires to join Auseth, with the child, overseas where Auseth is now employed. (*Id.*) Britain and Auseth both wish to raise L.B. according to their own values and faith, as one would expect natural parents to do. (*Id.* at 3, 10.)

Britain has been found to be "a loving, fit parent" (*id.* at 5), and Carvin's demand for visitation precludes her and Auseth from accomplishing their legitimate goals and creating the type of family environment they wish to provide their natural child. The decision below, by the Washington Supreme Court, effectively grants Carvin what this Court

described in *Smith* as a "sort of squatter's rights in another's child." *Smith*, 431 U.S. at 857. Thus, the decision by the Washington Supreme Court conflicts with *Smith's* third factor and should be reviewed by this Court.

CONCLUSION

The extent to which the *Smith* factors should be given precedential effect is a matter over which federal and state courts have differed. At least three federal circuits and the California state courts have followed *Smith* or, at the least, recognized the decision as relevant in determining the status and rights of putative *de facto* parents. Other state courts have either completely ignored the decision or read the language very broadly to extend parental rights to *de facto* parents where they directly conflict with the interests of fit natural parents. *L.B.* is a natural extension of the Court's decision in *Smith* and would provide the Court an opportunity to clarify *Smith's* reach. For this reason, the Court should grant Petitioner's request for certiorari.

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court grant the Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted
this 3rd day of April, 2006

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