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February 1, 2024

The Supreme Court of Texas
% The Honorable Blake A. Hawthorne
Clerk of the Supreme Court of Texas
P.O. Box 12448
Austin, Texas 78711

Re: Case No. 23-0697; State of Texas, et al. v. Lazaro Loe, et al.

To the Honorable Supreme Court of Texas:

Amicus Curiae, the Family Freedom Project, is a registered assumed name of Texas Home School Coalition, a nonprofit organization committed to preserving the fundamental rights of parents to raise their children without unwarranted and unnecessary interference by government officials or other nonparents. The Family Freedom Project has previously filed a full brief with the Court in this case but believes it necessary to address comments made during the January 30, 2024 oral arguments on the matter.

The Texas Home School Coalition d/b/a Family Freedom Project has retained Chris Branson, Attorney at Law, to file this Post-Submission Brief defending the constitutional interest of Texas parents and intends to exclusively pay any legal fees and costs associated with the provision of those services.

Justice Lehrmann stated during oral arguments that "we can't have a system where the parents have the right to make decisions for their children only when the state agrees with those decisions." Oral Argument at 45:13,

State v. Loe, No. 23-0697 (Tex. Jan. 30, 2024), https://www.texasbarcle.com/cle/SCPlayer5.asp?sCaseNo=23-0697. Appellants' response was that "the parent's right to make decisions is always limited by the menu of what is lawful." *Id.* at 45:30. The Family Freedom Project, while agreeing with Appellants that SB 14 should be allowed to stand, asks the Court to reject Appellants' view of constitutional parental rights as impermanent and subject to the will of a state legislature.

In Appellants' conception of the situation, a parent arrives at the local diner prepared to serve the needs of his child. The state then arrives at the parent's table and offers a pre-approved menu of options to that parent. The state grants the parent the opportunity to select any items from that menu. But there is a catch. At any time, the state may strike an item from the list and thereby restrict the parent's choices. By restricting the "menu of what is lawful," the state is able to exercise its governing power broadly without the need to consider the constitutional rights of parents. The parent is still given the right to make decisions, albeit only those decisions that have been pre-approved by the state.

Using Appellants' view of parental rights, it is hard to see what restrictions would be off-limits. A state legislature has no power except to make conduct legal or illegal. It has no other means by which to restrict a parent's choices. Thus, restricting the parent's rights to the "menu of what is lawful" functionally dictates those decisions. Appellants' argument does not provide any test for deciding when a restriction of parental rights is valid.

Rather, it offers a statement of fact: Parent's rights are what the state says they are.

Under this view, the state purports to inject itself into the decision-making process between parents and doctors with virtually no oversight from the courts. This view cannot be allowed to stand. A parent's right to make medical decisions for his child must be protected by a strict scrutiny analysis.

The procedures that the state seeks to ban in this case are barbaric, experimental, and irreversibly life-altering to these children. The compelling interest of the state to protect these children is obvious. *Cf. Packingham v. North Carolina*, 582 U.S. 98, 111 (2017) (explaining that the state has a compelling interest in protecting children's physical safety). The narrowly tailored language of SB 14 provides a constitutional mechanism by which the state may accomplish this goal. Brief for the Family Freedom Project as Amicus Curiae at 20–21, *State v. Loe*, No. 23-0697 (Tex. Jan. 12, 2024). SB 14 survives constitutional review because it passes strict scrutiny—not because it evades strict scrutiny.

The Court's decision in this case cannot be severed from its future implications. Appellants assert outright that the state has the power to overturn a treatment decision made by a parent and that parent's doctor—and that such an invasion constitutes nothing more than a slight tailoring of the "menu of what is lawful." Indeed, the state could presumably bar *any* procedure agreed upon by a parent and a doctor under this theory.

Appellants are, of course, focused on winning the present case. The Family Freedom Project, however, is concerned with safeguarding the constitutional rights of current *and future* parents and children in Texas. The claims presented by the Appellants at oral arguments present a radical threat to those rights.

The threat presented by Appellants' argument is real. As the court was hearing oral arguments in this case, news broke in Montana that the republican governor defended that state's forcible removal of a child because her parents wished to pursue alternative care for their child's gender dysphoria. Jackson Walker, *Montana Governor Defends Removal of 14-Year-Old from Parents Who Opposed Gender Identity*, WBMA (Jan. 30, 2024), https://abc3340.com/news/nation-world/montana-governor-defends-removal-of-14-year-old-from-parents-who-opposed-gender-identity-greg-gianforte-krista-todd-kolstad-lgbt-transgender-social-transition-custody. The only "menu item" offered to *those* parents in Montana was chemical castration and mutilation. If the medical care that a parent desires to obtain for his or her child is not on the state's menu, what, if anything, protects a parent's ability to choose?

The critical question that the state avoids is this: *What test determines what conduct the government may make legal or illegal?* Here, Appellants seem caught between two positions: (1) Their "menu of what is lawful" theory, which implies no test at all, and (2) their stated position that rational basis applies, with no clear criteria by which any higher standard like strict scrutiny would ever come into play.

Parents are the obvious losers in this scenario. Appellants' position debases the fundamental right of parents to, as Justice Lehrmann decried, the mere ability to make decisions for their children only when the state agrees with those decisions. *See* Oral Argument, *supra*, at 45:13.

Appellants have obscured the origins and structure of the right in question. The right of parents to raise their children is not created and fashioned by a legislature or bureaucracy and served up on a menu. This right and the high duty to nurture and protect their child's wellbeing are delegated to parents by God. The presumption, as is well established by this court, is that any decision by a parent for their child is in the child's best interest. *In re C.J.C.*, 603 S.W.3d 804, 807 (Tex. 2020). The burden, therefore, is on the state to demonstrate that any interference with this right is justified.

Simply put, Appellants' position is untenable because it renders parental rights essentially meaningless. Appellants' argument demands that the state be given the power to curate a "menu of what is lawful," whereby it may decide which parental rights can be quickly and quietly sacrificed by the government without rigorous judicial review. A government's base power is to define conduct as either legal or illegal. The mere decision by the state to exercise or not exercise this power cannot be the basis upon which the fundamental rights of parents rise or fall. Rather, as Justice Blacklock pointed out, there is a line where conduct is no longer protected by the Constitution. Oral Argument, *supra*, at 29:00. He asked where that line is. Oral Argument, *supra*, at 29:13. Family Freedom Project again urges the

Court to find that line at conduct inflicting significant harm to a child, viewed through a strict scrutiny lens.

A commitment by this Court to a strict scrutiny analysis does not make parental rights unlimited. Rather, such a commitment demonstrates the Court's (1) adherence to longstanding Texas and federal jurisprudence protecting these fundamental rights and (2) commitment to a rigorous process by which each case will be decided *on its own merits* according to the prongs of the strict scrutiny test. A continued adherence to the strict scrutiny test does not predetermine the outcome of this case or future cases. It merely gives lower courts clear guidance for the test by which those future cases must be decided.

As stated in Family Freedom Project's original brief, this court should reaffirm its commitment to the longstanding state and federal jurisprudence protecting the fundamental rights of parents under strict scrutiny review. *See* Brief for the Family Freedom Project as Amicus Curiae, *supra*, at 10–16. This court should analyze SB 14 under an explicit strict scrutiny analysis and uphold the law because it (1) accomplishes a compelling state interest and (2) is narrowly tailored.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with Tex. R. App. P. 9. It contains 1.331 words, as determined by the computer software's word count function, excluding the sections of the brief exempted by Tex. R. App. P. 9.4(i)(1) and is proportionally spaced using Georgia Pro, 14 point.

/s/ Chris L. Branson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was delivered to each party and/or their respective attorney of record on February 1, 2024, via electronic service in accordance with Tex. R. App. P. 9.5.

/s/ Chris L. Branson
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