APPLYING STRICT SCRUTINY IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS: WHY ALABAMA'S JURISPRUDENCE SHOULD RESHAPE CHILD PROTECTION PRACTICE

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Christopher Church & Vivek Sankaran***

"Our decision in [Pierce] holds that parents have a fundamental constitutional right to rear their children . . . . I would apply strict scrutiny to infringements of fundamental rights."[1]

"[S]trict scrutiny leaves few survivors."[2]

Termination of parental rights (TPR) stands as "a unique kind of deprivation" that results in the state irrevocably severing a parent's fundamental right to care for their child. In The Ties that Bind Us*, we scrutinized the child protection system's overuse of TPR, employing clinical, empirical, and constitutional perspectives. This Article advocates for a constitutionally anchored framework aimed at enforcing strict scrutiny when considering TPR petitions or reviewing TPR decisions.*

Grounded in constitutional principles, the proposed framework requires courts to ensure the state demonstrates that TPR is the least restrictive means of accomplishing a compelling governmental interest. Drawing from Alabama's steadfast application of strict scrutiny in TPR cases for over four decades, the framework comprises three components: proof of constitutionally sufficient statutory grounds for TPR, exploration and rejection of less restrictive alternatives, and a determination that TPR is in the child's best interests. Each component independently serves as a basis for denying TPR petitions or reversing TPR decisions.

Child protection administrative data reveal that Alabama's application of strict scrutiny to TPR decisions did not negatively impact safety and permanency outcomes for children in foster care. A consistent application of strict scrutiny to TPR actions offers a safe path towards reversing the child protection system's overreliance on TPR, ensuring family courts comply with well-established constitutional principles that safeguard children and parents' fundamental rights. A uniform application of strict scrutiny to TPR decisions should significantly reduce the rate at which the child protection system permanently severs the legal relationship between a parent and their child and would support a long overdue paradigm shift in the child protection system by prioritizing relationships over legal dispositions.

INTRODUCTION

Termination of parental rights (TPR) refers to the process by which a court legally and permanently severs a parent's rights and responsibilities to their child. TPR represents a "unique kind of deprivation," one in which the child protection system seeks "not simply to infringe upon [a parent's fundamental right] but to end it."[3] It is the most significant legal decision that can be made in state-initiated civil child abuse and neglect proceedings. Although the state

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1. Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).
2. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).
3. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).

may claim TPR serves several *parens patriae* interests, its procedural importance is that it renders a child eligible for adoption.

The United States Supreme Court has repeatedly held that a parent has a fundamental right to "the companionship, care, custody, and management of his or her children."[4] This right to family integrity is "perhaps the oldest of the fundamental liberty interests recognized by th[e] [United States Supreme] Court."[5] Despite the Court's repeated acknowledgment that the right to family integrity is fundamental, it has never clearly articulated the level of scrutiny for reviewing infringements on that right. For example, in *Troxel v. Granville*, the Supreme Court affirmed the judgment of the Washington Supreme Court striking down a third-party-visitation statute that was "breathtakingly broad."[6] The third-party-visitation statute required no showing of parental unfitness and amounted to, as one Justice described, a "judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision' than the objecting parent."[7] Justice O'Connor, in a plurality opinion in which Chief Justice Rehnquist, Justice Ginsberg, and Justice Breyer joined, believed that, as applied, the statute unconstitutionally infringed on the fundamental right of a parent to make decisions concerning the care, custody, and control of their children.[8] Justice Souter and Justice Thomas wrote separately, concurring in judgment only. Justice Souter would have affirmed the judgment of the Washington Supreme Court because its "facial invalidation of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake."[9] Similarly, Justice Thomas agreed that "this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."[10] However, he wrote separately to critique the plurality opinion, Justice Kennedy's dissent, and Justice Souter's concurrence for recognizing this fundamental right but not articulating the appropriate standard of review.[11] Justice Thomas clarified that he "would apply strict scrutiny to infringements of fundamental rights."[12] Nonetheless, the Supreme

4. Stanley v. Illinois, 405 U.S. 645, 651 (1972); *see also Lassiter*, 452 U.S. at 27 ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" (quoting *Stanley*, 405 U.S. at 651)); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It 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.").

5. *Troxel*, 530 U.S. at 65.

6. *Id.* at 66–67.

7. *Id.* at 78 (Souter, J., concurring) (footnote omitted) (quoting WASH. REV. CODE § 26.10.160(3) (1994), *invalidated by Troxel*, 530 U.S. at 75).

8. *See id.* at 66–67 (majority opinion).

9. *Id.* at 75 (Souter, J., concurring).

10. *Id.* at 80 (Thomas, J., concurring).

11. *See id.*

12. *Id.*

Court has yet to embrace Justice Thomas's blanket position that fundamental rights trigger strict scrutiny, and it is unlikely that the Court will.[13]

The Supreme Court's failure to clarify the standard of review is not without consequences. Foremost, state courts apply inconsistent standards of review to similar cases.[14] This is problematic because if the right to family integrity is protected by the United States Constitution, then a state's power to permanently deprive a parent of that right should be constrained by certain parameters that are uniform across state lines.[15] Of course, uniformity might mitigate the variance, but it does not answer which standard of review is most appropriate. For example, should limits on state power be guided by strict scrutiny, in which the state has the burden of proving that its action serves a compelling government interest and is narrowly tailored to achieve that interest?[16] Or should the state only have to survive intermediate scrutiny, demonstrating that its infringement is substantially related to an important governmental interest?[17] Or should the Court simply examine whether the infringement is reasonable, as it has done in the context of the Fourth Amendment?[18]

The United States Supreme Court's jurisprudence cautions against advocating for a one-size-fits-all level of scrutiny for reviewing infringements on fundamental rights. For example, compared to TPR, compulsory-education and child labor laws represent relatively modest limitations on a parent's ability to control the upbringing of their children. These actions, in turn, may be subject to only rational basis or intermediate-scrutiny review.[19] Visitation issues similar to those litigated in *Troxel* would certainly demand more than rational-basis review, as a fit parent must be afforded some deference in determining whether their child should spend time with other adults.[20] However, as the Supreme Court has recognized, when the state files a TPR petition, it has "sought not simply to infringe upon that interest but to end it."[21] Thus, as the Supreme Court continues to embrace a sliding scale to determine the standard

13. *See, e.g.*, Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227 (2006) (arguing the "well-worn adage" that fundamental rights trigger strict scrutiny "is simply not true" and discussing how the Court rarely applies strict scrutiny to infringements of fundamental rights).

14. *See infra* Part II; *see also* Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 142–47 (2018).

15. *See* Ryznar, *supra* note 14, at 129–30 & n.11.

16. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

17. *See, e.g.*, Tuan Anh Nguyen, v. INS, 533 U.S. 53, 60–61 (2001) (defining and applying intermediate scrutiny).

18. *See* Winkler, *supra* note 13, at 229.

19. *See, e.g.*, United States v. Darby, 312 U.S. 100, 121 (1941) (regarding child labor laws, Congress "may choose the means reasonably adapted to the attainment of the permitted end"); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (finding that a parent's right to engage an instructor to teach their children German is a protected liberty interest that may not be interfered with "by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state").

20. *See* Troxel v. Granville, 530 U.S. 57, 67 (2000).

21. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).

of review to apply to infringements of fundamental rights, TPR's "unique kind of deprivation" stands out as deserving nothing short of strict-scrutiny review.[22] As such, we join the collection of scholars arguing for the application of strict scrutiny to reviewing TPR decisions.[23]

In *The Ties that Bind Us*, we critiqued the child protection system's overuse of TPR through a clinical, empirical, and constitutional lens.[24] In this Article, we present a constitutionally anchored framework tailored for courts to apply strict scrutiny to TPR cases. This framework would not only ensure constitutional sufficiency in safeguarding the fundamental right to family integrity but would also curb the child protection system's harmful overreliance on TPR. If courts consistently and faithfully applied this strict-scrutiny framework in TPR cases, few TPR decisions would overcome the exacting scrutiny the Constitution requires. After all, TPR permanently deprives parents of "the oldest of the fundamental liberty interests"—their fundamental, constitutional right to parent their children.[25]

To survive strict scrutiny, the state must show first that the action "serve[s] a compelling state interest," and second that the action is "narrowly tailored."[26] Put another way, the action must represent "the least restrictive means of achieving a compelling state interest."[27] Terminating a parent's fundamental rights permanently burdens the right to family integrity, and yet, few jurisdictions across the country apply strict scrutiny when reviewing TPR petitions or decisions.[28] Even those that purport to use strict scrutiny fail to require the state to show that TPR is the least restrictive means to accomplish the state's interests.[29] The framework proposed in this Article is derived from a

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22. *See id.*

23. *See, e.g.*, Ryznar, *supra* note 14, at 153 ("Thus, it is clear to assert that strict scrutiny should apply to a state's actions that restrict [a parent's right to custody of their children]."); Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 111 (2021) ("Our model thus clarifies that any governmental action that threatens to separate parents and children must be subject to the strictest judicial scrutiny given children's overriding interest in maintaining the parent-child relationship."). *But cf.* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 570, 595 (2000) (arguing for intermediate scrutiny in parental-rights cases).

24. *See* Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 247–49 (2023).

25. *See Troxel*, 530 U.S. at 65.

26. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

27. McCullen v. Coakley, 573 U.S. 464, 478 (2014). Much of the litigation discussed in this Article has focused on the narrow-tailoring part of strict scrutiny, and there has been little discussion or litigation about what a compelling state interest would be in the context of a TPR. *See, e.g.*, *Troxel*, 530 U.S. at 66–67. Of course, if a statute must be narrowly tailored to meet a compelling state interest, you cannot meaningfully analyze whether it is narrowly tailored without fully articulating the state interest. This is an area of the TPR jurisprudence that needs more development.

28. *See infra* Part II; Ryznar, *supra* note 14, at 129–30.

29. *See, e.g.*, *In re* Child of Barni A., 314 A.3d 148, 153–54 (Me. 2024) (stating that the constitutionally sufficient legal standard to review TPR in Maine is clear and convincing evidence of a statutory ground of parental unfitness and a finding that TPR is in the best interests of the child, rejecting counsel's request to also require least restrictive means); B.T.B. v. V.T.B. (*In re* B.T.B.), 472 P.3d 827, 833–37 (Utah 2020)

synthesis of Alabama case law which has applied strict scrutiny when reviewing TPR decisions for nearly four decades.

As Chief Justice Parker of the Alabama Supreme Court fully articulated in his concurrence in *Ex parte Bodie*, there are three components to the framework.[30] First, the state must prove at least one statutory ground for TPR.[31] Second, the court must "properly consider and reject all viable alternatives to [TPR]."[32] This requirement honors our nation's belief that "[p]arental rights are indeed cherished and deserve the law's utmost protection against unwarranted interference."[33] Finally, the court must find that TPR is in the child's best interests.[34] Each component must be addressed sequentially and separately. Because all three components are required, each component serves as an independent basis for a trial court to deny a TPR petition or for an appellate court to reverse a TPR decision.[35]

For example, a court may find that the state proved a statutory ground for TPR against an unfit parent but that there are less restrictive means available to accomplish the state's compelling interests.[36] In that instance, the petition must be denied. Applying this framework, Alabama appellate courts have frequently reversed TPR decisions because viable alternatives to TPRs existed, such as relatives willing to take permanent or temporary custody of the child.[37] In such a context, the TPR would be constitutionally infirm and thus, the court need not examine whether TPR is in the child's best interests. However, even where the court finds that the state met its burden on statutory grounds and that no viable alternatives exist, the court should still deny the TPR petition if it finds that termination is not in the child's best interests.[38] "In this way, this third element acts as a backstop, a final check on the government's power, to ensure that termination is not only permitted but also prudent."[39] Under this third prong, Alabama appellate courts have reversed TPR decisions where the

(acknowledging the "multitude of times" Utah courts referenced the two-part test for TPR as requiring clear and convincing evidence of at least one statutory ground and a finding that TPR would be in the best interests of the child *until* the 2012 Utah legislature amended the code to require an additional finding that TPR is strictly necessary); Sierra v. Dep't of Servs. for Child., Youth & Their Fams., 238 A.3d 142, 155–56 (Del. 2020) (rejecting counsel's claim that the court must consider least restrictive means when infringing on fundamental rights; instead, the state must prove at least one statutory ground and determine whether TPR is in best interests of the child).

30. *See* 377 So. 3d 1051, 1064–69 (Ala. 2022) (Parker, C.J., concurring).

31. *Id.* at 1065. As discussed in Part III, the statutory ground itself must survive constitutional scrutiny review.

32. P.L.G. v. Mobile Cnty. Dep't of Hum. Res., 291 So. 3d 509, 513 (Ala. Civ. App. 2019).

33. *See Ex parte* Beasley, 564 So. 2d 950, 954 (Ala. 1990).

34. *Bodie*, 377 So. 3d at 1068 (Parker, C.J., concurring).

35. *See id.*

36. *See infra* Section III.A.

37. *See infra* Section III.A.

38. *See Bodie*, 377 So. 3d at 1066–68 (Parker, C.J., concurring).

39. *Id.* at 1068.

children maintained a strong relationship with their parents and where adoption was unlikely.[40]

TPR should be an exceedingly rare child protection action, with an exceedingly consistent application. It is not.[41] Applying a consistent and more constitutionally sound standard of review—a standard that "leaves few survivors"[42]—can ensure child protection proceedings do not run afoul of a parent's fundamental right to family integrity. As such, lawyers must not only carefully scrutinize and challenge the statutory grounds for TPR but must also argue that viable alternatives to TPR exist. The latter is a primary focus of this Article.

Part I of this Article explores the origins of Alabama's TPR jurisprudence, starting with *Roe v. Conn*,[43] a 1976 federal district court decision that laid the foundation for the proposed framework described herein. Part II explores several other opinions issued concurrently with *Roe*, reflecting a national effort to constitutionally challenge the parameters of the state's *parens patriae* authority in child protection proceedings. Part III synthesizes nearly four decades of Alabama jurisprudence that reinforced and refined the application of strict scrutiny to the review of TPR decisions. Part III concludes with Chief Justice Parker's concurrence in *Ex parte Bodie*, where he articulates the three-part test that we advocate for in this Article. Part IV analyzes federal administrative data to explore the impact of Alabama's TPR jurisprudence on outcomes related to safety and permanency for children in foster care. Part V invites advocates to be relentless in their invocation of this constitutional framework as a method to challenge the overuse of TPR, exploring a sample of cases under each prong that provide insight into the most persuasive framing of these issues.

Achieving a significant reduction in the rate at which the child protection system terminates parental rights is an enormous challenge.[44] Adoption is the child protection system's darling disposition, and the system rarely misses the

40. *See infra* Part III.

41. *See* Sankaran & Church, *supra* note 24, at 249–51; *see also infra* Part IV.

42. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

43. 417 F. Supp. 769, 773 (M.D. Ala. 1976).

44. *See* Agnel Philip et al., *The "Death Penalty" of Child Welfare: In Six Months or Less, Some Parents Lose Their Kids Forever*, PROPUBLICA (Dec. 20, 2022, 8:30 AM), https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever [https://perma.cc/AET4-VZ5J].

opportunity to celebrate,[45] recognize,[46] and award[47] its every occasion. Despite the growing body of research to the contrary,[48] the predominant narrative is that adoption reigns supreme over other non-reunification dispositions, like guardianship or relative custody, in securing legal permanency for children.[49] Given that TPR serves as a prerequisite to adoption,[50] the effort to minimize its use significantly will take time. The ship will turn slowly. Advocates will lose before they win. However, as we argued in *The Ties that Bind Us*, the research, the data, and the Constitution compel this fight.[51]

I. ORIGIN STORY: HOW A FEDERAL DISTRICT COURT RESTRAINED ALABAMA'S USE OF TPR

"On a warm night in early June, Margaret Ann Wambles was washing supper dishes while her three-year-old son Richard and her boyfriend watched television."[52] Just as she was finishing up, Margaret heard the doorbell and went to see who was at her door.[53] She encountered a plainclothes police officer requesting access to Margaret's apartment based on a complaint of child neglect.[54] "I told him to come on in. I had nothing to hide," Margaret later recalled.[55] After a brief inspection of her apartment, the officer assured

45. *See, e.g.*, Lance Reynolds, *'So Much Joy': Forever Families Celebrate National Adoption Day in Boston*, BOS. HERALD (Nov. 17, 2023, 10:47 PM), https://www.bostonherald.com/2023/11/17/so-much-joy-forever-families-celebrate-national-adoption-day-in-boston/ [https://perma.cc/637N-4AT8]; Bailey Miller & Karla Rendon, *'It Feels the Best': 4 Siblings Adopted into Same Family During Adoption Event*, N.B.C. L.A. (Nov. 19, 2023, 5:20 PM), https://www.nbclosangeles.com/news/local/it-feels-the-best-4-siblings-adopted-into-same-family-during-adoption-event/3272232/ [perma.cc/9DD4-PJJH]; *County Celebrates National Adoption Day*, PRINCE WILLIAM VA. (Nov. 20, 2023), https://www.pwcva.gov/news/county-celebrates-national-adoption-day [https://perma.cc/4WAT-DB8V].

46. *See, e.g.*, *Empowering Youth: Finding Points of Connection*, NAT'L ADOPTION MONTH 2023, https://adoptionmonth.childwelfare.gov/topics/adoption/nam/ [perma.cc/23X9-SYT2]; *Judge Gooding's Legacy: Making It Better for Kids*, FLA. TIMES-UNION (Nov. 23, 2008, 11:01 PM), https://www.jacksonville.com/story/news/2008/11/24/judge-goodings-legacy-making-it-better-for-kids/16004930007/ [perma.cc/74MY-GP25].

47. *See, e.g.*, *Adoption Excellence Awards for the Year 2022*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Nov. 15, 2022), https://www.acf.hhs.gov/cb/grant-funding/adoption-excellence-awards-year-2022 [perma.cc/JX4M-M5RK]; *NCFA Award Recipients*, NAT'L COUNCIL FOR ADOPTION, https://adoptioncouncil.org/who-we-are/awards/ [perma.cc/5JV3-J928]; *Angels in Adoption® Program*, CONG. COAL. ON ADOPTION INST., https://www.ccainstitute.org/programs/view/angels-in-adoption-honorees [perma.cc/EN5R-8BBQ].

48. *See* Sankaran & Church, *supra* note 24, at 261–62.

49. *See, e.g.*, Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 39–65 (2015); Mark F. Testa, *The Quality of Permanence - Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 509 (2005).

50. Gupta-Kagan, *supra* note 49, at 6.

51. *See* Sankaran & Church, *supra* note 24, at 253–64.

52. *Mother Loses Son; Center Sues*, POVERTY L. REP. (S. Poverty L. Ctr., Montgomery, Ala.), Sept. 1975, at 4, 4, https://digital.archives.alabama.gov/digital/collection/splc/id/34/rec/14 [https://perma.cc/MV5B-KNCJ].

53. *Id.*

54. *Id.*

55. *Id.*

Margaret "everything was all right" and left.[56] Just twenty minutes later, however, the officer returned, accompanied by two uniformed officers.[57] The officers showed Margaret a piece of paper[58] and told her, "We're taking this young'un right now."[59] With Margaret's child screaming, "No, mama, no," the officers grabbed the child from his mother's arms and left.[60]

These events unfolded in 1974 in Montgomery, Alabama.[61] Margaret was a "25-year-old white woman who ha[d] never married."[62] She had "no criminal record, ha[d] never received welfare or food stamps for herself or her child, and ha[d] never abused or neglected her child in any way."[63] Margaret was able to secure legal representation from the Southern Poverty Law Center to try and get her son back.[64] Her legal team learned that the plainclothes officer was responding to a complaint filed by Margaret's ex-boyfriend alleging that she was living with a black man.[65] After his initial visit to Margaret's home, the plainclothes officer reported that the home was "reasonably clean with enough food" but also noted that he "found a black man asleep in a bedroom."[66] On that basis, officers were sent back out to Margaret's home and her son was removed from her custody and placed in the legal custody of the state.[67] Thereafter, the Montgomery County Family Court awarded temporary custody of the child to Margaret's ex-boyfriend, the man that filed the initial child neglect complaint against Margaret.[68] The presiding judge later testified that the fact that Margaret and her son were living "in a black neighborhood could be dangerous for [the] child because it was his belief that 'it was not a healthy thing for a white child to be the only [white] child in a black neighborhood.'"[69]

The Southern Poverty Law Center agreed to represent Margaret in her state court proceeding, but they also filed a class action lawsuit in federal court challenging the constitutionality of Alabama's removal statute.[70] The Alabama removal statute authorized any person with knowledge or information to file a

56. *Id.*

57. *Id.*

58. *Id.* According to the responding officer, this piece of paper was a court order authorizing the removal of Richard from Margaret's physical and legal custody. *Id.*

59. *Id.*

60. *Id.*

61. *Wambles v. Conn*, POVERTY L. REP. (S. Poverty L. Ctr., Montgomery, Ala.), Jan. 1976, at 7, 7, https://digital.archives.alabama.gov/digital/collection/splc/id/45/rec/17 [https://perma.cc/CCA8-5N6X].

62. Roe v. Conn, 417 F. Supp. 769, 773 (M.D. Ala. 1976).

63. *Mother Loses Son; Center Sues*, *supra* note 52.

64. *See id.*

65. *Id.*

66. *Id.*

67. *See id.*

68. Wambles v. Coppage, 333 So. 2d 829, 832 (Ala. Civ. App. 1976).

69. Roe v. Conn, 417 F. Supp. 769, 775 (M.D. Ala. 1976) (second alteration in original).

70. *See Wambles v. Conn*, *supra* note 61.

petition claiming a child is neglected[71] and in need of the care and protection of the state.[72] Upon receiving the petition, a court officer could order an examination into the allegations or immediately remove the child.[73] Once the child was removed, the judge had the discretion to determine custody.[74] The federal class action lawsuit challenged the constitutionality of Alabama's child neglect statute, legitimation statute, and ex parte removals when there is no exigency or emergency, and argued that children had a right to counsel in such proceedings.[75]

While her federal class action lawsuit was pending, and after the family court awarded temporary custody of her son to the child's father and granted her reasonable visitation rights, Margaret filed a petition for custody of the child.[76] The family court denied her petition, and she filed an identical petition three months later, the denial of which was affirmed by the Alabama Court of Civil Appeals.[77] One month later, a three-judge panel issued its opinion in Margaret's federal class action lawsuit, *Roe*.[78]

The *Roe* panel made several significant rulings. It found that absent "danger of immediate harm or threatened harm to the child, the State's interest in protecting the child is not sufficient to justify a removal of the child prior to notice and a hearing."[79] Even where an emergency exists, the court held that "a hearing would have had to follow the seizure 'as soon as practicable' and not six weeks later as it did in the present case."[80] For these reasons, the three-judge panel found Alabama's removal statute violated the procedural due-process protections found in the Fourteenth Amendment.[81] The panel also addressed the trial court's decision to terminate Margaret's parental rights.[82] The panel first acknowledged the interplay between Margaret's right to family integrity,

71. *See Roe*, 417 F. Supp. at 773–74 n.1. A neglected child is "any child, who, while under sixteen years of age . . . has no proper parental care or guardianship or whose home, by reason of neglect, cruelty, or depravity, on the part of his parent or parents, guardian or other person in whose care he may be, is an unfit and improper place for such child . . . or is under such improper or insufficient guardianship or control as to endanger the morals, health or general welfare of such child . . . or who for any other cause is in need of the care and protection of the state." *Id.* at 773 n.1.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 772–73.

76. *See* Wambles v. Coppage, 333 So. 2d 829, 831 (Ala. Civ. App. 1976).

77. *See id.* at 833, 839. In its opinion, the Alabama Court of Civil Appeals briefly addressed Margaret's pending federal class action lawsuit, conceding that it involved all the same parties and "overlap[ped] considerably with this appeal." *See id.* at 831. The court acknowledged the federal court's authority to determine its jurisdiction and carefully set forth its own reasoning for exercising jurisdiction: "We are not aware of any injunction or order from the federal district court which would prevent our hearing this matter." *Id.* at 832.

78. *Roe*, 417 F. Supp. at 769, 773.

79. *Id.* at 778.

80. *Id.* (quoting Goss v. Lopez, 419 U.S. 565, 583 (1975)).

81. *Id.*

82. *See id.* at 779.

protected by the Fourteenth Amendment and the state's legitimate interests in child protection.[83] Alabama, the panel held, "may abrogate such rights only to advance a compelling state interest and pursuant to a narrowly-drawn statute restricted to achieve only the legitimate objective."[84] In other words, the panel held that Alabama's decision to terminate parental rights must pass strict scrutiny. The state's interest, the panel noted, "would become 'compelling' enough to [justify TPR] only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."[85] The panel concluded that Alabama's statute outlining grounds for termination[86] "swe[pt] far past the constitutionally permissible range of interference into the sanctity of the family unit."[87]

The three-judge panel in *Roe* was undoubtedly influenced by the reasoning in a federal district court opinion, *Alsager v. District Court of Polk County*,[88] that had recently found an Iowa TPR statute unconstitutional.[89] Part II examines the *Alsager* decision and several others that reflected a national effort to constitutionally challenge the parameters of states' *parens patriae* authority in child protection proceedings.

II. *ALSAGER* AND A NATIONWIDE MOVEMENT TO CHALLENGE THE POWER OF THE STATE'S *PARENS PATRIAE* AUTHORITY

In 1970, the Juvenile Division of the District Court of Polk County in Iowa terminated Charles and Darlene Alsager's parental rights to five of their six children.[90] The Alsagers later filed an action in federal court challenging the constitutionality of the TPR proceedings.[91] The Alsagers had a history with Iowa's foster-care system.[92] The current case arose out of several complaints made by their neighbors.[93] In response to the complaints, the court sent a probation officer to visit the Alsager home.[94] After spending "approximately twenty minutes inside the Alsager residence, which at the time was occupied

83. *See id.*

84. *Id.*

85. *Id.*

86. *Id.* The statute technically provided a definition of "neglected children," but it served an equivalent function to a modern statute defining statutory grounds for termination. *Compare id.* at 773 n.1 (quoting from ALA. CODE tit. 13, § 350(2) (1958)), *with* ALA. CODE § 12-15-102 (2009).

87. *Roe*, 417 F. Supp. at 779.

88. *See id.* at 777 ("This Court is in full agreement with the conclusion of Chief Judge Hanson in *Alsager* . . . .").

89. *See* 406 F. Supp. 10, 21 (S.D. Iowa 1975).

90. *Id.* at 12.

91. *See id.* Although the federal district court initially decided it should abstain from reaching the merits, on appeal, the Eighth Circuit reversed the decision and instructed the district court to consider the Alsagers' constitutional claims. *Id.*

92. *See id.* at 13.

93. *Id.*

94. *Id.*

only by Mrs. Alsager and the baby," the probation officer determined that all six of the Alsager children should be immediately removed.[95] In less than a week, the juvenile court found that the children were neglected, and less than a month after that, the probation department filed a petition seeking termination of the Alsagers' parental rights.[96] The juvenile court ultimately terminated the Alsagers' parental rights as to five of their six children, and the Iowa Supreme Court affirmed.[97]

In addressing whether the TPR proceedings violated the Alsagers' constitutional rights, the federal district court first acknowledged the "plethora" of United States Supreme Court opinions that recognized a fundamental right to family integrity.[98] That fundamental right to family integrity, the court reasoned, was "menaced by Iowa's parental termination statute."[99] Iowa's statute contained several grounds for TPR, including when a parent "refused to give the child necessary parental care and protection," or when a parent was "unfit by reason of . . . conduct . . . detrimental to the physical or mental health or morals of the child."[100] The state was required to prove these grounds under relaxed evidentiary rules[101] and by "a mere preponderance of the evidence."[102] The Alsagers challenged the TPR statute as unconstitutionally vague and also claimed that they were denied procedural and substantive due process.[103]

The court first found Iowa's termination statute was unconstitutionally vague.[104] It then analyzed the substantive due-process challenge under strict scrutiny, requiring the state to demonstrate a compelling interest and ensuring that the state's statutory scheme was "narrowly drawn to express only the legitimate state interest at stake."[105] The state argued that TPR served the compelling state interest of safety and permanency for children.[106] But the court disagreed, noting that the Alsagers lost custody of their children "through application of the loose standards, if any, contained within [Iowa's statutory scheme]."[107] Further, the court could not overlook that TPR had "failed to provide the Alsager children with either stable or improved lives."[108] Four of the children had experienced twenty-three different placements following

95. *Id.*
96. *Id.*
97. *Id.* at 14.
98. *See id.* at 15–16.
99. *Id.* at 16.
100. *Id.* at 15.
101. *See id.* For example, hearsay evidence was admitted. *Id.*
102. *Id.*
103. *Id.* at 16–17.
104. *See id.* at 18.
105. *Id.* at 21 (citations omitted in original) (quoting Roe v. Wade, 410 U.S. 113,155 (1973), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022)).
106. *See id.* at 22–23.
107. *Id.* at 23.
108. *Id.* at 23–24.

TPR.[109] Furthermore, the state's experts previously recommended two of the children be placed permanently in their current foster homes, but within months, the children had left those foster homes and were being considered for probationary placements back with their parents.[110] With the benefit of hindsight, the court could "see no apparent benefit to the [TPR]."[111] The court lamented the lesson that the case provided: "[TPR] is a drastic, final step which, when improvidently employed, can be fraught with danger."[112] On appeal, the Eighth Circuit affirmed the decision on both procedural and substantive due-process grounds.[113]

After *Alsager*, advocates from across the country filed constitutional challenges to various child welfare statutory schemes. *Alsager* was featured prominently in many of these cases. Another class action lawsuit in federal district court, *Davis v. Page*, challenged the constitutionality of Florida's practice of subjecting indigent parents to dependency proceedings without the benefit of counsel.[114] In *Davis*, the court found the constitutional rationale of *Alsager* persuasive and concluded that strict scrutiny was the appropriate standard of review for the right-to-counsel claim.[115] Similarly, in *Sims v. State Department of Public Welfare*, a federal district court in Texas found several constitutional defects across the Texas Family Code.[116] Although the court did not explicitly say that it was applying strict scrutiny in its constitutional analysis, the court cited *Alsager* and several other opinions discussing the constitutional right to family integrity and acknowledged that "courts are required to carefully scrutinize any attempt by a state to intrude upon it."[117] And in *Davis v. Smith*, the Arkansas Supreme Court also cited *Alsager* when it declared a statute unconstitutionally vague because the statute left "the discretion vested in judges so broad that arbitrary and discriminatory parental terminations [were] inevitable."[118]

Of course, the *Alsager* rationale was not universally embraced. In *In re Keyes*, a divided Oklahoma Supreme Court rejected a constitutional challenge to Oklahoma's child abuse statute.[119] Keyes raised several claims of error,

109. *See id.* at 23.

110. *Id.*

111. *Id.*

112. *Id.* at 24.

113. *See* Alsager v. Dist. Ct. of Polk Cnty., 545 F.2d 1137, 1137–38 (8th Cir. 1976).

114. *See* 442 F. Supp. 258, 259 (S.D. Fla. 1977), *aff'd in part, rev'd in part, vacated in part*, 640 F.2d 599 (5th Cir. 1981).

115. *Id.* at 262.

116. *See* 438 F. Supp. 1179, 1191–95 (S.D. Tex. 1977), *rev'd sub nom.* Moore v. Sims, 442 U.S. 415, 435 (1979).

117. *See id.* at 1190–91.

118. *See* 583 S.W.2d 37, 43 (Ark. 1979).

119. *See* 574 P.2d 1026, 1029 (Okla. 1977), *overruled on other grounds by* A.E. v. State, 743 P.2d 1041 (Okla. 1987).

including that Oklahoma's termination statute was unconstitutionally vague.[120] The majority explicitly stated that it was "not persuaded by the *Alsager* case, . . . nor the reasoning of [*Roe v. Conn*]."[121] However, the majority's lengthy discussion of *Alsager* focused on the vagueness doctrine and distinguished the statute and facts in the case before it from those in *Alsager*.[122] In other words, the *Keyes* majority did not explicitly disagree with the constitutional framework in *Alsager* and *Roe*; it simply found the facts before it distinguishable. In a dissenting opinion joined by two other justices, Justice Simms accused the majority of overlooking the appellant's procedural due-process claim[123] and suggested the Oklahoma statute was "virtually identical to the statute struck down . . . in *Alsager*."[124] Justice Simms did not "believe the statute was applied . . . in a constitutionally permissible manner."[125]

While the Oklahoma Supreme Court's initial consideration of *Alsager* may have signaled a reluctance to adopt strict scrutiny in TPR challenges, only a year later, the court embraced *Alsager* and its progeny.[126] In *In re Sherol*, the court reversed a TPR decision where the only evidence before the trial court was "proof . . . of a 'dirty' house."[127] In reviewing the appellant's constitutional challenge, the court stated that the fundamental integrity of the family unit was "subject to intrusion and dismemberment by the State only where a 'compelling' State interest arises and protecting the child from *harm* is the requisite State interest."[128] The court cited eight United States Supreme Court cases along with the *Alsager*, *Roe*, and *Sims* federal district court opinions to support its application of strict scrutiny to review the TPR decision.[129]

Shortly thereafter, in *In re Lester*, the Rhode Island Supreme Court considered whether strict scrutiny applied to constitutional challenges in child protection proceedings.[130] Much like the cases cited above, the court noted that "[t]he doctrine of strict judicial scrutiny . . . is applicable when a governmental authority interferes with the exercise of a fundamental right."[131] However, the court declined to adopt the *Alsager* reasoning for applying strict scrutiny and

120. *Id.* at 1027.

121. *Id.* at 1029 (citation omitted).

122. *See id.*; *see also In re* Biggers, 274 S.E.2d 236, 242 (N.C. Ct. App. 1981) (rejecting a vagueness challenge to a TPR statute while acknowledging *Alsager* and *Roe*); Tucker v. Marion Cnty. Dep't of Pub. Welfare, 408 N.E.2d 814, 818 (Ind. Ct. App. 1980) (refusing to reach a vagueness challenge under the reasoning of *Alsager* and *Roe* because the appellants failed to produce a record on appeal).

123. *See Keyes*, 574 P.2d at 1030 (Simms, J., dissenting).

124. *Id.* at 1034.

125. *Id.*

126. *See In re* Sherol A.S., 581 P.2d 884, 888 & n.8 (Okla. 1978); *see also Biggers*, 274 S.E.2d at 241 (applying strict scrutiny in dependency proceedings).

127. *In re Sherol A.S.*, 581 P.2d at 890.

128. *Id.* at 888.

129. *See id.* at 888 n.8.

130. *See* 417 A.2d 877, 878 (R.I. 1980).

131. *Id.* at 879.

instead opted to create an approach that was "three-dimensional, with due consideration given to the interests of the parents, the children, and the state."[132]

The *Alsager* opinion spawned numerous constitutional challenges to child protection proceedings based on the right to family integrity. Some were successful and others were not. However, the most lasting systemic impact of the *Alsager* opinion was its influence on *Roe*, the district court decision issued in Margaret Wambles's federal class action lawsuit. As discussed in Part III, the influence of the *Roe* opinion is evident in nearly four decades' worth of Alabama case law concerning involuntary TPR in dependency proceedings.

III. THE *ROE* PROGENY: THE DEVELOPMENT AND APPLICATION OF STRICT-SCRUTINY REVIEW ACROSS FOUR DECADES OF ALABAMA TPR JURISPRUDENCE

Roe maintains a lasting influence on the standard of review Alabama's appellate courts apply when reviewing TPR decisions. However, it took some time for the Alabama judiciary to warm up to the ideals espoused in *Roe*. In fact, as the Alabama Court of Civil Appeals itself noted in 2003, "[i]n several cases decided after *Roe*, [this court] attempted to distance itself in some respects from the *Roe* decision."[133] This Part explores the *Roe* progeny across nearly four decades in Alabama, leading up to Chief Justice Parker's concurrence in *Ex parte Bodie* where he advocated for the adoption of a three-part test: clear and convincing evidence of at least one statutory ground for TPR, no viable alternatives to TPR, and a finding that TPR is in the best interests of the child.[134] This Part begins with Alabama appellate courts' early consideration of the *Roe* opinion.

A. The Initial Application of Roe

In *Smith v. Alabama Department of Pensions & Security*, the Alabama Court of Civil Appeals considered an as-applied constitutional challenge in a case where the state had permanently deprived a mother of her parental rights to her two young children.[135] The *Smith* opinion was issued just six months after *Roe*, and while the *Smith* court ultimately side-stepped the constitutional question because it determined that the issue was not preserved at trial, it nonetheless hinted at its hostility towards any future reliance on *Roe*.[136] The *Smith* court first distinguished the case at hand, pointing out that *Roe* "addressed . . . only . . .

132. *Id.* at 880.
133. D.M.P. v. State Dep't of Hum. Res., 871 So. 2d 77, 88 (Ala. Civ. App. 2003).
134. *See* 377 So. 3d 1051, 1064 (Ala. 2022) (Parker, C.J., concurring).
135. *See* 340 So. 2d 34, 35 (Ala. Civ. App. 1976).
136. *See id.* at 37.

'neglected' children and d[id] not touch upon . . . 'dependent' children."[137] The court then removed any doubt as to whether that was an invitation to expand the reach of *Roe*, broadly concluding that "even if [*Roe*] is construed to apply to dependent children, this court is not bound by the decision rendered therein."[138]

Similarly, in *Miller v. Alabama Department of Pensions & Security*, a mother argued on appeal that before TPR, the constitutional standard to apply should be a harm standard rather than the broader, more discretionary best-interests-and-welfare standard.[139] The mother invoked *Roe* to argue for the heightened standard.[140] The *Miller* court reaffirmed that *Roe* only applied to neglected children and therefore upheld the application of the best-interests-of-the-child standard as opposed to the mother's request for a heightened harm standard.[141] The court then laid out a series of factors to determine the child's best interests:

> [C]onduct of the parents toward the child, family environment, health of the child, physical and emotional abuse of the child, abandonment of the child, love of and interest in the child by the parents, and activities of the parents that would be detrimental to the safety and welfare of the child.[142]

Curiously, the court then said, "Foremost among the listed factors, especially in a situation where the state is seeking a termination of parental rights, would be less drastic measures than permanent removal of parental custody."[143]

As this reasoning highlights, the *Miller* court's attempt to distinguish *Roe* resulted in the application of a *Roe*-like strict-scrutiny analysis. Just as strict scrutiny requires a court to consider whether state action is narrowly tailored—that is, whether the state action represents the least restrictive means—*Miller* reinforced that courts must consider less drastic measures before terminating parental rights. As a subsequent Alabama decision noted, "*Roe*'s strict-scrutiny analysis, requiring the use of 'less drastic measures' to address the 'compelling state interest' in alleviating the 'real and substantial harm' of a child remaining in the custody of an unfit parent, did manage to find its way into the analysis employed by the *Miller* court."[144] Despite the application of a heightened standard of review, the *Miller* court affirmed the TPR decision, reasoning that the state pursued alternative means to the point where those means proved

137. *Id.*

138. *Id.* (citing Minniefield v. State, 260 So. 2d 607, 705 (Ala. Crim. App. 1972) (noting that "[t]he decisions of federal courts other than those of the Supreme Court of the United States—no matter how persuasive—are not *binding* on a state appellate court.")).

139. *See* 374 So. 2d 1370, 1373 (Ala. Civ. App. 1979).

140. *Id.*

141. *Id.* at 1374.

142. *Id.*

143. *Id.* (citing Lovell v. Dep't of Pensions & Sec., 356 So. 2d 188 (Ala. Civ. App. 1978)).

144. D.M.P. v. State Dep't of Hum. Res., 871 So. 2d 77, 89 (Ala. Civ. App. 2003) (quoting *Miller,* 374 So. 2d at 1370).

futile.[145] Regardless, the Alabama Court of Civil Appeals's use of *Roe*'s logic in *Miller* demonstrated the court's early steps toward adopting strict scrutiny as the standard of review for TPR decisions.

Following *Smith* and *Miller*, Alabama's TPR jurisprudence continued to shift towards a straightforward application of strict scrutiny in reviewing TPR decisions. In *Glover v. Alabama Department of Pensions & Security*, the Alabama Court of Civil Appeals reviewed a decision in which a court terminated the rights of a mother with significant mental-health challenges.[146] The appellate court was troubled by the fact that the "prospect of adoption [was] slight to none" for her children and that permanent separation from the mother "would be detrimental to both [children]."[147] The *Glover* court acknowledged that "[t]hough this court previously has not endorsed all the things said in the case of *Roe v. Conn*," it would "continue in that posture."[148] The court addressed the seriousness of TPR, stating:

> We consider important that the State, in seeking permanent termination of parental rights, as compared to temporary custody of a dependent child, establish not only the permanent incompetency and unsuitability of the parent by clear and convincing evidence, but that it present a viable alternative to better serve the future welfare of the children.[149]

With this reasoning, the *Glover* court placed two key constitutional limits on TPR. First, it required a heightened standard of proof: clear and convincing evidence.[150] Second, much like the *Miller* court articulated, it required courts to consider viable alternatives before ordering TPR.[151] The court reversed the TPR because "the evidence at this time does not rise to the status of being so clear and convincing that the children are so dependent as to require the last and most extreme order of disposition permitted by statute."[152] The *Glover* decision reflected Alabama's growing reluctance to permanently sever familial ties between a parent and their child.

In *Hamilton v. State*, the Alabama Court of Civil Appeals built upon *Glover*'s discussion of viable alternatives by requiring "that evidence be presented by the State as to possible alternatives considered and/or what it plans to do with the children when granted permanent custody" in TPR cases.[153] The *Hamilton* court took issue with the evidence presented at trial, as it related "primarily to events and conditions existing prior to the initial [removal]," and concluded that the

145. *See Miller,* 374 So. 2d at 1376.
146. *See* 401 So. 2d 786, 788 (Ala. Civ. App. 1981).
147. *Id.* at 787, 788.
148. *Id.* at 789.
149. *Id.* at 788.
150. *See id.*
151. *See id.* at 788–89.
152. *Id.*
153. 410 So. 2d 64, 66 (Ala. Civ. App. 1982).

record before it "shed[] little light on . . . the [trial] court's present primary concern."[154] The court reversed the TPR, instructing the trial court to "determine what the circumstances of the mother are or would be if the children were returned to her" and to present possible alternatives to TPR.[155]

In the mid-to-late 1980s, Alabama courts continued to emphasize the importance of considering alternatives to TPR. In *Buckhalter v. Alabama Department of Pensions & Security*, the Alabama Court of Civil Appeals reversed a TPR decision because the trial court did not "first determin[e] whether the child's best interests could be served by less drastic alternatives."[156] The court's search for less drastic alternatives stemmed from the "presumption that the child's best interest will be served by placing it in the custody of the natural parents."[157] Following *Buckhalter*, the Alabama Court of Civil Appeals routinely required the state to demonstrate that no viable, less drastic alternatives to TPR existed. For example, in *Ex parte Ogle*, the court reversed a TPR decision because "the state failed to meet its burden of proving by clear and convincing evidence that there existed no viable alternative to the termination of Gail Ogle's parental rights."[158] Similarly, in *Wishinsky v. Alabama Department of Human Resources*, the court reversed a TPR and held that "because of the availability of viable, less drastic alternatives, the evidence at this time does not rise to a level of being so clear and convincing as to support terminating the parental rights of the *mother*, such action being the last and most extreme disposition permitted by statute."[159]

In *Wilson v. State Department of Human Resources*, the court reviewed a TPR decision involving parents whose children had been in and out of foster care for seven years leading up to the TPR trial.[160] At the outset, the court stated its two-prong TPR inquiry: "[T]here must be a finding of dependency by the court based upon clear and convincing legal evidence. . . . [And] the court must inquire as to whether all viable alternatives to termination have been considered."[161] The court reversed the TPR because the record failed to establish that the agency "ha[d] done any further evaluation of the Wilson home [in the past two years] or ha[d] explored the possibility of placing the children with other family members."[162] The *Wilson* court justified the reversal by relying on the second prong of its TPR inquiry: "In order to establish that termination

154. *Id.*

155. *Id.*

156. *See* 484 So. 2d 1119, 1121 (Ala. Civ. App. 1986).

157. *See In re* Hickman, 489 So. 2d 601, 602 (Ala. Civ. App. 1986) (citing Vinson v. AGAPE of Cent. Ala., Inc., 416 So. 2d 1075 (Ala. Civ. App. 1982)).

158. *See* 516 So. 2d 243, 247 (Ala. 1987) (citing Hickman v. State Dep't of Pensions & Sec., 489 So. 2d 601 (Ala. Civ. App. 1986)).

159. 512 So. 2d 122, 124 (Ala. Civ. App. 1987).

160. *See* 527 So. 2d 1322, 1323–24 (Ala. Civ. App. 1988).

161. *Id.* at 1323–24.

162. *Id.* at 1324.

of parental rights is the least drastic alternative, DHR should present evidence to the court of *recent* attempts to locate viable alternatives."[163]

In 1990, in *Ex parte Beasley*, the Supreme Court of Alabama reviewed a TPR decision in a private custody dispute.[164] The Supreme Court of Alabama clarified the difference in the context of a private custody dispute and "the *State's* (or a nonparent's) petition[] for a termination of parental rights."[165] In the latter, the court reinforced the two-prong inquiry that has been applied for years: a finding of dependency by clear and convincing evidence and consideration of all variable alternatives to TPR.[166] According to the court,

> [T]he primary focus of a court in cases involving the termination of parental rights is to protect the welfare of children and at the same time to protect the rights of their parents. Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances.[167]

The court noted that the TPR standard of review arises out of a "[m]indful[ness] of the serious nature of terminating parental rights."[168]

Beasley's two-prong inquiry is constitutionally sound. As the Alabama Court of Civil Appeals stated twenty years after the Supreme Court of Alabama issued its opinion in *Beasley*: "Parents and their children share a fundamental right to family integrity that does not dissolve simply because the parents have not been model parents. That due-process right requires states to use the most narrowly tailored means of achieving the state's goal of protecting children from parental harm."[169]

Beasley's second prong requiring narrowly tailored means honors the value of children maintaining relationships with their parents even when a parent is unable or unwilling to provide day-to-day parenting responsibilities: "[I]f some less drastic alternative to termination of parental rights can be used that will simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship, then a juvenile court must explore whether that alternative can be successfully employed instead of terminating parental rights."[170] *Beasley*'s articulation of Alabama's two-part test governing appellate review of TPR decisions reinforced the application of strict scrutiny to these proceedings, with a particular focus on requiring juvenile courts to

163. *Id.*

164. *See* 564 So. 2d 950, 950 (Ala. 1990).

165. *Id.* at 953.

166. *See id.* at 954.

167. *Id.*

168. *Id.*

169. T.D.K. v. L.A.W., 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011) (first citing Santosky v. Kramer, 455 U.S. 745, 754 (1982); and then citing Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976) (further citations omitted)).

170. *Id.*

consider viable alternatives to TPR. Section III.B explores the circumstances in which Alabama appellate courts have invoked *Beasley*'s second prong to reverse TPR decisions.

B. Four Categories of TPR Cases that Have Been Reversed Under Beasley's No-Viable-Alternatives Requirement

The demanding burden placed upon the state by *Beasley*'s second prong has resulted in TPRs being reversed in at least four different scenarios. First, courts have reversed TPR decisions where a family member had the ability to safely care for the child. For example, in *L.M. v. Shelby County Department of Human Resources*, the Alabama Court of Civil Appeals reversed a TPR decision where a child could have been placed safely in the father's custody.[171] The court could not explain the state's "failure to recommend that the custody of the children be returned to the father with orders that he strictly supervise the mother's contact with the children."[172] Ultimately, the court concluded that "[r]eturning custody of the children to the father while continuing [the state's] ability to supervise the family appears to be a viable alternative to termination of the mother's parental rights."[173]

Similarly, in *S.M.M. v. R.S.M.*, the Alabama Court of Civil Appeals reversed the trial court's TPR decision concerning a mother who had recently been released from jail.[174] The appellate court highlighted that the mother "had demonstrated significant progress toward rehabilitating herself. She had been involved in parenting the child before being incarcerated, and she had continued to maintain frequent communication and visitation with the child while she was in jail and during her drug rehabilitation."[175] The court reasoned that, because the child's father had sole custody and was in a position to ensure the child's safety during the mother's visitations, "[m]aintenance of the status quo and allowing the mother continued supervised visitation with the child adequately protects the welfare of the child while allowing for a beneficial relationship with both parents."[176] Thus, "a viable alternative to termination of the mother's parental rights exist[ed]."[177]

In *P.M. v. Lee County Department of Human Resources*, the Alabama Court of Civil Appeals reversed a TPR decision after finding that the child could live safely with relatives without terminating parental rights.[178] The record showed

171. *See* 86 So. 3d 377, 390 (Ala. Civ. App. 2011).
172. *Id.* at 389–90.
173. *Id.* at 390.
174. *See* 83 So. 3d 572, 577 (Ala. Civ. App. 2011).
175. *Id.* at 576.
176. *Id.* at 576–77.
177. *Id.* at 577.
178. *See id.* at 1172.

that, while the mother was unable to care for her child, she had maintained sobriety and had complied with some reunification efforts.[179] The court found that "the evidence support[ed] a conclusion that continued placement with the relative foster parents would serve the child's best interest while also maintaining the mother's relationship with the child."[180]

In *Ex parte A.S.*, the Alabama Supreme Court had a chance to reconsider the *Beasley* standard.[181] In that case, a child's maternal grandmother filed a TPR petition against her daughter, who was then serving a lengthy prison sentence.[182] The trial court granted the petition, and the Alabama Court of Civil Appeals affirmed the judgment without opinion.[183] Embracing *Beasley*'s second prong, the Alabama Supreme Court reversed.[184] In its reasoning, the court highlighted several key facts about the mother's progress and her relationship with her child. First, it noted that "[t]he mother has maintained limited contact with the child through telephone calls to the grandmother and has provided a small amount of support for the child."[185] Second, "the mother is in a treatment program in prison for her kleptomania and is apparently behaving while she is incarcerated because she has earned good-time credit."[186] Third, "[t]he mother is satisfied with the grandmother's care of the child as evidenced by the mother's testimony that she would not mind if the grandmother adopted the child but that she does not want her parental rights to the child terminated."[187] Under *Beasley*'s second prong, the court concluded that a "viable alternative to termination of the mother's parental rights" was "[t]he grandmother's maintaining custody of the child and having the ability to determine and supervise the mother's visitation with the child."[188] Therefore, the court concluded that the trial court's decision terminating parental rights was premature.[189]

These cases are emblematic of the heightened scrutiny Alabama appellate courts apply when reviewing TPR decisions where children are living with extended family.[190]

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179. *See id.* at 1167, 1170.

180. *Id.* at 1172.

181. *See* 73 So. 3d 1223, 1224–25 (Ala. 2011).

182. *Id.*

183. *Id.* at 1227.

184. *See id.* at 1228–30.

185. *Id.* at 1229.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 1230.

190. *See also* C.C. v. C.T., 375 So. 3d 38, 44 (Ala. Civ. App. 2022) (finding that "a viable alternative to termination is to keep the child in the aunt and the uncle's custody while maintaining the mother's parental rights"); J.C.D. v. Lauderdale Cnty. Dep't of Hum. Res., 180 So. 3d 900, 901 (Ala. Civ. App. 2015) ("This court has consistently held that termination of the parental rights of a noncustodial parent is not appropriate in cases in which the children can safely reside with the custodial parent and the continuation of the noncustodial parent's relationship does not present any harm to the children."); J.G. v. Lauderdale Cnty. Dep't of Hum. Res., 379 So. 3d 444, 451 (Ala. Civ. App. 2023) (finding TPR unnecessary to accomplish the

Second, appellate courts have reversed TPR decisions where the child protection agency failed to adequately investigate a child's placement with relatives. For example, in *R.P. v. State Department of Human Resources*, the Alabama Court of Civil Appeals invoked the second prong of *Beasley* to reverse a TPR decision where the parents believed the department had not fully explored the children's grandmother as a placement.[191] There, the parents argued that the State failed to prove that there were no viable alternatives because the children's grandmother had expressed interest in supporting the mother on a daily basis or assuming custody of the children.[192] However, the State "failed to pursue a home study to determine if she could assume custody of the children" and instead filed a petition to TPR.[193] In its analysis, the court noted that "[a]lthough the parents had lived in disturbingly filthy conditions at the time of the older children's removal[,]" they "had made strides since the . . . incident, and they love their children and the children love them."[194]

Ultimately, the *R.P.* court reversed the TPR order and remanded the case, holding that the trial court must "consider whether, in light of the potential viable alternative available in the present case, i.e., the assistance of the maternal grandmother, termination of the parents' parental rights is in the best interests of these children."[195]

Similarly, in *A.M. v. St. Clair County Department of Human Resources*, the Alabama Court of Civil Appeals reversed a TPR decision against a father, again relying on the second prong of the *Beasley* test, because the State was still completing a home study on the paternal grandmother at the time of the TPR trial.[196] By the time the trial court had entered its TPR judgment, the paternal grandmother was approved as a placement for the children.[197] The court acknowledged that the children's parental grandmother may not have been an "ideal candidate to be a relative resource for the father's children" but concluded that the juvenile court erred in not considering her as a viable alternative to termination.[198] Therefore, the State "failed to present clear and convincing evidence that there were no viable alternatives to terminating the father's parental rights."[199]

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state's interest because "the record shows that the state's goal of protecting the children from harm has been achieved by returning the children to the custody of the mother and restricting the father's association with the mother and the children through other legal remedies").

191. *See* 937 So. 2d 77, 83 (Ala. Civ. App. 2006).
192. *Id.* at 81.
193. *Id.*
194. *Id.* at 83.
195. *Id.*
196. *See* 146 So. 3d 425, 436–37 (Ala. Civ. App. 2013).
197. *Id.* at 436.
198. *Id.*
199. *Id.*

Third, Alabama appellate courts have reversed TPR decisions where children continued to have a close relationship with their parents and, thus, maintaining custody with a non-relative foster parent was a viable alternative to termination. In *R.H. v. Madison County Department of Human Resources*, the Alabama Court of Civil Appeals reversed the termination decision because evidence demonstrated that the children had a close relationship with their parents, and the foster parent wanted both parents to stay in the children's lives.[200] The foster parent testified that "the children need[ed] the mother and the father to remain involved" and believed such involvement would "benefit the children."[201] Thus, the court concluded that "maintaining the status quo or permanent placement with the foster mother was a viable alternative to terminating the mother's and the father's parental rights."[202]

In *A.B. v. Montgomery County Department of Human Resources*, the Alabama Court of Civil Appeals reversed the trial court's TPR decision because the child was "equally bonded" to the mother and foster parents, and the foster parents were amenable to continued contact between the parent and the child.[203] In *A.B.*, the State had explored several relative placements that ultimately did not pan out, and the caseworker testified that the mother had not completed her case plan.[204] Further, the foster mother "testified that she would adopt the child if the mother's parental rights were terminated."[205] However, the foster mother also "testified that she has a good relationship with the mother, that the child loves the mother, and that she intended to allow the child and the mother to have continued contact no matter the outcome of the termination-of-parental-rights proceeding."[206]

Further, the foster mother "testified that the mother regularly visited the child . . . [and] that the mother and the child communicated regularly by telephone."[207] The child testified that he "spoke with his mother regularly" and "indicated a desire both to be returned to the custody of his mother and to remain in the custody of the foster mother."[208] Applying the *Beasley* test, the court concluded:

> [T]he evidence does not support the conclusion that no viable alternative to the termination of the mother's parental rights exists. Instead, the evidence suggests that the mother's parental rights can remain intact while the child is

200. *See* 383 So. 3d 667, 673 (Ala. Civ. App. 2023).
201. *Id.* at 671.
202. *Id.* at 673.
203. *See* 370 So. 3d 822, 829 (Ala. Civ. App. 2022).
204. *Id.* at 827–29.
205. *Id.* at 828.
206. *Id.* at 830–31.
207. *Id.* at 831.
208. *Id.*

> provided a safe and stable home with the foster mother, who is willing to permit continued contact between the mother and the child.[209]

Finally, appellate courts have reversed terminations where the child protection agency failed to present evidence that adoption was a viable option for the children.[210] In *T.W. v. Calhoun County Department of Human Resources*, the Alabama Court of Civil Appeals reversed a TPR decision where the foster parent caring for the children did not want to adopt them.[211] The mother argued on appeal that the State had not identified "an adoptive resource for the children and . . . that it is 'by no means apparent that the children would obtain permanency if the mother's parental rights were terminated.'"[212] The court pushed back on the guardian *ad litem*'s assertion that this would "force the children to languish in foster care indefinitely."[213] Rather, the court reasoned that if adoption is the appropriate permanency plan, the State can file another TPR petition when it "recruits or otherwise identifies an adoptive resource for the children."[214]

Similarly, in *Talladega County Department of Human Resources v. J.J.*, the Alabama Court of Civil Appeals affirmed a decision by a trial court not to terminate parental rights because a child with autism lacked an identified adoptive resource and had a "strong possibility of being a legal orphan for her life" if parental rights were terminated.[215] The State argued that it presented clear and convincing evidence that there were no viable alternatives to TPR but claimed the juvenile court denied the TPR petition because there was no adoptive resource identified for the child.[216] The *J.J.* court acknowledged that it would be reversible error for a juvenile court to require the State to identify an adoptive resource before parental rights can ever be terminated.[217] But the court noted that in the instant case there was not only uncertainty regarding permanency for the child but also TPR could "result in emotional turmoil for [the] child" because there was "substantial evidence . . . [indicating] . . . a strong emotional bond between the father and the child."[218]

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209. *Id.*

210. *See, e.g.*, C.M. v. Tuscaloosa Cnty. Dep't of Hum. Res., 81 So. 3d 391, 398 (Ala. Civ. App. 2011); B.A.M. v. Cullman Cnty. Dep't of Hum. Res., 150 So. 3d 782, 784–86 (Ala. Civ. App. 2014); T.N. v. Covington Cnty. Dep't of Hum. Res., 297 So. 3d 1200, 1220–21 (Ala Civ. App. 2019); D.S.R., v. Lee Cnty. Dep't of Hum. Res., 348 So. 3d 1104, 1110–12 (Ala. Civ. App. 2021).

211. *See* No. CL-2022-0694, 2023 WL 3768317, at *7–8 (Ala. Civ. App. June 2, 2023).

212. *Id.* at *6 (quoting Brief of Appellant at 59, *T.W.*, 2023 WL 3768317, at *4 (CL-2022-0694)).

213. *Id.* at *8.

214. *Id.*

215. *See* 187 So. 3d 705, 709 (Ala. Civ. App. 2015).

216. *Id.* at 712.

217. *Id.* 713.

218. *Id.*

C. Chief Justice Parker's Call to Untangle Best Interests from No Viable Alternatives

Curiously, the *J.J.* court set forth *Beasley*'s viable-alternatives standard before discussing the child's viability for adoption in the context of whether TPR was in the best interests of the child.[219] This is not uncommon.[220] Although Alabama has one of the strongest bodies of appellate case law concerning TPR, Chief Justice Parker has described that body of law as being "all over the map."[221] His critique calls for a "strong analytical framework for [TPR] cases . . . [one] that moves this area of the law away from its tendency to allow the subjective perceptions and predilections of juvenile and appellate courts to determine individual case results through vague, amorphous, and unstructured rhetorical pathways."[222] Accordingly, he calls for *Beasley*'s two-prong test to be clarified as a three-part inquiry,[223] which is the framework embraced in this Article. Under the framework, termination is only warranted where there is: (1) a constitutionally sufficient statutory ground for TPR, (2) the absence of a viable alternative to TPR, and (3) a showing that TPR is in the best interests of the child.[224] Chief Justice Parker criticizes the courts' historical discussion of no viable alternatives as focusing on "factors and circumstances that generally are not relevant to this element," including whether a parent may be rehabilitated and able to take custody in the future or whether there is a strong emotional bond between the parent and the child.[225] These two considerations and others like them, Chief Justice Parker argues, are properly considered under the best-interests-of-the-child element.[226] That is because:

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219. *See id.* ("This court has held that, although the lack of an adoptive resource may serve as a factor that a juvenile court may consider when determining whether [TPR] would not be in the best interests of a child . . . .").

220. *See, e.g.*, *In re* B.T.B., 472 P.3d 827, 839–42 (Utah 2020) (holding that the strictly necessary requirement of TPR is not a third part of the TPR inquiry but rather incorporated as part of the best-interests inquiry); *In re* People *ex rel.* S.D. Dep't of Soc. Servs., 691 N.W.2d 586, 592–93 (S.D. 2004) (considering least-restrictive-alternative argument as part of the best-interests inquiry); *In re* Gabriella M., 303 A.3d 319, 325–26 (Conn. App. Ct. 2023) (considering least restrictive means as part of best-interests inquiry); Timothy B. v. Dep't of Child Safety, 505 P.3d 263, 270 (Ariz. 2022) (requiring the juvenile court to consider permanent guardianship as an alternative to TPR); Helms v. Ark. Dep't of Hum. Servs., 662 S.W.3d 285, 296–98 (Ark. Ct. App. 2023) (considering least-restrictive-alternative placement with fictive kin under the best-interests prong).

221. *Ex Parte* Bodie, 377 So. 3d 1051, 1069 (Ala. 2022) (Parker, C.J., concurring).

222. *Id.*

223. *See id.* at 1064.

224. *Id.* at 1064. Some jurisdictions outside Alabama articulate a three-part inquiry similar to that of Chief Justice Parker's. *See, e.g.*, S.M. v. Fla. Dep't of Child. & Fams., 202 So. 3d 769, 775–77 (Fla. 2016) (articulating a similar three-part test but stating that "[i]n most cases, . . . [the least restrictive means] prong is generally satisfied by DCF offering the parent a case plan and providing the parent with the help and services necessary to complete the case plan"). However, those states do not have a body of appellate case law similar to that of Alabama's described herein. *See generally* Jacqueline D. Stanley, *Grounds for Termination of Parental Rights*, *in* 32 AM. JUR. PROOF OF FACTS 83 (3d ed. 1995).

225. *Bodie*, 377 So. 3d at 1066–67 (Parker, C.J., concurring).

226. *See id.* at 1067.

> [T]hese first two elements for [TPR]—a ground for [TPR] and no viable alternative—are rooted in constitutional strict scrutiny, their manifest purpose is to limit the power of the State as it seeks to further its interests. These elements are ultimately expressions of strict constitutional limitation, not merely nice suggestions for the betterment or well-being of families, or even merely legislative or common-law impositions that can be fundamentally modified by popular will or judicial sentiment.[227]

After the juvenile court finds that TPR is constitutionally authorized—that is, there is clear and convincing evidence of a constitutionally sufficient statutory ground and proof of no viable alternatives—the juvenile court should then consider whether TPR is in the best interests of the child.[228] Examining the totality of the circumstances, the court should consider whether TPR will "promote the child's well-being."[229] This stage, Chief Justice Parker argues, is when the court should consider the status of the state's attempts to rehabilitate the parent, the emotional bond between the child and their parent, the desirability of other permanent dispositions for the child, and other appropriate factors.[230]

Much of Alabama's TPR jurisprudence focuses on the least-viable-alternative element.[231] As just discussed, Chief Justice Parker's framework would shift some of the factors to be analyzed under the best-interests element.[232] However, there is scant discussion of what state interest might be sufficiently compelling to justify a TPR. Chief Justice Parker argues "the primary [s]tate interest at stake [during a TPR trial] is the interest in facilitating permanent (rather than perpetually temporary) arrangements for the child's care ('permanency')."[233] As such, Chief Justice Parker sidesteps an independent analysis of whether a state interest is sufficiently compelling to justify a TPR and examines it in the context of whether a viable alternative exists to termination, such as relative custody: "[R]elative placement . . . satisfies (without statutory qualification) the State's interest in permanency without requiring termination. Therefore, if relative placement is a viable option in a particular case, then it is a viable alternative to termination."[234] Under Alabama's jurisprudence, the state may have a compelling interest in TPR when it is necessary to protect a child from the harm of any ongoing relationship with the parent because Alabama has reversed TPRs when there was evidence of a positive relationship.[235] The state may also have a compelling interest in TPR

227. *Id.* at 1068.
228. *Id.*
229. *Id.*
230. *Id.*
231. *See supra* Section III.B.
232. *Bodie*, 377 So. 3d at 1068 (Parker, C.J., concurring).
233. *Id.* at 1066.
234. *Id.*
235. *See supra* Section III.B.

when it is the only way to achieve legal permanency.[236] However, given the limited discussion in the case law, there is a need for further litigation to fully develop the parameters of the state's compelling interest to TPR.

Chief Justice Parker's framework ensures that TPR is both constitutionally permitted and also prudent.[237] It ensures that "whatever cases mean when they say that best interests is a 'paramount concern,' they cannot mean that it overrides the constitutional and statutory requirements for termination."[238] Chief Justice Parker's framework would "focus and channel [the discretion of juvenile court judges] . . . , enable meaningful and disciplined appellate review, improve the predictability of results, and fortify the rule of law."[239] Although the origin story of the TPR framework proposed herein began in the 1970s with Margaret Wambles having her screaming child ripped from her arms, its curtain call is Chief Justice Parker's concurrence in *Ex parte Bodie*.

IV. THE IMPACT OF TPR JURISPRUDENCE ON ALABAMA'S CHILD PROTECTION SYSTEM

As discussed in *The Ties that Bind Us*, "TPR remains an all-too-common feature in the child protection system."[240] During federal fiscal year (FFY) 2022, nearly fifty thousand children were the subject of a TPR nationally,[241] a relatively stable number over the past decade.[242] Like many child protection metrics, there is significant variance in the TPR rate across jurisdictions. Since FFY 2010, Alabama has consistently reported low annual TPR rates as compared to other reporting jurisdictions.[243] With the exception of 2020, which coincided with the onset of the COVID-19 pandemic, Alabama has reported a TPR rate below the national rate.[244]

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236. *See supra* Section III.B.

237. *Bodie*, 377 So. 3d at 1068 (Parker, C.J., concurring).

238. *Id.* at 1069.

239. *Id.*

240. Sankaran & Church, *supra* note 24, at 249.

241. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) FOSTER CARE FILE, FFY 2022 [hereinafter 2022 FFY AFCARS Dataset] (analysis on file with author Christopher Church) (n = 49,959). Unless otherwise noted, data utilized in this Article were made available by the National Data Archive on Child Abuse and Neglect, Cornell University, Ithaca, New York. Data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) are originally collected by state child welfare agencies pursuant to federal reporting requirements. Authors and collaborators at Fostering Court Improvement have analyzed the data, and analyses are on file with the corresponding author. Neither the collector of the original data, the Archive, Cornell University nor its agents or employees bear any responsibility for the analyses or interpretations presented here. Data are reported for, and referenced by, the FFY, which runs from October 1st in the preceding year through September 30th in the referenced year.

242. Sankaran & Church, *supra* note 24, at 249.

243. *See* 2022 FFY AFCARS Dataset, *supra* note 241.

244. *See id.* (*Compare* FFY 2010 = 4.67 per 10K in Alabama, *with* 7.01 per 10K nationally; *compare* FFY 2011 = 3.84 per 10K in Alabama, *with* 6.92 per 10K nationally; *compare* FFY 2012 = 5.19 per 10K in Alabama, *with* 7.01 per 10K nationally; *compare* FFY 2013 = 4.75 per 10K in Alabama, *with* 7.22 per 10K nationally;

Alabama's jurisprudence of limiting TPR in certain circumstances, such as when children are living with relatives, is reflected in the data. Since FFY 2010, very few children have experienced a TPR while living with relatives in Alabama. Nationally, as many as one-third of children who are subject to a TPR are living with relatives at the time of their TPR.[245] However, in Alabama, the highest reported annual percentage of children that experienced a TPR while living with a relative was 3.4%.[246]

Furthermore, many states encourage relatives that are caring for children in foster care to consider adoption, even though other viable options exist. During FFY 2022, there were more than 52,000 children discharged from foster care for adoption.[247] Public adoption files contain information on about 45,000 of those children, or 84%.[248] Among those 45,000 children, more than 14,000 were adopted by one of their relatives, representing 32% of all adoptions.[249] In some jurisdictions, relative adoptions account for more than half of all foster care adoptions.[250]

There are several reasons why relative adoptions should rarely be an appropriate child welfare disposition,[251] but of note here, they are often in direct contravention of Alabama's constitutionally anchored TPR jurisprudence.[252] The Alabama data bear this out. Unsurprisingly, during FFY 2022, only three of Alabama's 576 adoptions were adoptions between a child and their relative,

compare FFY 2014 = 4.85 per 10K in Alabama, *with* 7.6 per 10K nationally; *compare* FFY 2015 = 4.81 per 10K in Alabama, *with* 7.94 per 10K nationally; *compare* FFY 2016 = 4.82 per 10K in Alabama, *with* to 8.6 per 10K nationally; *compare* FFY 2017 = 6.22 per 10K in Alabama, *with* 9.01 per 10K nationally; *compare* FFY 2018 = 6.97 per 10K in Alabama, *with* 9.27 per 10K nationally; *compare* FFY 2019 = 7.35 per 10K in Alabama, *with* 9.15 per 10K nationally; *compare* FFY 2020 = 7.86 per 10K in Alabama, *with* 7.04 per 10K nationally; *compare* FFY 2021 = 7.66 per 10K in Alabama, *with* 8.09 per 10K nationally; *compare* FFY 2022 = 6.05 per 10K in Alabama, *with* 6.91 per 10K nationally).

245. *See id.* (FFY 2010 = 21.7%; FFY 2011 = 27.5%; FFY 2012 = 27.7%; FFY 2013 = 27.8%; FFY 2014 = 28.8%; FFY 2015 = 30.6%; FFY 2016 = 31.8%; FFY 2017 = 33.6%; FFY 2018 = 34.2%; FFY 2019 = 32.9%; FFY 2020 = 32.3%; FFY 2021 = 33.9%; FFY 2022 = 34.6%).

246. *See id.* (FFY 2010 = 1.1%; FFY 2011= 0.2%; FFY 2012 = 2.2%; FFY 2013 = 1.5%; FFY 2014 = 1.7%; FFY 2015 = 2.3%; FFY 2016 = 0.9%; FFY 2017 = 3.4%; FFY 2018 = 0.9%; FFY 2019 = 1.9%; FFY 2020 = 1.1%; FFY 2021 = 1.7%; FFY 2022 = 2.3%).

247. *Id.* (n = 52,385).

248. *Id.* (n = 44,496); AFCARS contains separate Foster Care and Adoption datasets for each FFY. Thus far, this Article has relied entirely on the Foster Care file. However, the Adoption file contains additional data related to the children who are adopted and the families into which they are adopted. Fostering Court Improvement links these datasets. For FFY 2022, Fostering Court Improvement was able to link 84% of the adoption records in the Foster Care file to the Adoption file. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) ADOPTION FILE, FFY 2022 [hereinafter 2022 FFY AFCARS Linked Adoption Dataset] (analysis on file with author Christopher Church).

249. 2022 FFY AFCARS Linked Adoption Dataset, *supra* note 248 (n = 14,320).

250. *Id.* (Hawaii = 61%, Minnesota and Delaware = 57%, Nebraska = 51%).

251. Sankaran & Church, *supra* note 24, at 256–62.

252. *See Ex Parte* Bodie, 377 So. 3d 1051, 1066 (Ala. 2022) (Parker, C.J., concurring) ("Therefore, if relative placement is a viable option in a particular case, then it is a viable alternative to termination.").

among the lowest rates in the nation.[253] This is not to suggest Alabama does not rely on relatives to support children in foster care. To the contrary, during FFY 2022, Alabama discharged more children to the custody of a relative than any other jurisdiction.[254]

Discharge to the custody of a relative is a creature of state statute, and several states do not rely on relative custody as a child-protection-system legal disposition.[255] Those jurisdictions more commonly rely on kinship adoption or guardianship dispositions, which may provide families with additional financial support.[256] Alabama participates in the federal kinship guardianship assistance program,[257] and Alabama also funds a supplemental kinship guardianship program.[258] Despite the availability of these subsidies, Alabama very rarely discharges children to guardianships.[259] Family members that receive custody of children discharged from foster care may receive financial assistance such as TANF, SNAP, Medicaid, SSI, or the Earned Income Tax Credit,[260] but the monthly subsidy is only available if the child meets eligibility requirements and is "placed in kinship guardianship by a court."[261]

Alabama's reliance on relative custody over kinship guardianship as a permanency disposition may be leaving relative caregivers without adequate financial support to care for children,[262] and the state should prioritize shifting that reliance towards increasing subsidized kinship guardianships. Even with Alabama's practical inequity in post-foster-care financial support for relative caregivers compared to adoptive parents, there is no evidence of relative custody being less permanent than other legal dispositions in Alabama.

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253. 2022 FFY AFCARS Linked Adoption Dataset, s*upra* note 248. Massachusetts, Mississippi, and New York reported no adoptions to relatives, and Wisconsin reported one adoption to a relative. The next lowest was Alabama, reporting three adoptions to a relative. *Id.*

254. 2022 FFY AFCARS Dataset, *supra* note 241. Of all the children exiting foster care in Alabama during FFY 2022, 26% were discharged to the custody of a relative, compared to 6% nationally. *Id.* Colorado ranked second behind Alabama at 25%. *Id.*

255. *Id.* Washington, Texas, Rhode Island, New Hampshire, Nebraska, Iowa, Idaho, Hawaii, Florida, and California all reported zero discharges to relative custody in their 2022 FFY AFCARS reports. *Id.*

256. *See Title IV-E Adoption Assistance*, CHILD.'S BUREAU (May 17, 2012), https://www.acf.hhs.gov/cb/grant-funding/title-iv-e-adoption-assistance [https://perma.cc/2FMJ-RHNF]; *see also Title IV-E Guardianship Assistance*, CHILD.'S BUREAU (July 26, 2013), https://www.acf.hhs.gov/cb/grant-funding/title-iv-e-guardianship-assistance [https://perma.cc/W7YS-969S].

257. *See Title IV-E Guardianship Assistance*, *supra* note 256 (Program Highlights).

258. Kinship Guardianship Subsidy Program, ALA. CODE § 38-12-33 (West, Westlaw through 2024 Sess.).

259. 2022 FFY AFCARS Dataset, *supra* note 241. During FFY 2022, Alabama reported discharging only thirty-five children to guardianship, representing 1% of all discharges compared to 11% nationally. *Id.* Alabama and Virginia both reported only 1% of discharge to guardianship, tied for the lowest rate. *Id.*

260. *See Kinship Care Outside of Foster Care*, ALA. KINSHIP NAVIGATOR, https://navigator.alabama.gov/kinship-care-outside-of-foster-care/ [https://perma.cc/4AU9-ED5L].

261. ALA. CODE § 38-12-34 (West, Westlaw through 2024 Sess.).

262. *See, e.g.*, Mark F. Testa, *Systems of Kinship Care: Enduring Challenges and Emerging Opportunities*, 16 J. FAM. SOC. WORK 349, 354–55 (2013).

Over the past decade, 37% of children exited foster care to reunification, and 31% exited to the custody of a relative—the two most common dispositions in Alabama.[263] As Figure 1 reflects, throughout that time, children reentered foster care from a previous relative-custody discharge at rates consistently below those reentering from a prior reunification.[264]

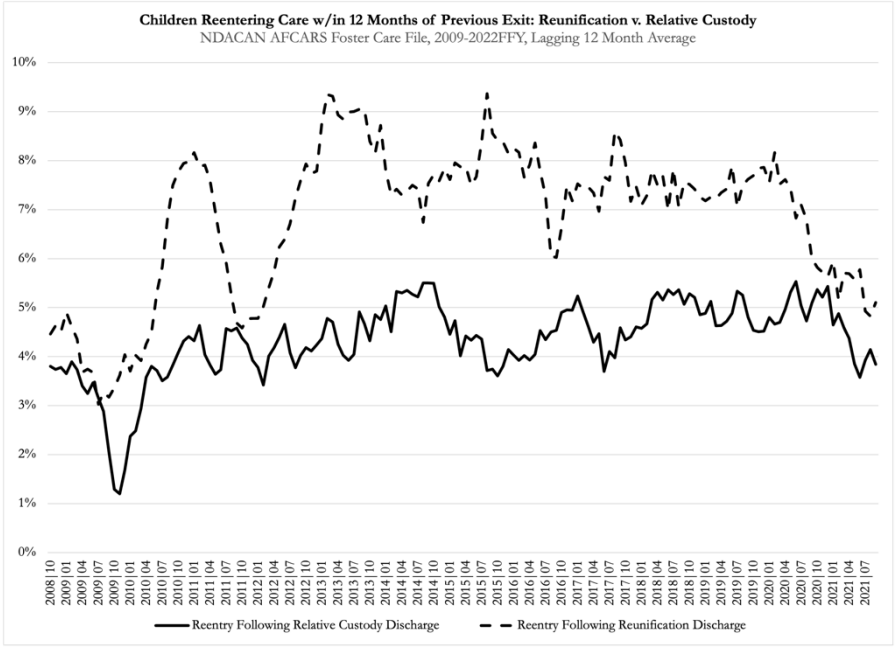

Figure 1: Alabama Reentry Rates, FFY 2009 to FFY 2022

Despite Alabama's heavy reliance on relative custody, reentry within twelve months of a discharge to relative custody never eclipsed 6%, while reentry following reunification consistently hovered between 7% and 9%.[265] Reentry to foster care following an adoption is not reliably tracked in administrative data systems,[266] but federal studies and scholars have challenged the idea that adoption creates stability and is more permanent than guardianship or relative

263. 2022 FFY AFCARS Dataset, *supra* note 241.

264. *See id.*

265. *Id.*

266. *See* Aleszu Bajak & Marisa Kwiatkowski, *Broken Adoptions, Buried Records: How States Are Failing Adoptees*, USA TODAY (May 19, 2022) https://case.edu/socialwork/sites/default/files/2022-05/Broken%20adoptions%2C%20buried%20records%20%28USA%20Today%29%205.19.22.pdf [https://perma.cc/H58Y-7K6B] (describing how and why only sixteen states allow kids to be longitudinally tracked in AFCARS after a finalized adoption); *see also* 2022 FFY AFCARS Dataset, *supra* note 241. During FFY 2022, states reported a combined total of only forty-two children reentering care within twelve months of a previous adoption, a 0.1% reentry rate. 2022 FFY AFCARS Dataset, *supra* note 241. Only eleven states reported non-zero reentries from adoption, with Kentucky reporting the most at five children. *Id.*

custody.[267] In sum, Alabama's heavy reliance on discharges to relative custody and nearly nonexistent practice of encouraging relatives to adopt children in foster care—most certainly influenced by the TPR jurisprudence requiring the consideration of viable alternatives to TPR—has not resulted in a groundswell of instability for children.

Additionally, Alabama ranks among the top jurisdictions that achieve permanency for children within twelve months of their removal,[268] a core measure included in the federal government's periodic audit of states.[269] If more jurisdictions relied on permanent dispositions like relative custody or guardianship (when reunification is not possible) that do not require TPR as a prerequisite, children would spend less time legally and physically separated from their families for purposes of foster-care placement.[270] By essentially taking TPR off the table when children are living with relatives, Alabama has invited parties to work together to expedite permanency for children, whether through reunification or placing children in the legal custody of relatives.

CONCLUSION

Alabama's jurisprudence requiring courts to apply strict scrutiny, including the determination that TPR is the least restrictive means of furthering the state's interests, was born out of a national movement by public-interest lawyers constitutionally challenging several child protection statutory schemes in the 1970s. That resulted in several significant decisions that reinforced the fundamental right to family integrity, such as those discussed in Part II of this Article. As a result of *Roe* and its progeny, Alabama has long reported a relatively

267. *See, e.g.*, Gupta-Kagan, *supra* note 49, at 2, 48–54; HEATHER RINGEISEN ET AL., OFF. OF PLAN., RSCH., AND EVALUATION, ADMIN. FOR CHILD. AND FAMS., U.S. DEP'T OF HEALTH AND HUM. SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (NSCAW) ADOPTION FOLLOW-UP STUDY: FINDINGS REPORT (2022), https://www.acf.hhs.gov/sites/default/files/documents/opre/PAGI_NSCAW%20Adoption%20Study_Findings%20Report_12-20-22.pdf [https://perma.cc/TQN5-JW45] (finding higher rates of post-adoption instability than previously reported); Testa, *supra* note 49, at 528 (finding there is "little evidence from this study, however, that much is gained for either the child or the extended family" by prioritizing adoption over guardianship).

268. 2022 FFY AFCARS Dataset, *supra* note 241. Alabama and Ohio are tied for the sixth-highest rate of children exiting to permanency within twelve months of their removal at 46%, trailing: Wyoming and South Carolina at 55%; Colorado at 52%; Minnesota, Kentucky, and Idaho at 49%; Nevada at 48%; and Louisiana and Montana at 47%. *Id.*

269. Capacity Building Center for States, *Permanency in 12 Months for Children Entering Care: CFSR Round 4 Statewide Data Indicator Series*, CHILD WELFARE CAPACITY BLDG. COLLABORATIVE (2022), https://capacity.childwelfare.gov/states/resources/cfsr-r4-swdi-permanency-in-12-mos-entering-care [https://perma.cc/HK34-AURJ].

270. *See, e.g.*, 2022 FFY AFCARS Dataset, *supra* note 241. Among all children exiting foster care during FFY 2022, the median time from removal to reunification discharge was 11.2 months; median time from removal to relative discharge was 6.6 months; median time from removal to guardianship discharge was 18.8 months, and removal to adoption was 30.8 months. *Id.* Among adoptions, the median time from removal to TPR was 19.6 months. *Id.* Accordingly, the longest pathway to permanency is via adoption. *See id.* Even more, the median time from removal to TPR—a prerequisite to adoption—is itself longer than the median time to discharge for relative custody or guardianship (the other primary nonreunification discharges). *Id.*

low TPR rate and an almost nonexistent TPR rate when children are living with relatives.

This Part invites advocates to challenge the TPR framework in three ways. First, family defense lawyers should continue to challenge TPR petitions as applied. Where appropriate, they should challenge statutory grounds for termination by arguing that the evidence fails to demonstrate a parent is unfit to care for a child or that reasonable efforts to reunify were not made by the child protection agency.

Additionally, even if a parent is not ready to care for a child, lawyers should argue that TPR does not serve the best interests of children based on the clinical needs of a child. For example, as seen in Alabama's case law detailed in Part III, a TPR may not serve a child's best interests where a child has a close bond with a parent or where a child has no identified adoptive placement, thereby increasing the likelihood that they may exit foster care as a legal orphan.

Second, lawyers must look to challenge the constitutionality of TPR statutory provisions on substantive due-process grounds where the enumerated ground does not assess a parent's current fitness to care for a child. Such challenges have been successful in appellate courts across the country. For example, in *In re Gach*, the Michigan Court of Appeals struck down the provision of the Juvenile Code that permitted trial courts to find statutory grounds for termination based solely on a parent's prior TPR.[271] The court held that the provision violated the Constitution because it created an irrebuttable presumption of unfitness and did not give parents a "fair opportunity to rebut it."[272]

In *In re H.G.*, the Illinois Supreme Court considered the constitutionality of the statutory ground that allowed a juvenile court to TPR a child whenever the child had been in foster care for fifteen out of the most recent twenty-two months.[273] In finding the statute failed to survive strict scrutiny, the trial court stated: "The problem is inherent in that this particular statute, unlike all of the other provisions for finding unfitness, relates not to conduct of a parent or an internal flaw of character or behavior or mental illness or physical infirmity, but rather the mere passage of time."[274] The Supreme Court of Illinois agreed and found that the statutory ground was not "narrowly tailored to the compelling goal of identifying unfit parents because it fails to account for the fact that, in many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child."[275]

Similarly, in *In re Amanda D.*, the Illinois Court of Appeals struck down a statutory provision that permitted TPR based solely on a conviction of the

271. *See* 889 N.W.2d 707, 716 (Mich. Ct. App. 2016).

272. *Id.* at 715 (quoting Vlandis v. Kline, 412 U.S. 441, 446 (1973)).

273. *See* 757 N.E.2d 864, 865 (Ill. 2001).

274. *Id.* at 868.

275. *Id.* at 872.

death of another child by physical abuse.[276] The court acknowledged that the mother in the case "could have introduced a plethora of evidence regarding her fitness, and the trial court still would have been compelled to find her unfit pursuant to [the statute]."[277] Thus, the court applied strict scrutiny to determine whether the statute was narrowly tailored, that is, "whether every member of the class of people who [are convicted of aggravated battery to a child] is a member of the class of unfit parents."[278] The court found the statute unconstitutional, because "[i]t fails to take into account several things relevant to the ultimate fitness determination. For example, it makes no room for the consideration of things such as the passage of time without a similar incident, the circumstances of the crime, or the parent's rehabilitative efforts."[279] Similar to the Michigan Court of Appeals's reasoning in *Gach*, the court found the provision unconstitutional because it did not permit a parent to rebut the presumption of unfitness.[280]

These three cases are but a few examples where appellate courts have applied strict scrutiny to strike down statutory grounds for TPR, particularly when they do not accurately assess whether a parent is currently fit to care for a child. Lawyers must critically analyze the provisions in their state statutes and raise these constitutional challenges to statutory grounds whenever possible.

Finally, and perhaps most relevant to the crux of this piece, lawyers must challenge the constitutionality of a TPR decision whenever less restrictive alternatives are available to accomplish the state's interests. As the Alabama case law indicates, viable alternatives are commonly available. The most straightforward example is whenever a child is living with a relative that is willing to assume caretaking duties for as long as necessary. That is not the only example: this Article has highlighted several others, and advocates will unearth more.

Chief Justice Parker's proposed framework for reviewing TPR decisions provides advocates and judges with the blueprint towards a constitutionally anchored system that "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[281] Under that framework, the State must prove, by clear and convincing evidence, three distinct elements: (1) a statutory ground for TPR; (2) the absence of a viable alternative to TPR; and (3) that TPR is in the best interests of the child.[282] If every jurisdiction in the country adopted this framework, involuntary TPR trials in juvenile court might not reflect "a railroad

276. *See* 811 N.E.2d 1237, 1248 (Ill. App. 2004).
277. *Id.* at 1241.
278. *Id.* at 1242.
279. *Id.*
280. *See id.* at 1248.
281. Frisby v. Schultz, 487 U.S. 474, 485 (1988).
282. *See Ex Parte* Bodie, 377 So. 3d 1051, 1064 (Ala. 2022) (Parker, C.J., concurring).

with no stops and only one destination, in which judges act as mere conductors."[283]

283. Alma S. v. Dep't of Child Safety, 425 P.3d 1089, 1096 (Ariz. 2018) (Bolick, J., concurring).