STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2015AP122-CR & 2015AP123-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALINA CAMINITI and
MATTHEW CAMINITI,

Defendants-Appellants.

ON APPEAL FROM JUDGMENTS OF CONVICTION AND SENTENCE ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE ELLEN K. BERZ PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 267-2223 (Fax)
whelanmf@doj.state.wi.us

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ISSUES PRESENTED

1. A parent has a substantive due process right to discipline his children. Therefore, a child abuse statute must balance that right against the State's interest in protecting children from abuse. Under Wisconsin law, a parent who intentionally causes bodily harm to his child may be guilty of child abuse. The statutes recognize a privilege for reasonable discipline, involving "only such force as a reasonable person believes is necessary." Here, the Caminitis disciplined their young children by striking their bare bottoms with a wooden "rod." Do the statutes abridge the Caminitis' constitutional right to discipline their children?

The circuit court said no. The State asks this Court to affirm the circuit court.

2. Under the Free Exercise Clause, religiously motivated conduct is not exempt from the reach of a non-discriminatory criminal statute. Under the Wisconsin Constitution's freedom of conscience clause, religiously motivated conduct is not exempt from the reach of a criminal statute that furthers a compelling state interest that cannot be served by a less restrictive alternative. Here, the Caminitis' use of "rod discipline" is motivated by their religious beliefs. Do the statutes unconstitutionally burden their free exercise of religion and freedom of conscience?

The circuit court said no. The State asks this Court to affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts. Publication may be warranted depending on the Court's approach to resolving the issues.

STATEMENT OF THE CASE

On March 18, 2011, criminal complaints were filed against defendants-appellants Alina and Matthew Caminiti alleging five counts of intentional child abuse causing bodily harm (R. 2).[1] In each count, both defendants were charged as parties to a crime (*id.*). The victim in the first four counts was the Caminitis' daughter, born on June 18, 2008; the victim in the fifth count was their son, born on December 21, 2009 (R. 2:1-2). After a preliminary hearing, the Dane County Circuit Court found probable cause and the Dane County District Attorney filed an Information against the Caminitis on July 19, 2011 (R. 17; 124).

On October 18, 2011, the Caminitis moved to dismiss the case. They argued that the child abuse statute, Wis. Stat. § 948.03(2)(b), in combination with Wis. Stat.

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[1]The Caminitis confine their circuit court record citations to "the record in Alina's case which is identical in all material respects to the record in Matthew's case but numbered slightly differently." Caminitis' Brief at 5 n.1. The State will also cite to Alina's circuit court record only.

§ 939.22(4), which defines bodily harm, is unconstitutional as applied to them because it interferes with the free exercise of their religion, and is vague and overbroad (R. 26). On July 30, 2012, the Caminitis moved to dismiss the case on a new ground. They argued that criminalizing what they portrayed as the use of moderate force in the discipline of their children interferes with their fundamental liberty interest in their family relationships (R. 45). The motions were fully briefed. The circuit court held an evidentiary motion hearing on October 2, 2012 (R. 126).

On May 17, 2013, the circuit court denied the Caminitis' motions (R. 57). Regarding the claim that the child abuse statute interferes with the Caminitis' "religious or family liberty rights," the court reasoned as follows (R. 127:7). First, it held that Aleitheia's belief in "spare the rod, spoil the child" (the court's characterization) "is a sincerely-held religious belief" (R. 127:8). Second, the court found that "the expression of that belief is [not] burdened by the application of state law" (*id.*).

> The defendant[s] would have to show that refraining from physically abusing their children would be a burden on their religious expression. Their religious belief, however, as testified to, does not encompass abuse. Pain teaches us to not put a hand onto a hot stove burner, measured pain through reasonable discipline, as in spanking a three-year-old child. But unreasonable discipline, for example, stoning that same child, is not encompassed by the defendants' religious beliefs. The statute, when considered in conjunction with the affirmative defense of reasonable parental discipline, does not pose a burden on their religious expression.

(R. 127:8).

Because the court found that the Caminitis were not burdened by the state statutes, the State was not required to show a compelling state interest and the absence of less restrictive alternatives to serve that interest. Nevertheless, the court addressed those questions. It held that the State has "a compelling interest in the physical protection and welfare of children," and that the interest "cannot be served by less restrictive alternatives" (R. 127:9). "The intent element [in the child abuse statute] and the affirmative defense of reasonable parental discipline amply served to limit the bounds of the government's reach" (R. 127:9).

The Caminitis had a jury trial that extended from March 3 to March 7, 2014 (R. 130-34). Before sending the case to the jury, the court gave it the following instruction:

> Discipline of a child is an issue in this case because the defendants are the parents of both children.
>
> As to each count, the State must prove by evidence which satisfies you beyond a reasonable doubt that a specific defendant did not act reasonably in the discipline of the named child.
>
> Wisconsin recognizes the right of a parent to inflict corporal punishment to correct or discipline a child. The law allows a parent to use reasonable force to discipline his or her child. Reasonable force is that force which a reasonable person would believe is necessary and not excessive.
>
> Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the

> standpoint of the defendant at the time of that defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> In determining whether the discipline was or was not reasonable, you should consider the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances....

(R. 134:50-51).

On March 7, 2014, the State filed an Amended Information (R. 105). In the Amended Information, counts 1, 3, 5, and 6 charged Matthew with intentional child abuse of his daughter, and count 7 charged him with intentional child abuse of his son. Counts 2 and 4 charged Alina with intentional child abuse of her daughter, and count 8 charged her with intentional child abuse of her son. The counts involving the Caminitis' daughter were based on acts committed when the child was between two months and two years old (*id.*). The count involving their son was based on acts committed when he was between two and eleven months old (*id.*).

The jury returned verdicts of guilty on counts 1 through 5, 7, and 8 (R. 134:154). They returned a verdict of not guilty on count 6 (*id.*).

The Caminitis moved the court to set aside the verdicts on account of insufficient evidence (R. 114). The court denied the motion (R. 118:2).

The court held a sentencing hearing on May 2, 2014 (R. 135). On each count, the court withheld sentence and imposed eighteen-month terms of probation, all to run concurrently (R. 119; 135:43).

This appeal follows.

STATEMENT OF FACTS

The Aleitheia Bible Church is a small congregation of Evangelical Christians living in Black Earth, Wisconsin (R. 32:145-46, 155). They follow many biblical injunctions literally, including Proverbs 13:24: "He who spares his rod hates his son, but he who loves him disciplines him diligently" (R. 132:149-50). Based on this directive, Aleitheia parents use corporal punishment to discipline their children (R. 132:168-69). Their chosen method involves the use of a rod—in the form of a wooden spoon or dowel—to spank the bare bottom or upper thigh of the child being disciplined (R. 132:45-47, 154-58).

Matthew Caminiti is one of three "elders" of the Aleitheia Bible Church (R. 132:148). Alina Caminiti is Matthew's wife (R, 132:213). Matthew and Alina have two children, a daughter born on June 18, 2008, and a son born on December 21, 2009. This prosecution arises from Matthew and Alina's use of rod discipline against their two children when they were less than two years old (R. 2).

The Dane County Sheriff's Office launched an investigation of Aleitheia after it was informed that some church members were physically abusing infants and

toddlers in their care (R. 132:28). Dane County Sheriff's Detective Josalyn Longley received a thirteen-page document from Families United Against Spiritual Abuse containing these and other allegations (R. 109:170-83).

Alina and Matthew were interviewed by Dane County Sheriff's Detectives Longley and Steve Wegner (R. 131:113). Longley and Wegner testified at trial, summarizing noncustodial statements the couple made to them on November 30, 2010, during the Sheriff Department's investigation (R. 131:166; 132:33).

Alina told the detectives that she "'spanked [her children] and was very careful about it'" (R. 132:45). She spanked the children "on their bare butt or on their upper thigh" (R. 132:47). The spanking was applied with a rod rather than a hand and consisted of between one and three strikes (*id.*). Alina first applied rod discipline to her daughter when the baby was two or three months old; her son was two months old when he was spanked for the first time (R. 132:49). "When the children were younger, she would use a wooden spoon, and as they got older or meatier, she would graduate to a wooden dowel" (R. 132:47).

Longley recounted Alina's justifications for spanking her baby girl with a rod:

> [I]f [she] was angry or not listening, if she was not being quiet. During that time they were trying to work with her on being quiet in church and reading, and if she wasn't learning it, that could result in a spanking.

. . . .

> [Alina] had told me about a time in church when she handed [her daughter] to another member and she started crying, she had to take her to another room and spank her.

(R. 132:52). Alina employed rod discipline to help her daughter with her "listening skill[s]" (R. 132:57). The baby boy received rod discipline for "not listening" (R. 132:53).

When the Caminitis' baby girl was between two and six months old, Alina estimated that she spanked her about once every two weeks (R. 132:55). From six to twelve months, the baby received spankings two to five times a week (*id.*). The spanking frequency increased because "they were working on [her] training and listening during that time" (*id.*). The boy was spanked every one or two months (R. 132:59).

Alina explained that the purpose of using the rod was to inflict pain. "[T]he belief was that the rod was painful enough for the child, you needed to inflict pain on the child" (R. 132:47).

With the girl, bruising was common. When she was between six and twelve months old, one in three spankings caused a bruise (R. 132:58). Alina couldn't remember if her daughter suffered any bruising prior to that (*id.*). Alina told the detectives that she would modify the spanking if she spotted a bruise on the baby. "She told me that if she went to spank her and saw a bruise, she would spank on the other side of the buttock or on a different part of the leg"

(R. 132:58). Alina "recounted a time when [her daughter] was approximately, I believe, 10 months old and . . . having problems sitting down, and Alina believed it was from spanking" (R. 132:59). Alina estimated that her son, who was spanked less often, was bruised about five times after Alina spanked him (R. 132:59-60).

While changing her granddaughter's diaper when the baby was between two and four months old, Cindy Harrison, Alina's mother, noticed a bruise on her bottom (R. 132:105-06, 218). During this period, Harrison also noticed that Alina and Matthew carried a wooden spoon in their diaper bag (R. 132:219). At some point, Harrison confronted Alina, who wrote her parents a letter explaining the baby's discipline.

> "[She has] a very small comfort zone, which includes not wanting to go to people and crying at all kinds of weird things and times. I had let [her] get away with a lot of selfishness and selfish crying because of my poor labeling. When I would deal with her I was not sure or confident, so I would be slow and inconsistent. Now I'm working to always be on guard for any form of selfishness in her and to deal with them quickly, consistently and in a way that will make them not happen again. Especially in regard to her crying with other people, my main focus . . . has been to get her to fear, respect and listen to me all throughout the day I all others [sic] areas, because that would carry over to more specific problems [sic] areas, like crying when other people hold her.'"

(R. 132:238). In a subsequent email to her father, Alina acknowledged that her parents "'were concerned about how I

was disciplining [the baby] because of her bruises'" (R. 132: 241).

Matthew told the detectives that he began rod discipline with the two children when they were two months old (R. 131:181, 228). He used a "[w]ooden flat spoon at the beginning" (*id.*). "[O]nce the child got older . . . she graduated from the use of the flat wooden spoon to a round wooden dowel" because "the legs and butt are 'meatier'" (R. 131:185). The spanking consisted of between one and three strikes and "had to be 'hard enough to inflict pain'" (R. 131:184).

Matthew explained Aleitheia's philosophy of discipline to Wegner. The purpose of spanking was always to correct disobedience (R. 131:228). Even at two months old, their daughter was able to disobey (R. 131:220). Matthew considered spanking with a rod a "'[d]isciplinary measure that matches the disobedience'" (R. 131:179). If "it was clear with the children what they needed to do and they disobeyed, then the spankings followed" (R. 131:184).

Matthew told Wegner that he did most of the spanking of his children (R. 131:191). The frequency varied. "Sometimes it was two times in a week. Other times it was two times in a month or beyond" (*id.*). The spankings had to be "'hard enough to inflict pain'" (R. 131:184). They "need to be painful, they need to hurt, they need to be . . . not through clothing because it wouldn't be effective. So bare bottom would be the most effective way to inflict the pain"

(R. 131:180). Pain must be inflicted "[s]o the child knows they have disobeyed" (*id.*). Matthew observed bruising on both children (R. 131:182). He saw bruises on his son about five times (R. 131:188). The red and purple bruises, about the "size of the flat spoon," would last a day or two (R. 131:188, 240). He saw more bruising on the girl than the boy (R. 131:188).

Matthew's father, Philip, testified about a specific incident involving Matthew and his daughter when the baby was about eighteen months old (R. 132:172). The toddler was in her high chair "eating and being fussy and being selfish" (R. 132:175, 179). Matthew tried to correct her verbally and by squeezing her arm (R. 131:180). When that didn't work, Matthew laid her down on the kitchen floor, took off her diaper, and spanked her on the bare bottom with a wooden dowel twelve to fourteen inches long and between one-half and three-quarters of an inch thick (R. 131:181, 209). The girl cried as a result of the spanking (R. 131:182).

Two experts testified for the State at trial. Pediatrician Dr. Barbara Knox testified that there is no appropriate or effective form of discipline for a child younger than eighteen months because she is not cognitively capable of connecting the punishment to the undesirable behavior (R. 133:93-94). Knox further stated that physical discipline creates a serious risk of physical injury (R. 133:94). Rod discipline, in particular, is both ineffective and painful (R. 133:95-96). Clinical psychologist Dr. Anna Salter testified

that corporal punishment is not an effective disciplinary strategy to stop an infant or toddler from crying. "[I]t makes no sense because you're doing a behavior that is eliciting the very thing you say you are trying to stop" (R. 133:148). Like Knox, Salter explained that a child under two years old lacks the cognitive capacity to conform her behavior to adult expectations (R. 133:148-52). Thus, spanking will not teach her to be quiet in church (R. 133:151-52).

Alina and Matthew spoke on their own behalf at sentencing. Alina said:

> The way I discipline my children was my own choice. That said, I have always cared a great deal about being a law-abiding person, and this has been true since the first day of the investigation until today. I would like to share with you a few examples of this.
>
> First, when the police arrived on the first day of the investigation, I asked one of the officers what the law defined as being illegal child discipline, and I was more than happy to abide by what I was told.
>
> Second, when I was questioned by social services, I explained to them that I was happy to modify the discipline of my children.
>
> Third, I signed a consent decree with social services promising to only discipline my children in a manner they found acceptable. This agreement . . . extends to all future discipline.
>
> . . . .
>
> If the police had told me on the first day of the investigation that my conduct was illegal and no charges had been pressed, that would have been enough for me to stop what I was doing.

(R. 135:31-32).

Matthew concurred:

> First, merely having law enforcement inform me that my form of discipline is not allowed has been enough reason for me to modify my behavior. From the moment I was first investigated, I've been honest about the discipline I've carried out, and my sincere desire has been to learn what is considered appropriate discipline and abide by that standard.
>
> For this reason I was thankful for the consent decree proposed by social services which outlined what they considered to be appropriate physical discipline—no physical discipline under 12 months, no marks or bruises at any time—and I'm glad to abide by that standard in the future according to the ongoing nature of the agreement with them.

(R. 135:33-34).

ARGUMENT

I. The Caminitis' substantive due process right to discipline their children is not abridged by the child abuse and reasonable discipline statutes.[2]

A. Legal principles.

Parents have a broad liberty interest "in the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also id.* at 66 (collecting cases); *State v. Neumann*, 2013 WI 58, ¶13, 348 Wis. 2d 455, 832 N.W.2d 560. Subsumed within that broad interest is a narrower interest in child discipline. *See Doe v. Heck,* 327 F.3d 492, 522 (7th Cir. 2003); *Hamilton ex rel Lethem v. Lethem*, 270 P.3d 1024, 1026 (Haw. 2012); *State v. Wilder*, 748 A.2d 444, 449 (Me. 2000). These interests are generally understood to inhere in the Substantive Due Process Clause. *See, e.g.*, *Doe*, 327 F.3d at 517-19.

"[A] parent's fundamental right to make decisions concerning his or her child is not unlimited." *Neumann*, 348 Wis. 2d 455, ¶113. "Indeed, this liberty interest in

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[2]Part I of the State's Argument corresponds to parts II-IV of the Caminitis' Argument. Part V of the Caminitis' Argument is a cursory argument (with no legal citations) that their parental rights are protected by the First Amendment as well as the Due Process Clause. Caminitis' Brief at 40-41. The State will not separately address this argument and this Court need not consider it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed."); *id.* ("Arguments unsupported by references to legal authority will not be considered.").

familial integrity is limited by the compelling governmental interest in the protection of children—particularly where the children need to be protected from their own parents." *Croft v. Westmoreland Cnty.*, 103 F.3d 1123, 1125 (3d Cir. 1997). Thus, it is within the State's constitutional power to enforce criminal child abuse statutes against parents. *See Doe*, 327 F.3d at 520; *Wilder*, 748 A.2d at 449; *Keser v. State*, 706 P.2d 263, 267-68 (Wyo. 1985) (collecting cases); *see also Sweaney v. Ada Cnty.*, 119 F.3d 1385, 1391 (9th Cir. 1997) (no "unlimited [constitutional] right to inflict corporal punishment on [one's] children").

A court reviewing a defendant's claim that a state's criminal child abuse statute impinges on his fundamental rights as a parent must "balance . . . the fundamental right to the family unit and the state's interest in protecting children from abuse." *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1019 (7th Cir. 2000); *accord Croft*, 103 F.3d at 1125. "'[S]tandards designed to regulate'" the "'delicate and complex'" parent-child relationship "'must necessarily provide some flexibility while at the same time effectuating the state policy of protecting children from abuse.'" *Keser*, 706 P.2d at 267 (citation omitted).

A statutory scheme that both allows parents to be prosecuted for child abuse and provides them with a reasonable discipline privilege strikes an appropriate balance between parents' liberty interests and the State's police power interest. *See Brokaw*, 235 F.3d at 1019;

Lethem, 270 P.3d at 1035-36; *Keser*, 706 P.2d at 268-70. Wisconsin has adopted just such a statutory scheme. *See State v. Kimberly B.*, 2005 WI App 115, ¶¶ 29-30, 283 Wis. 2d 731, 699 N.W.2d 641.

In Wisconsin, physical abuse of a child is punishable as a felony under Wis. Stat. § 948.03. Parents who physically abuse their children are subject to prosecution under the statute. *See, e.g., State v. Williams*, 2006 WI App 212, ¶¶ 2-6, 296 Wis. 2d 834, 723 N.W.2d 719, 723-25. The subsection applicable in this case required the State to prove that, as to each act charged, the parent "intentionally caus[ed] bodily harm to a child." Wis. Stat. § 948.03(2)(b). As defined by the Wisconsin statutes, "bodily harm" includes "physical pain," as well as "injury, illness, or any impairment of physical condition." Wis. Stat. § 939.22(4).

Wisconsin provides a statutory "reasonable discipline" privilege for a parent's corporal punishment of a child. The privilege defense can be claimed:

> When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. . . .

Wis. Stat. § 939.45(5)(b).

The burden is on the State to "disprove the parental privilege defense beyond a reasonable doubt." *Kimberly B.*, 283 Wis. 2d 731, ¶ 29. It must prove either (1) that the use of force was not reasonably necessary, or (2) that the amount

and nature of the force used was unreasonable. *Id.* ¶ 30. The privilege analysis is multi-factored and context-dependent.

> There is no inflexible rule that defines what, under all circumstances, is unreasonable or excessive corporal punishment. Rather, the accepted degree of force must vary according to the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

Id. ¶ 33 (citation omitted). Whether the privilege absolves a parent of liability in a given case is a question for the jury. *See id.* ¶ 37.

Wisconsin statutes are presumed to be constitutional. A party challenging a statute on constitutional grounds must prove its unconstitutionality beyond a reasonable doubt. *State v. Luedtke*, 2015 WI 42, ¶ 75, 362 Wis. 2d 1, 863 N.W.2d 592. As noted above, a law impinging on the parental right of discipline must balance "the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse." *Croft*, 103 F.3d at 1125; *accord Doe*, 327 F.3d at 518-20; *Brokaw*, 235 F.3d at 1019. A statute that achieves that balance will survive a constitutional challenge.

The Caminitis assert that the child abuse statute is subject to strict scrutiny because it interferes with their parental rights. Caminitis' Brief at 19-20. The State knows of no published judicial authority applying strict scrutiny to a child abuse statute under these circumstances. None of the

cases cited by the Caminitis support this proposition. *See* Caminitis' Brief at 19-31.

Whether a statute is constitutional is a question of law subject to this Court's de novo review. *See In re Gwenevere T.*, 2011 WI 30, ¶16, 333 Wis. 2d 273, 797 N.W.2d 854.

B. Analysis.

1. Wisconsin's child abuse and reasonable discipline statutes are constitutional because they balance the parents' right to discipline their children with the State's interest in protecting the children from abuse.

Wisconsin's child abuse statute, as tempered by the reasonable discipline privilege, comports with substantive due process requirements. It balances the parental right of discipline with the State's interest in protecting children from abuse. *See Croft*, 103 F.3d at 1126. Section 948.03(2)(b) prohibits the intentional infliction of bodily harm, including pain and injury, on a child, and thereby advances the State's interest in protecting children. Section 939.45(5)(b) allows a parent to discipline her child as long as it is reasonable, involving "only such force as a reasonable person believes is necessary," and thereby advances the parent's liberty interest in controlling her children. The statute thus survives constitutional scrutiny.

In this case, the State proved that the Caminitis intentionally inflicted bodily harm on their children, as revealed by their own statements that the children

experienced bruising after they were spanked with wooden spoons or dowels. The State also disproved the reasonable discipline privilege beyond a reasonable doubt. It showed that the Caminitis' use of rod discipline on their daughter (as an infant and young toddler) and their infant son because they were "disobedient," "angry," "not listening," "not being quiet," "crying," or "being selfish," was not reasonably necessary and that the amount and nature of the force used was unreasonable (R. 131:228; 132:52, 53, 175, 179, 238). The State's factual evidence was buttressed by the testimony of the experts, who explained that the use of rod discipline on such young children was ineffective and counterproductive.

For these reasons, this Court should reject the Caminitis' claim that their prosecution under the child abuse statute violates their fundamental right to discipline their children.[3]

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[3]In *State v. Philip Caminiti*, No. 2013AP730-CR, unpublished slip op. (WI App Mar. 20, 2014), this Court held that the "reasonable discipline privilege strikes a balance between parents' constitutional rights to the care and control of their children and the State's interest in preventing child abuse," thus passing the applicable balancing test used in *Doe v. Heck*. *See Caminiti*, unpublished slip op., ¶ 37. As an authored but unpublished court of appeals opinion, *Caminiti* "may be cited for its persuasive value." Wis. Stat. § 809.23(2)(b). The State attaches a copy of the opinion in the appendix to this brief (P-R App. 001-026). *See* Wis. Stat. § 809.23(3). The defendant in the cited case, Philip Caminiti, is the father of Matthew Caminiti and the head elder of the Aleitheia Bible Church. *Caminiti*, unpublished slip op., ¶ 9. Philip Caminiti was convicted of

2. The Caminitis' arguments are unavailing.

The Caminitis assert that any governmental restriction on their parental right to discipline their children is subject to strict scrutiny review. Thus, they do not address the balancing test of *Doe*, *Brokaw*, and *Croft* in their brief.

The Caminitis' argument is as follows: In part II., they argue that the parent-child relationship is constitutionally protected under the Substantive Due Process Clause, which the State concedes. In part III., after citing additional case law supporting the previous uncontested proposition, they argue that the constitutional liberty interest includes the right to discipline their children. In part IV., they argue that the circuit court failed to analyze and the State failed to prove that there are no less restrictive alternatives to Wisconsin's chosen approach to protecting children from physical abuse by their parents.

It is important to note that the Caminitis' parental rights challenge to Wisconsin law is not an as-applied challenge. Their theory is that the law is unconstitutional on its face. *See* Caminitis' Brief at 30, 35-39. Here the law in question is really a combination of three statutes and a court decision: Wis. Stat. § 948.03 (the child abuse statute); § 939.22(4) (the definition of bodily harm); § 939.45(5)(b) (the reasonable discipline privilege); and *Kimberly B.*

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eight counts of conspiracy to commit child abuse based on the use of rod discipline by Aleitheia's adherents. *Id.* ¶ 1.

(the multi-factored reasonable discipline test). As the State understands their brief, the Caminitis are challenging all four components of the law as they come together in a discipline-based child abuse prosecution.

The scope of the Caminitis' challenge has two important implications for this Court's review. First, as mentioned above, because Wisconsin statutes are presumed to be constitutional, the Caminitis bear the burden of proving that one or more parts of the statutory scheme is unconstitutional. *See Luedtke*, 362 Wis. 2d 1, ¶ 75. Second, this Court does not have the authority to overrule *Kimberly B. See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Only the Wisconsin Supreme Court can do that.

a. The cases cited by the Caminitis in part III. do not support their conclusion that parents may determine, without state interference, what discipline is reasonable.

In part III. of their argument, the Caminitis enlist a host of cases to support their position that a parent's liberty interest in her child's upbringing includes the right to use reasonable corporal punishment as discipline. The State agrees with this general proposition. However, the Caminitis' analysis implies that the parent gets to decide what punishment is reasonable without interference from the State. The cited case law does not support that

conclusion. Moreover, the Caminitis' discussion of the cases in this section is frequently misleading. Many of the cases cited are irrelevant, inapposite, or mischaracterized by the Caminitis.

The Caminitis cite *Ingraham v. Wright*, 430 U.S. 651 (1977), twice. First, they use it to support the point that a parent may be unable to care for or control "an unruly child without the ability to impose discipline." Caminitis' Brief at 24. Second, they cite it to support the assertion that "[t]he Supreme Court has recognized historical and contemporary approval of reasonable corporal punishment in public schools." *Id.* at 26.

Ingraham says nothing about a parent's right to discipline his children. On the contrary, the plaintiffs in *Ingraham* were public school pupils *and their parents* who sued their school under the federal civil rights statutes after the children suffered injuries from being spanked with a wooden paddle. 430 U.S. at 653 n.1. The plaintiffs raised two legal theories, both of which the Court rejected. They argued that the punishment violated their Eighth Amendment right to be free from cruel and unusual punishment; the Court held that the Eighth Amendment does not apply to non-criminal school-based punishments. *Id.* at 670. The plaintiffs argued that they were not afforded procedural due process; the Court held that they were. *Id.* at 672. The Court explained that advance procedural safeguards were unnecessary because state law provides civil and

criminal remedies to a pupil subjected to severe or excessive discipline. *Id.* at 677-78. These holdings do not support the Caminitis' contention that the State may not impose criminal sanctions on parents who subject their children to unreasonable physical punishment in the name of discipline.

The Caminitis note correctly that the *Ingraham* court acknowledged the historical and contemporary approval of corporal punishment in schools.[4] They fail to note the Court's discussion about which branch of government has the authority to decide whether to permit or limit such punishment. "Elimination or curtailment of corporal punishment would be welcomed by many as a societal advance. But when such a policy choice may result from this Court's determination of an asserted right to due process, rather than from the normal processes of community debate and legislative action, the societal costs cannot be dismissed as insubstantial." *Id.* at 681. In other words, at least when it's performed in the classroom, the legislature, not the courts, should decide whether physical discipline of children is allowed.

The Caminitis also ignore the Court's historical observation that "a single principle has governed the use of corporal punishment since before the American Revolution:

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[4]Whether the statutory approval of school-based corporal discipline is as widespread as it was when *Ingraham* was decided nearly forty years ago is unknown. However, Wisconsin's position on the question is clear: corporal punishment in public schools is prohibited unless sanctioned by a specific statutory exception. *See* Wis. Stat. § 118.31.

Teachers may impose *reasonable but not excessive force* to discipline a child." *Id.* at 661 (emphasis added). Citing a leading torts casebook and the *Restatement (Second) of Torts*, the Court summarized the factors that determine whether a teacher's corporal punishment of a pupil is reasonable:

> All of the circumstances are to be taken into account in determining whether the punishment is reasonable in a particular case. Among the most important considerations are the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline.

Ingraham, 430 U.S. at 662. The *Ingraham* factors are much like the factors identified by this Court to determine whether Wisconsin's reasonable discipline privilege applies in a particular case. *See Kimberly B.*, 283 Wis. 2d 731, ¶ 33. *Ingraham* is fully consistent with *Kimberly B.*

The Caminitis misleadingly tilt *Ingraham* towards their own position when they write that the "Court found that the child's interest in personal security or the child's right to be free from unjustified intrusions did not outweigh the need for maintaining discipline." Caminitis' Brief at 27 (citing *Ingraham*, 430 U.S. at 676). In fact, the Court wrote:

> The concept that reasonable corporal punishment in school is justifiable . . . represents "the balance struck by this country," between the child's interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child's education. Under that longstanding

> accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege.

Id. at 676 (citations omitted). In other words, as in *Doe*, *Heck*, and *Croft*, the protection of the child must be balanced against the right of discipline.

In addition to *Ingraham*, the Caminitis cite several other non-Wisconsin cases concerning corporal punishment of school children. *See Doe v. Heck*[5]; *Ark. Dep't of Human Servs. v. Caldwell*, 832 S.W.2d 510 (Ark. Ct. App. 1992); *Lander v. Seaver*, 32 Vt. 114 (1859) (in which the eleven-year-old plaintiff was whipped with a rawhide). These cases, involving children between eight and eleven years old, are inapposite because the physical discipline of a child over the age of eight is not comparable to spanking an infant or toddler younger than eighteen months with a wooden spoon or dowel. The circumstances are distinguishable because the baby's body is smaller and more vulnerable than the child's. Moreover, the baby, unlike the older child, lacks the cognitive ability to understand the purpose and goal of the punishment. *See supra* at 11-12. For the same reason, *Johnson v. Smith*, 374 N.W.2d 317 (Minn. Ct. App. 1985), involving a mother's physical discipline of a twelve-year-old, is inapposite.

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[5]Incorrectly cited as "*Doe v. Lang*, 327 F.3d 492, 523 (7th Cir. 2003)." Caminitis' Brief at 26.

The Caminitis quote at length from *Parham v. J.R.*, 442 U.S. 584 (1979), a class action lawsuit challenging Georgia's "voluntary" commitment statute, which allowed parents of minors to commit them to mental health facilities against their will. The case had nothing to do with "[t]he presumption that parents . . . know how to properly discipline their own children," as the Caminitis imply. Caminitis' Brief at 25. The Court acknowledged the legal presumption that parents are better able than children to make important decisions and usually act in their children's best interests. *Id.* of 602. It then noted that "[a]s with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this." *Id.* Thus, "we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Id.* at 603. After considering both sides of the question, the Court concluded "that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied." *Id.* at 606.

Next, the Caminitis mischaracterize *Troxel v. Granville*, falsely representing it as addressing the parental discipline of children. According to the Caminitis: "The right

of parents to discipline their children is the 'oldest of the fundamental interests recognized by [the United States Supreme] Court.'" Caminitis' Brief at 25 (quoting *Troxel*, 530 U.S. at 65). *Troxel* concerned the right of grandparents to visit their deceased son's out-of-wedlock children. *See* 530 U.S. at 60. It has absolutely nothing to do with child discipline. The Caminitis follow the *Troxel* quote with a citation to the dissenting opinion in *In re RGB*, 229 P.3d 1066, 1121 (Haw. 2010), another case that is not about child discipline or punishment.

After mischaracterizing *Troxel*, the Caminitis go on to cite *Lang v. Starke County Office of Family & Children*, 861 N.E.2d 366 (Ind. Ct. App. 2007), to support the proposition that the "right to discipline includes the right to use reasonable corporal punishment." Caminitis' Brief at 25-26. This is what the Indiana court wrote:

> [P]arents do have the right to use reasonable corporal punishment to discipline their children. However, just as a parent's right to raise his or her children is not absolute, we find no authority for the proposition that a parent's right to use reasonable corporal punishment is absolute and cannot in some instances be subordinated to a child's interests. Here, the DCS [the Starke County Office of Child Services] determined that corporal punishment was not in the best interest of Lang's children based upon his previous use of unreasonable corporal punishment. Lang is correct that a blanket policy prohibiting all forms of corporal punishment for parents undergoing family counseling would not be permissible. However, where a parent such as Lang, who has a history of using *unreasonable* corporal punishment, both refuses to recognize that his previous conduct was not permissible and refuses to

> work with the DCS to improve his conduct, the DCS is left with little choice but to require that the parent repudiate all forms of corporal punishment before allowing children in their care to be released to the parent's home for unsupervised visitation.

861 N.E.2d at 378 (citations omitted).

Some of the Caminitis' case citations are puzzling. They cite Justice O'Connor's dissent in *City of Boerne v. Flores*, 521 U.S. 507, 545 (1997),[6] wherein the Roman Catholic Church challenged a local zoning ordinance under the Religious Freedom Restoration Act and the Court held the statute unconstitutional. That case is irrelevant and off-point in every possible respect. They cite *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989), in which a child who had been beaten and permanently injured by his father sued his county's social services agency for failing to protect him, arguing that they violated his substantive due process rights. The Court held that they did not. In the passage cited by the Caminitis, the Court distinguished the responsibility the state owes to a person in its custody (*e.g.*, a prison inmate) from the responsibility it owes to the general public (*e.g.*, the child plaintiff). Again, the case is irrelevant and off-point.

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[6] *Superseded by statute*, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 804, 42 U.S.C. 2000cc-1(a), *as recognized in Charles v. Verhagen*, 348 F.3d 601, 606 (7th Cir. 2003).

Many of the cases discussed above affirm a parent's right to use *reasonable* corporal punishment. But they do not support the Caminitis' implicit assertion that a parent gets to decide whether his chosen form of physical discipline is appropriate, reasonable, and lawful without interference from the State.

On the contrary, the cases show that the parents' right of discipline must be balanced against the child's interest in being free from harm and the State's interest in protecting the child from harm. *Parham* acknowledges that children will sometimes need the State to protect them from their parents. 442 U.S. at 603. *Ingraham* (albeit in the school setting) recognizes a child's right to civil and criminal remedies for excessive discipline. 430 U.S. at 677-78. It leaves to the legislature and the community the questions of whether and under what circumstances physical discipline of children will be legally permitted or criminally sanctioned. *Id.* at 681. *Ingraham* explains that reasonableness must be determined through a multi-factored analysis that considers all the circumstances. *Id.* at 662. That same analysis is used by the Wisconsin courts. *See Kimberly B.*, 283 Wis. 2d 731, ¶ 33. Indeed, the jury in this case was instructed to determine whether the Caminitis' rod discipline of their children was reasonable under that multi-factored analysis (R. 134:51).

b. The availability of less restrictive alternatives is not part of the constitutional parental rights analysis; moreover, the circuit court correctly concluded that there is no less restrictive alternative.

Part IV. of the Caminitis' argument opens with the observation that the circuit court found no "less restrictive alternatives" to the child abuse and reasonable discipline privilege statutes that would "protect children without infringing on the rights of parents to make decisions about discipline absent interference from the government." Caminitis' Brief at 30. Whether there are "less restrictive alternatives" to the government's chosen method of regulating conduct is not part of the constitutional analysis applicable to the parental rights claim. *See supra* at 15-16. Therefore, neither the circuit court nor this Court is obligated to consider less restrictive alternatives. Nevertheless, the State will address the issue.

The Caminitis' less restrictive alternatives argument consists of two separate (but overlapping) components. The first component is based on the child's injury. Under § 948.03(2)(b), the State must prove that the child suffered "bodily harm," which, as defined by § 939.22(4), includes "physical pain or injury." The less restrictive alternative proposed by the Caminitis is not clear. Generally, they seem content with an "actual injury" standard. Caminitis' Brief at 33, 35, 37. At certain points,

however, they seem to call for a standard of "substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress." *Id.* at 39; *see also id.* at 31 (quoting *State v. Adaranijo*, 792 N.E.2d 1138, 1140 (Ohio Ct. App. 2003); *id.* at 33 (quoting *Model Penal Code* § 3.08(1) (1985)). The second component of the Caminitis' argument is that the parent's reasons for disciplining the child must not be considered by the jury or the State. In their view, that inquiry should be jettisoned and the sole focus should be on the child's injury.

This Court should reject the Caminitis' less restrictive alternatives argument.

Both versions of the Caminitis' proposed injury standard should be rejected. The "actual injury" version fails for two reasons. First, it is amorphous and would not have changed the result in this case. Here, the State introduced evidence that the children suffered bruising after they endured rod discipline. *See supra* at 8-11. A "bruise" is "[a]n injury to underlying tissues or bone in which the skin is not broken, often characterized by ruptured blood vessels and discolorations." *The American Heritage Dictionary of the English Language* 238 (5th ed. 2011). Therefore, the State proved "actual injury." Second, the Caminitis cite no authority that "actual injury" is a constitutionally required standard. Their reference to statutes from four other states proves only that those states and Wisconsin made different

policy choices.[7] Caminitis' Brief at 35-36. The burden is on the Caminitis to prove that Wisconsin's legislative choice violates the U.S. Constitution. To carry that burden, they must do more than show that Wisconsin could have chosen a weaker standard of liability than it did.

The "substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress" standard also fails. Again, the Caminitis cite no authority that this "great bodily harm" standard, *see* Wis. Stat. § 939.22(14), is constitutionally required and therefore do not meet their burden of proof. They emphasize § 3.08 of the Model Penal Code (which has not been widely adopted in the thirty years since its publication), but that is a policy recommendation only, not a constitutional mandate. Caminitis' Brief at 32-33. Their case citations reveal that some state legislatures have adopted a standard matching or approximating a great bodily harm standard. *See*, *e.g.*, *State v. Ivey*, 648 N.E.2d 519, 523 (Ohio Ct. App. 1993), *cited in* Caminitis' Brief at 31. But, again, all that shows is that different legislative choices are available to the states. It is well within Wisconsin's legislative police power authority to

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[7]Only the Oregon and Wyoming citations support the Caminitis' position. The Pennsylvania statutes cited concern roads. *See* 16 Pa. Cons. Stat. §§ 2701, 2703. The second West Virginia citation defines "bodily injury" as "substantial physical pain, illness or any impairment of physical condition." W. Va. Code § 61-8B-1 (2007).

prohibit the parental infliction of bodily harm that falls short of great bodily harm.

The other component of the Caminitis' less restrictive alternatives argument is that the jury and the State have no business inquiring into a parent's reasons for imposing corporal punishment on his child. The Caminitis present this notion as a constitutional imperative, stating that "[a] jury's inquiry into a reason for spanking violates the Constitution," and "[a]sking a jury to evaluate whether the reason for discipline was appropriate to invoke a spanking intrudes directly into an area which the State is constitutionally prohibited from intruding: whether or not the parent was justified in disciplining the child for certain conduct." Caminitis' Brief at 35, 37. The Caminitis offer no authority for these bold and remarkable statements.

To bolster this otherwise unsupported argument, the Caminitis refer to their religious beliefs, which they assert are beyond the pale of legitimate legal inquiry. Caminitis' Brief at 39-40. The role of their religious beliefs in their use of rod discipline is appropriately discussed not here but in the context of their free exercise argument, which the State will address below. However, one point made in these pages warrants a response here. The Caminitis assert that they believe their method of discipline is necessary to save their children from "spiritual death (which lasts an eternity)." *Id.* at 39. In other words, they have no choice but to follow the biblical injunction to use the rod; if they obey

Wisconsin law instead, they will consign their children to eternal darkness. *Id.* at 39-40.

But that is not what the Caminitis told the circuit court at their sentencing hearing. *See supra* at 12-13. Alina said that when the police came to her house and told her the legal limitations on child discipline, she "was more than happy to abide by what I was told" and later told social services that she "was happy to modify the discipline of my children"
(R. 135:31). Similarly, Matthew said that "having law enforcement inform me that my form of discipline is not allowed has been enough reason for me to modify my behavior" (R. 135:33). Either the Caminitis were lying at their sentencing hearing or they are misrepresenting the necessity of their commitment to rod discipline in their appellate brief.

The Court should reject the Caminitis' less restrictive alternatives argument both because it has no place in the constitutional parental rights analysis and because it fails on the merits.[8]

[8]In *Caminiti*, this Court agreed with the State that "anything less restrictive than [Wisconsin's statutory scheme] would allow a person's religious beliefs to prevent the prosecution of egregious cases of child abuse." *Caminiti*, unpublished slip op., ¶ 32.

II. The child abuse and reasonable discipline statutes do not unconstitutionally burden the Caminitis' free exercise of religion and freedom of conscience.[9]

A. Legal principles.

1. The First Amendment.

"[T]he 'exercise of religion' often involves not only belief and profession [of belief] but the performance of . . . physical acts . . . ." *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990).[10] However, whereas the First Amendment protects religious belief absolutely, it does not extend absolute protection to acts performed in the exercise of religious belief. *Id.* at 878.

The U.S. Supreme Court has never recognized a free-exercise exemption from "an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884; *accord id.* at 878-80, 882, 885. The *Smith* court explained that

> the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes)

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[9]Part II of the State's Argument corresponds to part VI of the Caminitis' Argument.

[10]*Superseded by statute*, the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S.C. 2000bb, *as recognized in State v. Miller*, 202 Wis. 2d 56, 68, 549 N.W.2d 235 (1996). RFRA does not apply to the states. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Thus, the constitutional analysis of *Smith*, not RFRA, controls in free exercise challenges to state laws. *Id.*

> conduct that his religion prescribes (or proscribes)." In *Prince v. Massachusetts*, 321 U.S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do."

494 U.S. at 879-80 (citations omitted except as indicated); *accord Neumann*, 348 Wis. 2d 455, n. 76 (U.S. Supreme Court has "'never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.'" (citation omitted)).

There is no special constitutional test for determining whether a religious objector must obey a facially neutral criminal law. *Smith*, 494 U.S. at 885. As long as a criminal law is of general applicability and does not discriminate on religious grounds, all citizens are expected to abide by it regardless of their religious convictions. *See id.* at 884-85.

2. The Wisconsin Constitution's freedom of conscience clause.

Article I, § 18 of the Wisconsin Constitution protects freedom of conscience. *See State v. Miller*, 202 Wis. 2d 56, 66-69, 549 N.W.2d 235 (Ct. App. 1996). Our courts use "the compelling state interest/least restrictive alternative test" to review freedom of conscience claims. *Id.* at 66. The individual challenging a state law has the burden of proving that he or she has a sincerely held religious belief

that is burdened by the application of the law. *Id.* The burden then shifts to the State to prove that the law serves a compelling state interest that "cannot be served by a less restrictive alternative." *Id.*

B. Analysis.

1. Wisconsin's child abuse and reasonable discipline statutes do not violate the federal and state constitutions.

The Caminitis argue that Wisconsin's child abuse and reasonable discipline statutes violate their First Amendment right to free exercise and their freedom of conscience right under the Wisconsin Constitution. They have the burden of proving the statutes' unconstitutionality beyond a reasonable doubt. *See Luedtke*, 362 Wis. 2d 1, ¶ 75.

The First Amendment claim fails. Wisconsin's child abuse statute is facially neutral and does not discriminate on religious grounds. Therefore, all Wisconsin citizens, including the Caminitis, are expected to obey it or face criminal prosecution. *See Smith*, 494 U.S. at 884-85.

The freedom of conscience analysis under the Wisconsin Constitution is more complex, but that claim also fails. The State concedes for purposes of this argument that the Caminitis met their burden of proving that the child abuse and reasonable discipline statutes, as applied in this case, burden their sincerely held religious beliefs. *See Miller*, 202 Wis. 2d at 66. However, the application of the statutes to

them is constitutional because the statutes serve a compelling state interest that cannot be served by a less restrictive alternative. *See id.*

The State has a compelling interest in preventing child abuse. *See, e.g.*, *Doe v. Heck*, 327 F.3d at 520; *Brokaw*, 235 F.3d at 1019; *State v. Killory*, 73 Wis. 2d 400, 407, 243 N.W.2d 475 (1976). That interest includes protecting children from abuse by their parents. *See Doe*, 327 F.3d at 520; *Brokaw*, 235 F.3d at 1019. "[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child." *Wisconsin v. Yoder*, 406 U.S. 205, 233-234 (1972). The State knows of no published judicial decision, and the Caminitis cite none, that holds otherwise.

In service to its goal of preventing child abuse, Wisconsin law criminalizes objectively unreasonable incidents of corporal punishment. Wisconsin has concluded that any type of child abuse is an evil to be sanctioned by a criminal statute applied neutrally and uniformly to all. *See* Wis. Stat. § 948.03. Meanwhile, Wisconsin provides the reasonable discipline privilege, which allows parents to use force that "a reasonable person believes is necessary" to correct or punish their children. Wis. Stat. § 939.45(5)(b). The privilege is neutral and uniform and applies to all parents equally, regardless of their religious views. There is

no less restrictive alternative to the statutory scheme Wisconsin has adopted.

The Caminitis argue that a less restrictive alternative would "disallow[] the State to convict one of child abuse for simply having caused transient pain (which results from any spanking)." Caminitis' Brief at 60. As explained above, this case does not involve mere "transient pain." *See supra* at 8, 11, 31. And the reasonable discipline privilege, which allows "force as a reasonable person believes is necessary," would most likely protect "transient pain" resulting from an ordinary spanking. *See* Wis. Stat. § 939.45(5)(b). The statutes protect children from *unreasonable* punishment at the same time that they protect the parents' right to impose *reasonable* punishment. The fact that this statutory balance does not accord with the Caminitis' religious preferences does not make the statutes unconstitutional. Reducing the statutory injury component would lower the standard of child protection in Wisconsin to the detriment of the State's children.

The State can imagine no alternative that would be *both* "less restrictive" for the Caminitis *and* impartial to everyone else. A less restrictive alternative that would create a different standard for religiously minded child discipliners would immunize such people from child abuse prosecutions in even the most egregious cases. *Cf. Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 495-96 (1949) ("it is difficult to perceive how . . . these constitutional guaranties

afford [the Caminitis] a peculiar immunity from laws against [child abuse] unless . . . [they are] given special constitutional protection denied all other people") (*Giboney* involved union picketing in restraint of trade).

The child abuse and reasonable discipline statutes do not abridge the Caminitis' free exercise or freedom of conscience rights because they are facially neutral and further a compelling state interest that cannot be served by a less restrictive alternative.[11]

2. The Caminitis' arguments are unavailing.

a. The narrow interpretation argument.

The Caminitis argue that the U.S. and Wisconsin Constitutions require a narrow interpretation of the child abuse and reasonable discipline statutes to allow them to apply corporal punishment to their children, which in their case consists of striking the bare bottoms of infants and young toddlers with wooden spoons and dowels. Neither constitution requires that the Caminitis be exempt from the laws governing all other parents in Wisconsin.

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[11]In *Caminiti*, this Court concluded that Philip Caminiti's prosecution did not "violate his right to freedom of religion." *Caminiti*, unpublished slip op., ¶ 25. The Court held that the State has a compelling interest in preventing child abuse and that Wisconsin's statutory scheme was the least restrictive alternative available to the State to achieve its goal. *Id.* ¶¶29, 32.

The "narrower interpretation of the child abuse statute" sought by the Caminitis would accommodate their religious beliefs by not "criminaliz[ing] transitory, mild or moderate pain that is administered in a loving relationship for the good of the child." Caminitis' Brief at 47-48. In a way, they call for a multi-factored analysis that looks at the corporal punishment in context.

This Court adopted a different multi-factored analysis in *Kimberly B.*, which set forth the test for determining what constitutes reasonable discipline under the privilege statute. The Court held that "the accepted degree of force must vary according to the *age*, sex, physical and mental condition and disposition of the child, *the conduct of the child*, *the nature of the discipline*, and all the surrounding circumstances." 699 N.W.2d at 750 (emphasis added). Thus, under Wisconsin law, even where discipline "is administered in a loving relationship" for the purported "good of the child," it may not be reasonable where the child is less than two years old, his or her conduct consists of "not listening," "not being quiet," "crying," or "being selfish," and the nature of the discipline is being spanked on the bare bottom with a wooden rod (R. 131:228; 132:52, 53, 175, 179, 238).

Whereas the Caminitis' test is parent-centered, the *Kimberly B.* test is child-centered. That focus does not offend any recognized constitutional principle. Regardless of the intent underlying the discipline, if it is extreme or injurious, it is not privileged. A religious impulse does not provide

immunity. *See Prince*, 321 U.S. at 166 ("[The State's] authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience."); *see also id.* at 170 (parents are not "free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves").

Of course, the Caminitis deny that rod discipline is extreme or injurious, insisting that it causes only "transitory, mild or moderate pain." Their characterization does not accord with the evidence. The Caminitis themselves, as well as Alina's mother, said that the children were frequently bruised as a result of the beatings (R. 131:182, 188, 240; 132:58-60, 105-06, 241). Alina reported that after being spanked when she was ten months old, her daughter had trouble sitting down (R. 132:59). For children under two, pain from spanking hard enough to cause bruising and prevent sitting is not "transitory, mild or moderate."

b. The First Amendment argument.

The Caminitis seek support for their free exercise claim from U.S. Supreme Court case law. But the high court's opinions in this area run counter to the Caminitis' position. The Wisconsin statutes at issue here are neutral; they do not single out anyone's religious practices. Therefore, they are constitutional under *Smith*. *See supra* at

35-36. *Smith* is the controlling precedent. *See City of Boerne*, 521 U.S. at 536.

The Caminitis' lengthy discussion of *Fowler v. Rhode Island*, 345 U.S. 67 (1953), is thus beside the point. There, the U.S. Supreme Court struck down a municipal ordinance that prohibited religious meetings of Jehovah's Witnesses in a public park but allowed religious services by mainstream churches to take place there. The ordinance was unconstitutional because it discriminated against a particular religious group. The Caminitis claim that the Aleitheia Bible Church is similarly discriminated against because their religion's approach to child-rearing is subject to governmental regulation while the child-rearing practices of other religions are not. Caminitis' Brief at 51. The Caminitis misconstrue *Fowler*. Unlike the municipal ordinance in *Fowler*, the child abuse and reasonable discipline statutes apply to all parents uniformly, regardless of religious affiliation. *Fowler* teaches that a law must be neutrally applied to all religions; it does not teach that a neutral law's effect on all religions must be the same.

The Caminitis also look to *Yoder*, 406 U.S. 205. Caminitis' Brief at 51-53. There, the U.S. Supreme Court applied a "balancing process" to Wisconsin's enforcement of compulsory school attendance on the Old Order Amish, who declined on religious grounds to send their children to school beyond the eighth grade. 406 U.S. at 213. The *Yoder* balancing test required Wisconsin to prove that its interest

in universal education was compelling enough to "override" or "overbalance" the interests of the Amish families. *Id.* at 214-15. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. . . . [H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.* at 215. Wisconsin was unable to satisfy the balancing test. *Id.* at 219-29.

In *Smith*, the Court noted that the balancing test used in *Yoder* had never been applied to "an across-the-board criminal prohibition on a particular form of conduct" and was "inapplicable to such challenges." 494 U.S. at 884.

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.

Smith, 494 U.S. at 885 (citations omitted). Unlike *Yoder*, this case involves "an across-the-board criminal prohibition on a particular form of conduct," *i.e.*, child abuse. The balancing test is thus inapplicable and *Yoder* is inapposite.

c. The freedom of conscience argument.

Turning to the Wisconsin Constitution, the Caminitis cite the "compelling state interest/least restrictive alternative" *Miller* test. *Miller*, 202 Wis. 2d at 66. As the State has shown, the child abuse and reasonable discipline statutes pass that test. The prevention of child abuse is a compelling state interest. A neutral child abuse statute applicable to all parents, leavened by a reasonable discipline privilege, is the least restrictive alternative available to the State. *See supra* at 31-33.

The Caminitis reach a different conclusion, asserting that they "have clearly been persecuted for the exercise of sincerely held religious beliefs." Caminitis' Brief at 58. They argue that "a less restrictive alternative that would still protect the children from injury" would be to "[d]isallow[] the State to convict one of child abuse for simply having caused transient pain." *Id.* at 60. They call for a rewriting of the child abuse statute, which declares that "intentionally caus[ing] bodily harm to a child" is child abuse. Wis. Stat. § 948.03(2)(b). "Bodily harm" includes "physical pain and injury." Wis. Stat. § 939.22(4). The Caminitis argue that causing "pain" should not be a crime, and that the State must be required to prove "harm." Caminitis' Brief at 60. The Caminitis do not suggest what "harm" means. In the last paragraph of this section, they use the term "injury" instead. *Id.* at 67.

The State has already responded to variations of this argument above and will not repeat those responses here. *See supra* at 30-34, 38-40. But even if the Caminitis were right that "pain" is an insufficient basis for a felony child abuse prosecution, it would not help them in this case. Here, the State proved that the Caminitis *injured* their children. The children were bruised and a bruise is an injury. *See supra* at 8, 11, 31. The State's closing arguments show that it relied on the evidence of bruising, not pain, to prove the "bodily harm" element of the charges (R. 134:67, 69, 71-74, 77, 79, 81-83, 85, 136, 139). The State concedes that bruises from spanking are not as serious as broken bones from another abusive act. But that does not mean they are outside the reach of the criminal law. The sentencing court can use its discretion to account for the degree of bodily harm suffered by the victim.

The Caminitis reject the premise that the reasonable discipline privilege can "cure the constitutional infirmity." Caminitis' Brief at 61. The privilege statute permits "only such force as a reasonable person believes is necessary." Wis. Stat. § 939.45(5)(b). In other words, as interpreted by this Court, "the use of force must be reasonably necessary; [and] the amount and nature of the force used must be reasonable." *Kimberly B.*, 283 Wis. 2d 731, ¶ 30. The Caminitis object to the reasonableness standard. They complain that it "allow[s] a juror to exercise viewpoint discrimination and to reject religious beliefs that

underlie the discipline." Caminitis' Brief at 61. They conclude that it thereby allows the majority culture[12] to impose its views and mores on religious minorities. *Id.* at 62-63. Furthermore, they observe that religion relies on faith, not reason, and therefore religious practices should not be subjected to legal tests based on reason. *Id.* at 61-62.

This line of argument ignores the most fundamental tenet of the American tradition of free exercise and freedom of conscience. The State may not interfere with an individual's religious *beliefs*, but it may prohibit *conduct* based on those religious beliefs as long as the prohibition is facially neutral (the federal standard), and furthers a compelling state interest that cannot be served by a less restrictive alternative (the Wisconsin standard). *See Smith*, 494 U.S. at 884-85; *Miller*, 202 Wis. 2d at 66. The Caminitis' attack on the reasonableness standard conflates belief and conduct—they contend that by prosecuting them for their conduct (and by having the jury judge their conduct) the State is unconstitutionally interfering with their beliefs. That is not what happened here.

The jurors in this case were not empowered to judge the Caminitis' religious beliefs or to punish them for those beliefs. They were instructed to determine whether the

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[12]Confusingly, while they worry about majoritarian discrimination against their corporal punishment practices on pages 62-63 of their brief, the Caminitis assert that the majority of Americans approve of corporal punishment on pages 65-67 of their brief.

Caminitis' conduct—*not their beliefs*—violated a neutral law applicable to all people in Wisconsin (R. 134:49-50). They were also instructed to determine whether the Caminitis' conduct constituted "reasonable discipline" according to an objective standard, not according to their own subjective views and preferences (R. 134:50-51).[13] Under the objective standard, the jury was directed to consider several specific factors before reaching its conclusion on the privilege. *See Kimberly B.*, 283 Wis. 2d 731, ¶ 33. Those factors are applicable to both the Caminitis and all other parents invoking the privilege. Here, the jury concluded that the Caminitis' abuse of their children did not come within the privilege. With their verdicts, the jury did not judge the lawfulness of the defendants' beliefs, but the lawfulness of their conduct. That judgment comports with both the U.S. and the Wisconsin Constitutions.

d. Conclusion.

This Court should reject the Caminitis' free exercise and freedom of conscience arguments. Neither the U.S. nor the Wisconsin Constitution requires or authorizes this Court to rewrite the relevant statutes in the manner requested by the Caminitis.

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[13]"[I]t is presumed that jurors follow the jury instructions given by the court." *Geise v. Am. Transmission Co.*, 2014 WI App 72, ¶ 26, 355 Wis. 2d 454, 853 N.W.2d 564.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this Court affirm the judgment and order from which this appeal is taken.

Dated this 22nd day of July, 2015.

BRAD D. SCHIMEL
Attorney General

MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 267-2223 (Fax)
whelanmf@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,189 words.

Dated this 22nd day of April, 2015.

MAURA FJ WHELAN
Assistant Attorney General

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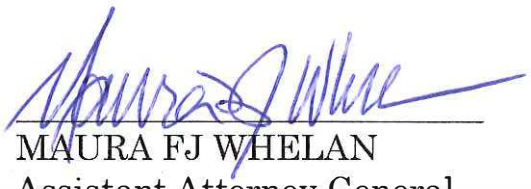

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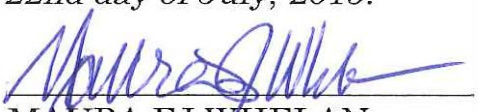

MAURA FJ WHELAN
Assistant Attorney General