No. 17-913

IN THE

Supreme Court of the United States

D.T.,

Petitioner,

v.

W.G.,

Respondent.

On Petition for a Writ of Certiorari
to the Alabama Court of Civil Appeals

REPLY BRIEF FOR PETITIONER

M. Virginia Buck
13112 Martin Rd. Spur
Northport, AL 35473

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

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REPLY BRIEF FOR PETITIONER

The Supreme Court of Alabama recognized that under this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), it violates the Fourteenth Amendment for the state to decide grandparent visitation petitions under a bare best-interests-of-the-child standard that affords no presumption in favor of parental decisions but instead simply "substitutes the judge for the parent as the decision-maker." *Ex parte E.R.G.*, 73 So. 3d 634, 647 (Ala. 2011) (plurality opinion).[1]

So for most parents, Alabama law contains a "presumption" in favor of "a fit parent's decision to deny or limit visitation," Ala. Code § 30-3-4.2(c)(1); a requirement that grandparents prove entitlement to visitation by "clear and convincing evidence," *id.* § 30-3-4.2(c)(2); and a requirement that grandparents show likely harm to the child if the visitation is denied, *id.* § 30-3-4.2(e)(2). *See* BIO 4 (acknowledging these requirements); *see* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L.Q. 1, 5 (2013) (describing how many states adopted one or more of these requirements after *Troxel*).

But respondent acknowledges that Section 30-3-4.2, with its "strict requirements," just "does not apply here," BIO 13, 14. Alabama instead relegates

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[1] The Alabama courts have twice struck down the State's statutes for deploying best-interests standards that gave no meaningful weight to the determinations of fit parents. *See E.R.G.*, 73 So. 3d at 647-48; *Weldon v. Ballow*, 200 So. 3d 654, 671 (Ala. Civ. App. 2015), *cert. denied sub nom. Ex parte Strange*, 200 So. 3d 675 (Ala. 2016).

petitioner to a "second track," BIO 5, where a lay judge can order visitation at his "discretion," Ala. Code § 26-10A-30. This judge "is not required to give any special weight to the wishes of the adoptive parent." Pet. App. 18a.

Respondent cannot credibly deny that the sole reason Alabama has shunted petitioner onto the second track is that she adopted her child. The Court of Civil Appeals initially struck down Section 26-10A-30 as inconsistent with the Fourteenth Amendment and *Troxel*. *J.S. v. D.W.*, 835 So. 2d 174, 184 (Ala. Civ. App. 2001). The Alabama Supreme Court reversed that decision in *Ex parte D.W. and J.C.W.*, 835 So. 2d 186 (Ala. 2002). The basis for its holding was this: The "fundamental right of parents to rear their children, the linchpin of the United States Supreme Court's holding in *Troxel*," does not apply to adoptive parents. Pet. App. 39a.[2] According to the Alabama court, adoptive parents have no *constitutional* right to direct the upbringing of their children. Instead, "the rights of adopting parents are purely statutory." *Id.* 41a. The Legislature having decided to give an adoptive parent's views no deference, she "must be treated differently than natural parents." *Id.* 42a. Respondent is simply wrong to characterize this analysis as "snippets of dictum." BIO 15. It is the heart of why petitioner was subjected to Section 26-10A-30.

Respondent tries to brush away this holding, which she is unprepared actually to embrace, BIO 15, by reassuring this Court that *some* adoptive parents

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[2] All citations to *D.W.* are to the pages in the Pet. App. where the decision is reprinted.

in Alabama do receive respect for their parental determinations. BIO 4.

That is irrelevant. Petitioner's due process claim turns not on what rights Alabama statutes give *other* parents, but on what rights the U.S. Constitution gives *her*. And just the law at issue in *Craig v. Boren*, 429 U.S. 190 (1976), discriminated on the basis of gender even though it accorded equal treatment to *some* males and females—namely, those over the age of 21—so too Section 26-10A-30 discriminates against adoptive parents even though it does not discriminate against *all* adoptive parents.

Respondent's misframing of this case infects her arguments against review. This case implicates a deep and intractable split over the constitutional rights of adoptive parents. And when it comes to the merits, respondent not only ignores the relevant part of this Court's decision in *Troxel*, but compounds that error by offering broad and doubtful assertions about intrafamily adoptions and other methods of family formation. In any event, the proper and only constitutionally permissible way to take account of the value of grandparental contact is adjudicating such claims "on a case-by-case basis," *Troxel*, 530 U.S. at 73, under standards that recognize that a parent is a parent. Pet. 31-32. But under respondent's preferred rule, petitioner is a second-class parent, required to submit to a regime where her parenthood is "conditioned on acceptance of a more permissive scheme for court-ordered grandparent visitation" than the State could impose on other parents, BIO 5.

I. The conflict is real and implicated by the decision here.

1. Respondent does not deny that Mississippi and Arizona take the position that judgments by individuals who are adoptive parents warrant no special weight in adjudicating visitation claims. *See* Pet. 11-12 (discussing cases). Respondent claims, however, that this case does not implicate any split because Section 26-10A-30 applies only after intrafamily adoptions. *See* BIO 14-16.

Respondent confuses the Alabama court's constitutional holding with its application to the statute before it. The holding that adoptive parents have only the parental rights Alabama law gives them, Pet. App. 41a, provided the basis for sustaining the constitutionality of Section 26-10A-30.

2. Petitioner cannot rehearse all the cases on the other side of the split. *See* Pet. 12-15. So consider only the three that respondent acknowledges involve intrafamily adoptions. BIO 19-22. Each squarely conflicts with *D.W.*, both as to the equality of biological and adoptive parents and as to the standard which visitation petitions must meet

The Colorado Supreme Court held in *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006), that the Fourteenth Amendment requires both "a presumption in favor of the parental visitation determination" and a "clear and convincing evidence" standard. *Id.* at 319. And it did so in the context of holding "that adoptive parents have the same right as natural parents in controlling the upbringing of their child," *id.* at 326.

Those are exactly the legal propositions rejected in *D.W.* and the decision below. Pet. App. 15a-16a.

Thus, the decision in *C.A.* is hardly "[l]ike" the decision of "the court below," BIO 19. It conflicts directly. The Colorado statute was upheld *only* because it embodied the protections Alabama gives biological parents but denies to adoptive ones. And if adoptive parents have the same decisional right as biological parents, as the Colorado court held, a fortiorari the state cannot enact a "distinct" visitation regime like Alabama's, *id.*, that denies some adoptive families that protection.

Respondent's reading of *In the Matter of P.B.*, 117 A.3d 711 (N.H. 2015), is equally tortured. Like Colorado's high court, but unlike Alabama's, the Supreme Court of New Hampshire held that "deference to a fit parent's judgment" regarding visitation "must be accorded to both natural and adoptive parents." *Id.* at 714. Moreover, that court explained that giving "judicial deference to a natural or adoptive parent's judgment" was necessary to avoid "plac[ing] adoptive parents in an unconstitutional 'subclass.'" *Id.* (citing *Troxel*).[3]

Finally, in *Visitation of Cathy L.M. v. Mark Brent R.*, 617 S.E.2d 866 (W. Va. 2005) (per curiam), a case

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[3] Respondent's suggestion that the New Hampshire court would have ordered visitation here because "secretive" intrafamily adoptions warrant such orders, BIO 20, is doubly flawed. First, the New Hampshire court suggested no such thing. It simply rejected the grandparents' claim that the child's adoption was "improperly conducted." *P.B.*, 117 A.3d at 716 n.2. Second, despite respondent's insinuations, nothing in the record supports her claim that petitioner's adoption of A.K.S. three years after obtaining legal custody and after respondent had left Alabama was done "hastily (or secretly)," BIO 29. Respondent herself admits that Alabama law did not require that she be notified. *Id.* 3.

involving an intrafamily adoption, the West Virginia Supreme Court of Appeals read *Troxel* to make "clear that the court must accord at least some special weight to the parent's own determination." *Id.* at 873 (internal quotation marks omitted).

In short, there is a genuine split, it is longstanding, and it will not go away absent this Court's intervention. *See* Pet. 15.

II. Section 26-10A-30 violates the Fourteenth Amendment.

1. The starting point of respondent's argument on the merits reflects her fundamental confusion. The claim that it is "doubtful whether *Troxel* produced a binding rule of law at all," BIO 23, is hard to take seriously. True, the decision does not dictate precisely how states must configure grandparent visitation statutes to comply with the Fourteenth Amendment. But the case poses no problem under *Marks v. United States*, 430 U.S. 188 (1977). The opinions of six Justices—not to mention the unbroken line of precedent regarding parents' fundamental right to direct the upbringing of their children, *see* Pet. 24, 26-27—show the constitutional infirmity of Section 26-10A-30. The plurality opinion declared for four Justices that states must "accord the parent's decision" some "presumption of validity," rather than "plac[ing] the best-interest determination solely in the hands of the judge." *Troxel v. Granville*, 530 U.S. 57, 67 (2000). Justice Souter's concurrence similarly condemned visitation regimes that "plac[e] hardly any limit on a court's discretion to award visitation rights." *Id.* at 77-78. And Justice Thomas's concurrence recognized "a fundamental constitutional right" of parents "to rear their children," seeing no "legitimate

governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Id.* at 80. Section 26-10A-30 flouts every one of these articulations of the Fourteenth Amendment standard.

2. Respondent's fallback position is equally implausible. She posits that *Troxel* held no more than that an "any person" visitation statute is impermissible. BIO 23-24. Not so. While the plurality mentioned that problem, the focus of the opinion was on a second constitutional flaw—one present in Section 26-10A-30 as well: the Washington statute "contain[ed] no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." *Troxel*, 530 U.S. at 67. Given that it was the children's grandparents who sought visitation, it was clearly *this* flaw that made the statute unconstitutional "as applied in [Troxel's] case," *id.* at 73. And Justice Thomas's concurrence never mentioned the "any person" problem. Instead, his position rested "[o]n this basis": that Washington lacked any legitimate justification for "second-guessing a fit parent's decision." *Id.* at 80.

Respondent goes further off the rails when she discusses the post-*Troxel* case law. For example, she claims that *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007), involved a statute with "standards similar to those found in Section 26-10A-30." BIO 24. She is wrong. The Minnesota court upheld that statute only after construing it to require that the standard of proof for the party seeking visitation "be clear and convincing evidence." *SooHoo*, 731 N.W.2d at 823. That is, of course, precisely the standard Alabama refuses to apply to parents like petitioner.

It therefore beggars belief, and respondent hardly suggests otherwise, that Alabama could constitutionally apply Section 26-10A-30 to *all* grandparent visitation petitions. Indeed, the Alabama courts themselves have already held that it could not. *See supra* at 1 n.1.

3. So respondent retreats further still: to the assertion that there is something about intrafamily adoptions that permits Alabama to apply a rule to these parents that it could not constitutionally apply to anyone else. That assertion is unfounded.

As an empirical matter, respondent's contrast between intrafamily and out-of-family adoptions rests on outmoded generalities. She assumes that out-of-family adoptions "typically involve a clean and absolute break from the child's natural family." BIO 2. That may have been true in the 1950s, but it is untrue today. More than one-third of all adopted children (including more than two-thirds of children adopted domestically through private agencies) have some postadoption contact with their birth families. U.S. Dep't of HHS, Admin. for Children & Families *Working With Birth and Adoptive Families to Support Open Adoption* 3 (Jan. 2013), https://tinyurl.com/17-913CR1. Forty percent of foster children adopted by nonrelatives have contact with their birth family. U.S. Dep't of HHS, Ass't Sec'y for Planning & Evaluation, *Children Adopted from Foster Care: Child and Family Characteristics, Adoption Motivation, and Well-Being* 10 (May 2011), https://tinyurl.com/17-913CR2.

Accordingly, there is no necessary correspondence between type of adoption and ongoing relationship with biological grandparents. There will be some children adopted by relatives shortly after birth who

have no pre-adoption relationship with their biological grandparents. And parents who are estranged from their adult children may not learn until after an intrafamily adoption has occurred that they even are grandparents. Conversely, one-fifth of children children adopted out of foster care are adopted after they turn six. *See Children Adopted from Foster Care*, *supra*, at 4. These children may well have close relationships to biological grandparents that antedate their adoption by strangers.

The key point is this: whether grandparent visitation is in a child's best interest does not depend on whether a child is living with a biological parent or with one kind of adoptive parent or another. And however a family has been formed, a fit parent is the person best situated to determine whether contact with grandparents is in her child's best interest under all the circumstances, which can vary dramatically from one family to another. *See generally* Br. of Adoption Scholars and Organizations.

It may be that when visitation issues wind up in court, a higher proportion of grandparents in cases involving intrafamilial adoptions can satisfy the burden of proof required by the Fourteenth Amendment and rebut the presumption in favor of the parent's decision. But visitation must be determined "on a case-by-case basis" in any event, *Troxel*, 530 U.S. at 73. So gross generalizations provide no justification for prospectively denying an entire class of adoptive parents the respect for their judgment that the Fourteenth Amendment demands. *See* Pet. 31-32.

4. The BIO's responses to petitioner's equal protection argument are unpersuasive.

First, respondent misstates the applicable test. Because a fundamental liberty interest is at stake, Alabama must do more than show that its distinction is "not arbitrary," BIO 27. As petitioner has already explained, heightened scrutiny is required. Pet. 27.[4]

And as petitioner has also shown, Alabama's regime fails heightened scrutiny both because the fit between the classification and Alabama's interest in promoting children's welfare is exceptionally slack and because Alabama's regime inflicts an expressive harm on a class of adoptive families. Pet. 29-32.

Second, respondent's waiver argument is unconvincing. The court below treated petitioner's constitutional challenge as foreclosed by the Alabama Supreme Court's decision in *D.W.* Pet. App. 9a-10a. And although it found that petitioner had waived a claim involving *ex parte* communications by not "mak[ing] any argument to the probate court," Pet. App. 12a, it nowhere suggested that petitioner had waived her equal protection argument. There is thus no indication that the Alabama courts "declined to reach" the argument for failure to comply with state law, BIO 26. In any event, precisely because petitioner was forced to defend her parental rights in probate court, the proceedings were not transcribed. *See* Pet. 5, 30 n.11. Still, the filings reflect that petitioner asserted the unconstitutionality of Section 26-10A-30

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[4] Respondent's citation to cases involving inheritance, BIO 27, are inapposite. Petitioner's argument is not that adoptive parenthood is a suspect classification that requires skepticism of all differential treatment of adoptive parents or adopted children. Rather, it is that parental control is a fundamental right, and therefore laws that classify parents differently with respect to this right trigger heightened scrutiny.

in her Verified Answer, ROA 17; that the Probate Judge explained his rejection of petitioner's constitutional argument on the basis of reading *D.W.* to hold that "the rights enjoyed by *adoptive* parents under Alabama law may be limited by the legislature, whereas similar limitations may not be placed on the rights of *natural* parents under *Troxel*," ROA 56—an analysis sounding in equal protection; and that petitioner immediately challenged that reading, arguing that "if the ruling in that case is accepted at face value, it appears to be a violation of the equal protection clause," ROA 62. Particularly given that petitioner's equal protection argument rests on the existence of her fundamental parental liberty interest, there is no impediment to this Court's review.

III. This case offers an excellent vehicle for deciding the Question Presented.

Petitioner's first "vehicle" argument—that "the Alabama legislature has expressly conferred all of the rights of natural parents on adoptive parents *as a matter of statute*," BIO 29—does not pass the straight-face test. Respondent concedes, and vigorously defends, the State's refusal to confer on adoptive parents like petitioner the protections provided by Section 30-3-4.2 to all biological parents.

Her second vehicle argument—that "a reversal here would at most call for a remand for reconsideration under Section 30-3-4.2," BIO 29—is even weaker. Remand is precisely the appropriate resolution of this case. This Court should resolve the constitutional question and then, "consistent with [its] role as 'a court of review, not of first view,'" should leave it to the Alabama courts to adjudicate respondent's visitation claim in the right court, under

the right standard, *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015) (quoting *Nautilus, Inc. v. Biosig Instruments, Inc.,* 134 S. Ct. 2120, 2131 (2014). *See also Malat v. Riddell*, 383 U.S. 569, 572 (1966) (per curiam).

At any rate, respondent's suggestion that the outcome on remand would be the same is nothing more than wishful thinking. The court below expressly rejected petitioner's argument that "clear-and-convincing-evidence burden of proof" should apply. Pet. App. 16a. Instead, it emphasized that its review was "limited to considering whether the probate court abused its discretion." *Id.* 21a. And it upheld the staggeringly intrusive visitation order based on the "limited record"—itself a product of Section 26-10A-30—and the "deferential standard of review." Pet. App. 22a. Under these circumstances, this Court should not speculate about what a court would decide using the proper standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

M. Virginia Buck
13112 Martin Rd. Spur
Northport, AL 35473

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

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