No. _____

In the
Supreme Court of the United States

KELLY GEORGENE ROUTTEN,

Petitioner,

v.

JOHN TYLER ROUTTEN.

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Claus forbids States from removing a minor child from a parent's custody without a hearing on that parent's fitness. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) ("all [] parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody"). The North Carolina Supreme Court held, in conflict with twenty-eight other state courts of last resort, that no finding of unfitness is required because this "right is irrelevant in a custody proceeding between two natural parents." *Routten v. Routten*, 372 N.C. 571, 577, 843 S.E.2d 154, 159 (2020). The question presented is:

1. Does due process require a finding that a parent is unfit before a State denies that parent all visitation with their child?

PARTIES TO THE PROCEEDINGS

Petitioner (defendant-appellee in the North Carolina Supreme Court) is Kelly Georgene Routten. Respondent is John Tyler Routten (plaintiff-appellant in the North Carolina Supreme Court).

STATEMENT OF RELATED PROCEEDINGS

Routten v. Routten, P16-419 (N.C. App. July 14, 2016)

Routten v. Routten, Wake County No. 14 CVD 10295 (March 6, 2017)

Routten v. Routten, COA 17-1360 (N.C. App. November 20, 2018)

Routten v. Routten, 455A18 (N.C. June 5, 2020)

Routten v. Routten, 19-1075 (N.C. App. July 7, 2020)

Routten v. Routten, 455A18-2 (N.C. no judgment entered yet)

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INTRODUCTION

This case presents an issue affecting every separated parent with minor children: when a court may deny a parent all visitation.

This Court recognizes that due process protects a parent's "fundamental right" to "the care, custody, and control of their minor children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Unless a parent is unfit, a court cannot separate parent and child—even if the court believes it is in the child's best interests. *Stanley v. Illinois*, 405 U.S. 645, 653-658 (1972).

Yet state courts of last resort are split on whether this precedent is even relevant here. Twelve states say parents' rights must yield to a judge's determination of what is in the child's best interests. *E.g.*, *Sullivan v. Bonafonte*, 172 Conn. 612, 614, 376 A.2d 69, 71 (1977). Seventeen states say a judge can limit or deny the right if visitation would harm the child. *E.g.*, *Boswell v. Boswell*, 352 Md. 204, 225-238, 721 A.2d 662, 672-678 (1998). Like *Stanley*, eleven require a finding of unfitness before denying a parent visitation. *E.g.*, *State ex rel. Wingard v. Sill*, 223 Kan. 661, 665, 576 P. 2d 620, 624 (1978).

This question affects the interests of every child with separated parents and the rights of every separated parent with children—roughly one in ten Americans. *Grall, Timothy*, "CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015," Current Population Reports, P60-262, U.S. Census Bureau, Washington, DC, 2018. It is ripe for decision

and needs a uniform national answer. This case presents the question cleanly and is an ideal vehicle for answering it. This Court should grant the petition.

OPINIONS AND ORDERS BELOW

The decision of the North Carolina Supreme Court is reported at 843 S.E.2d 154 (2020), and reprinted at App., *infra* 1a-14a. The decision of the North Carolina Court of Appeals is reported at 822 S.E.2d 436 and 262 N.C. App. 436 (2018), and reprinted at App., *infra* 15a-64a. The child custody orders are reprinted at App., *infra* 65a-101a.

JURISDICTION

The North Carolina Supreme Court issued its decision on June 5, 2020. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV § 1, provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

North Carolina's child custody statutes are at Chapter 50 of the *General Statutes of North Carolina*. The applicable child custody statute is excerpted at App., *infra* 102a-107a. N.C. Gen. Stat. § 50-13.5(i) (2019) reads:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

STATEMENT OF THE CASE

In August 2016, the Wake County District Court denied Petitioner Kelly Routten all custody and all visitation with her minor children. App., *infra*, 65a-67a. The trial court did so by a handwritten memorandum of judgment. The memorandum of judgment form is typically used for a consent order. Petitioner neither consented to nor stipulated to the August 2016 memorandum of judgment.

The same day it issued a memorandum of judgment, the trial court learned that Petitioner had the results of a court-ordered psychological evaluation but she may have misled opposing counsel and may have withheld those results. In late July 2016, Petitioner moved for a continuance of the August hearing because, although she had complied with the order about a psychological evaluation, the "report of that evaluation ha[d] not been completed yet." Petitioner wanted all parties and the trial court to "have that information and the accompanying expert testimony before them for [the August] hearing." The

trial court denied Petitioner's motion to continue and proceeded with the August 2016 hearing.

Although it did not have the psychological report yet, the trial court still ordered a change in custody. Petitioner lost primary physical custody of her children and she lost all visitation. App., *infra*, 65a. The terms of the memorandum of judgment became part of a December 2016 permanent custody order. *Compare* App., *infra*, 65a-66a; *with* App., *infra*, 79a-82a.

Petitioner objected to the permanent custody order. Because the trial court "made no findings of fact that [Petitioner] was an unfit parent or that she had acted inconsistent with her protected parental status," Petitioner moved for a new trial and relief from judgment. She argued that denying her custody and visitation without these findings violated her "rights as a parent." The trial court amended its order and only added six new findings of fact. *Compare* App., *infra*, 70a-78a *with* App., *infra*, 85a-97a. But the trial court did not find Petitioner unfit. *Id*. Nor did it find that visitation would harm her children. *Id*. Instead, the trial court concluded that visitation with Petitioner was not in the best interests of her children. App., *infra*, 97a.

Petitioner appealed to the North Carolina Court of Appeals. She raised several issues on appeal. The first issue she raised was whether "the trial court violate[d] [Petitioner's] due process rights under the [F]ourteenth [A]mendment of the U.S. Constitution and the law of the land clause of the North Carolina

Constitution?" She argued the trial court violated due process by denying her all visitation without finding her unfit.

The North Carolina Court of Appeals agreed with Petitioner on that issue. The Court of Appeals held a judge must find, by clear and convincing evidence, that a parent is unfit or has acted inconsistently with her constitutionally protected status before it can deny a parent visitation. *Routten v. Routten*, 262 N.C. App. 436, 445-446, 822 S.E.2d 436, 443 (2018) (citing *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d at 268 (2003)). It held this because due process "ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child." *Id.*, at 446, 822 S.E.2d, at 443. The court also treated the trial court's usage of "electronic visitation" as a misnomer. *Id.*, at 445, 822 S.E.2d, at 443. "Electronic communication," the court held, "*may not* be used as a replacement or substitution for custody or visitation." *Id.* (emphasis original) (quoting N.C. Gen. Stat. § 50-13.2(e)).

A dissenting opinion argued Petitioner could not claim the right to visitation because custody cases between parents differ from cases by non-parents against parents. *Id.*, at 459-460, 822 S.E.2d, at 451-452 (Inman, J, dissenting). The dissent reasoned this difference meant a "parent's constitutional right is *irrelevant* in a custody dispute with the other parent." *Id.*, at 460, 822 S.E.2d, at 452 (emphasis original).

Respondent appealed to the North Carolina Supreme Court based on the dissent. At the North Carolina Supreme Court, Petitioner again argued that "terminating [her] visitation deprive[d] her of due process." Citing this Court's decision in *Stanley v. Illinois*, Petitioner contended that "due process protect[ed] [her] from being deprived of her children without a finding that she is unfit."

Without citing *Stanley*, the North Carolina Supreme Court reversed the Court of Appeals and affirmed the trial court. The North Carolina Supreme Court held that a parent's "protected right is irrelevant in a custody proceeding between two natural parents." *Routten v. Routten*, 374 N.C. 571, 577, 843 S.E.2d 154, 159 (2020). Its decision cited no United States Supreme Court precedent. Instead, the North Carolina Supreme Court relied on its own precedent and N.C. Gen. Stat. § 50-13.5(i) (2019) to reach its holding.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three reasons. First, the North Carolina Supreme Court's holding conflicts with this Court's holdings in *Stanley* and the cases following it. Second, there is a well-developed and intractable split between state courts of last resort over the question presented. Third, the question is exceptionally important, is ripe for review, and requires a uniform national answer.

I. The Decision Below Conflicts with This Court's Precedent.

This Court has recognized that parents have a "fundamental liberty interest" in the "care, custody, and control" of their minor children. *Troxel*, 530 U.S., at 65. The Due Process Claus of the Fourteenth Amendment protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.*, at 66.

In *Stanley* an unwed father sought custody of his children. *Stanley*, 405 U.S., at 646. Because their mother was deceased and Stanley never married her, Illinois law presumed Stanley unfit and denied him custody and visitation. *Id.* Stanley argued Illinois denied him due process and equal protection of law. *Id.*, at 647.

This Court agreed with Stanley. The right to "raise one's own children" is a "basic civil right" "far more precious…than property rights." *Id.*, at 651. Due process protects this right. *Id.* The State has a legitimate interest in protecting minor children's best interests. *Id.*, at 652-653. But the State "spites its own articulated goals" when it "separates children from the custody of fit parents." *Id.*, at 652. As "a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him." *Id.*, at 648. All fit parents have a due process right to see their children. *Id.*, at 658.

This Court has applied the protected right in several circumstances. *Troxel* applied the right to overturn a Washington grandparent visitation statute. *Troxel*, 530 U.S., at 57-58 (holding unconstitutional a statute that allowed courts to "disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest"). Even if parents "have not been model parents or have lost temporary custody of their child to the State," the right is still relevant. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). This is because "the State's interest in caring for the children is '*de minimis*' if the [parent] is in fact a fit parent." *Quilloin v. Walcott*, 434 U.S. 246, 248 (1978).

Even when this Court has limited the protected right, it has still recognized its relevance. *See Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989) (plurality affirming California law presuming children born in wedlock are legitimate); *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) ("unwed father" must "demonstrate[] a full commitment to the responsibilities of parenthood" to "acquire[] substantial protection under the Due Process Clause"). In those cases, this Court did not give natural parents the benefit of the protected right because those parents had never acted as parents or had custody. *Stanley*, on the other hand, addressed removing custody from a parent who already had it. 405 U.S., at 649. Those cases turned on "[t]he difference between the developed parent-

child relationship" and a "potential relationship." *E.g.*, *Lehr*, 463 U.S., at 261.

Because of the importance of maintaining a developed parent-child relationship, this Court has applied this precedent broadly, even outside the child custody context. This precedent is relevant to zoning regulations that infringe on the family. *Moore v. E. Cleveland*, 431 U.S. 494, 500-501 (1977). It is relevant to school regulations. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535, (1925) ("the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). In the kaleidoscope of circumstances this Court has addressed, one rule remains constant: due process requires a hearing on fitness before the State separates parent and child.

Yet North Carolina held "the protected right is irrelevant in a custody proceeding between two natural parents." *Routten*, 374 N.C., at 577, 843 S.E.2d, at 159. North Carolina denied that a fit parent is entitled to any presumption in favor of custody or visitation. *Id.*, at 575, 843 S.E.2d, at 158. So, in North Carolina, a trial court can deny a mother all custody and visitation without even considering that mother's fundamental right to the care, custody, and control of her minor children.

North Carolina's decision relied on a distinction this Court has never recognized. North Carolina

distinguished custody cases between two parents from all other custody cases. *Routten*, 374 N.C., at 577, 843 S.E.2d, at 159. This Court has recognized the distinction between existing parent-child relationships and potential parent-child relationships. *Lehr*, 463 U.S., at 261 ("The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant"). But it has never recognized the distinction North Carolina created below. That distinction conflicts with this Court's precedent and relies on arguments this Court has rejected.

Routten recites the same arguments this Court rejected in *Stanley*. In *Stanley*, Illinois argued that an "unwed father's claim of parental qualification" was "irrelevant." *Stanley*, 405 U.S., at 650. Like the argument by Illinois this Court rejected in *Stanley*, North Carolina says, "the protected right is irrelevant." *Routten*, 374 N.C., at 577, 843 S.E.2d, at 159. North Carolina says a trial court's determination of the best interests alone is enough to deny custody and visitation. *Id*., at 575, 843 S.2d., at 157-158. Illinois argued the same in *Stanley*: "the only relevant consideration" is "whether the best interests of the child are served by [State] intervention." *Stanley*, 403 U.S., at 653, n. 5. *Stanley* rejected North Carolina's arguments. But North Carolina's decision did not distinguish *Stanley* or this Court's cases relying on *Stanley*.

Indeed, North Carolina's decision did not cite *Stanley* or any case from this Court. Instead, North Carolina directly disagreed with this Court. While North Carolina says the "protected right is irrelevant," this Court holds "all [] parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Compare Routten*, 374 N.C., at 577, 843 S.E.2d, at 159 *with Stanley*, 403 U.S., at 658 (1972). While North Carolina says "no constitutionally based presumption…bars the award of full custody to one parent without visitation to the other," this Court enforces "the traditional presumption that a fit parent will act in the best interest of his or her child." *Compare Routten*, 374 N.C., at 576, 843 S.E.2d, at 158 *with Troxel*, 530 U.S., at 69. North Carolina disregarded this presumption and *Stanley's* fitness hearing requirement.

When this Court holds one thing and a state court of last resort holds the opposite, the state court's holding conflicts with this Court and certiorari is appropriate. North Carolina's holding below contradicts this Court's holdings in *Stanley, Troxel*, and the cases that follow on them. This Court should grant certiorari because North Carolina's decision conflicts with this Court's precedent.

II. The Decision Below Conflicts with a Majority of State Courts of Last Resort.

North Carolina's decision does not just conflict with this Court's precedent; it conflicts with a majority

of state courts of last resort. State courts of last resort disagree about what due process requires and whether parents' rights are relevant in a custody case between natural parents. This Court should grant certiorari to resolve this conflict and clarify that *Stanley* applies to custody disputes between natural parents.

A. The Conflict Between State Courts of Last Resort is Intractable.

State courts of last resort apply one of three rules when deciding whether a judge can deny a parent visitation: the judicial best interests rule, the actual harm rule, or the unfitness rule. No federal court has reached this issue because federal courts typically lack jurisdiction over child custody cases. *E.g.*, *Sosna v. Iowa,* 419 U.S. 393, 404 (1975); *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975). Twelve states, including North Carolina, allow a judge to deny a parent visitation just because the judge believes it is in the child's best interests ("the judicial best interests rule").[1] Seventeen states require a judge to find that visitation would harm the child before denying a parent visitation ("the actual harm rule").[2] Eleven

[1] Appendix G (108a-110a) lists the states applying the judicial best interests ruling, including a quote from the relevant holding.

[2] Appendix H (111a-115a) lists the states applying the actual harm rule, including a quote from the relevant holding.

states only allow a judge to deny a parent visitation if the parent is unfit ("the unfitness rule").[3]

This conflict is not merely semantic. It is a conflict about parents' due process rights and this Court's precedent. The judicial best interests rule provides that a judge's decision about best interests is all that matters—and *Stanley* is irrelevant. The actual harm rule says parents' rights matter but a judge can limit those rights if a parent harms his or her children. Like *Stanley* and this Court's cases following it, the unfitness rule says a parent must be unfit before a court can deny that parent visitation.

This conflict creates a secondary disagreement about what the bests interests of the child means. The judicial best interests rule says bests interests means whatever the judge says it means. The actual harm rule says best interests means a non-harmful relationship. The unfitness rule says best interests means maintaining the parent-child relationship if the parent is fit. These differences in law mean they rule differently on the same facts.

Consider Petitioner's case. The trial court denied her visitation without finding her unfit. It did not find she had harmed her children. It did not find that visitation would harm her children. North Carolina applied the judicial best interests rule. A different rule would mean a different result. If it had applied the actual harm rule, it may have remanded to the

[3] Appendix I (116a-119a) lists the states applying the unfitness rule, including a quote from the relevant holding.

trial court to find more facts about whether visitation would harm her children. If it had applied the unfitness rule, it would have reversed because there was no evidence Petitioner was unfit.

When states reach different results on the same facts because they disagree about what the law is, their conflict is intractable. Looking more closely at the different rules shows how deep the conflict goes.

B. Eleven States Apply this Court's Rule Requiring a Finding of Unfitness Before Denying a Parent Visitation.

The unfitness rule ties parents' rights to children's interests. Fit parents act in their children's best interests. So visitation with a fit parent is in the children's best interests. Unless a parent is unfit, a judge cannot deny a parent visitation.

The "welfare of the child" is important, but it cannot "deprive an unoffending parent of his natural right to the custody of his child." *Hammack v. Wise*, 158 W.Va. 343, 346, 211 S.E.2d 118, 121 (1975). A parent has a "natural right" to "visit the child." *In re McMenamin*, 310 P.2d 381, 382 (Okla. 1957). A parent may forfeit this right by "misconduct, neglect, immorality, abandonment, or other dereliction of duty." *Hammack*, 158 W.Va., at 346, 211 S.E.2d, at 121. But a parent must "forfeit [this] right in a manner recognized by law" for the court to have "authority to interfere." *Davis v. Davis*, 212 Ga. 217, 218, 91 S.E.2d 487, 489 (1956).

Several states applying the unfitness rule do so because of this Court's precedent. A parent's interest in the "care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme Court.]" *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013) (quoting *Troxel*, 530 U.S., at 65). This liberty interest—which the unfitness rule terms a natural right—means that a "fit and proper parent is entitled to have access to and at reasonable times visit" their children. *State ex rel. Wingard v. Sill*, 223 Kan., at 665, 576 P.2d, at 624-625 (quoting *Stanley v. Illinois,* 405 U.S. 645 (1972)).

North Carolina did not find Petitioner unfit. No evidence supports a conclusion that she is unfit. If she is a fit parent, this Court presumes she acts in her children's best interests. Without finding her unfit, the trial court could not deny her reasonable visitation with her children. The unfitness rule requires reversal here.

C. Seventeen States Apply an Actual Harm Rule that Conflicts with North Carolina.

The actual harm rule starts with a similar premise to the unfitness rule: visitation is presumptively in a child's best interests. But it reaches a different conclusion: denying a parent visitation is only in the child's best interests if it would harm the child. This rule sometimes sounds like the judicial best interests rule but it applies a different definition of best interests. A judge cannot simply

decide visitation is not in the child's best interests, she must support this decision with facts showing harm.

Those facts must relate to the child and visitation. *E.g.*, *Taylor v. Taylor*, 353 Ark. 69, 83, 110 S.W.2d 731, 739 (2003); *Turley v. Turley*, 5 S.W.3d 162, 164 (Mo. 1999) (quoting Mo. Rev. Stat. § 452.400.2 (2019)); *Porter v. Porter*, 246 S.C. 332, 340-341, 143 S.E.2d 619, 624 (1965). In some states, the court must find those facts by more than a preponderance of the evidence. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978) (persuasive evidence); *DeSantis v. Pegues*, 2011 VT 114 ¶ 20, 35 A.3d 152, 162 (clear and convincing evidence).

A judge cannot deny a parent visitation just because that parent says, believes, or does things the judge does not like. *Boswell* 352 Md. 204, 721 A.2d 662 (1998). After they separated, the father in *Boswell* told his wife he was homosexual. *Id.*, at 210, 721 A.2d, at 664. The trial court ordered him not to have visitation with "anyone having homosexual tendencies or such persuasions" and denied him overnight visits with his children. *Id.*, at 211, 721 A.2d, at 665. His ex-wife did not even ask for these limits.

The Maryland Supreme Court reversed. Parents presumptively get "liberal unrestricted visitation." *Id.*, at 221 721 A.2d, at 671. Unless "the best interests of the child would be endangered by [visits]," a court cannot deny visitation. *Id.* General harm is not enough. The court must first find "adverse impact" then "find a nexus between the child's emotional

and/or physical harm and the contact with the non-marital partner." *Id*., at 237, 721 A.2d, at 678. The trial court did not make these findings, so it could not restrict the father's visitation rights. *Id*.

Like the trial court in *Boswell*, the trial court here made no findings that visitation did or could harm Petitioner's children. The only finding it made about visitation is that some person unrelated to Petitioner acted aggressively at a custody exchange. App., *infra*, 75a-76a, 93a. The trial court did not find that Petitioner's children even saw this interaction. Because no facts showed visitation harmed her children, the actual harm rule says visitation would be in Petitioner's children's best interests.

D. Twelve States Follow North Carolina's Judicial Best Interests Rule.

The judicial best interests rule focuses on judges. A judge's decision about what is in the children's best interests is all that matters. Unlike the actual harm rule, the judge need not find any specific facts or specific harms. Unlike the unfitness rule, the judge need not find the parent unfit or apply any presumption in favor of visitation. If the judge believes denying visitation is in the children's best interests, she can deny a fit parent visitation.

Some states applying this rule hold that the parent who wants visitation must prove that visitation would be in their children's best interests. *E.g.*, *Normand v. Barkei*, 385 Mass. 851, 852-853, 434 N.E.2d 631, 632-633 (1982); *Gay v. Cairns,* 298 N. W.

2d 313, 315 (Iowa 1980). Others let a judge deny a parent visitation even if that parent is fit. *E.g.*, *Routten*, 374 N.C., at 577, 843 S.E.2d, at 159; *Sullivan*, 172 Conn., at 614, 376 A.2d, at 72.

A parent who pays child support and is a loving, qualified parent may not get visitation under the judicial best interests rule. *Sullivan,* 172 Conn., at 612, 376 A.2d., at 71. In *Sullivan*, a natural parent sought visitation with his son. *Id.* He paid medical bills for his son's birth, paid child support, and gave his son gifts. *Id.* Even so, Connecticut denied him visitation. He did not prove his children "needed to have an opportunity to develop a relationship with [him.]" *Id.*, at 614, 376 A.2d, at 72. So the trial court could deny him visitation because "the legal rights of no one, even a parent, may militate against the court's determination of the best interests of the child." *Id.*

North Carolina went further than Connecticut. Connecticut recognized parents' rights could be relevant. North Carolina said they are "irrelevant." *Routten*, 374 N.C., at 577, 843 S.E.2d, at 159. But the result is the same: a judge decides what is in the children's best interests and the parent must prove the judge wrong.

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Under the same facts, each rule gives a different result. The conflict is intractable and well-developed. Forty state courts of last resort have applied one of these rules from 1949 to today—including two conflicting rulings in 2020. *Compare Routten*, 374

N.C., at 577, 843 S.E.2d, at 159 *with Layman v. Bohanon*, 599 S.W.3d 423, 429 (Ky. 2020). Almost every state court of last resort has ruled here. And they have ruled in ways that contradict one another. State courts of last resort need clarity. Applying this Court's precedent in *Stanley* and the cases that rely on it will provide needed clarity.

III. This Case Is an Ideal Vehicle to Resolve Issues of National Importance Affecting Every Separated Parent with Minor Children.

The current conflict in state law does not protect parents or children. This case is an ideal vehicle for resolving the due process visitation rights of parents. It cleanly presents the question, has no jurisdictional defects, and raises no other questions. The question it does raise is of national importance—it affects more than one in ten Americans—and requires a uniform national answer.

Without a uniform national answer, parents could lose or gain rights just because they move. Parents and their children routinely move. Children who were born in one state may be unable to see a parent because of differing state rules. Fourteenth Amendment due process does not change with state borders. Nor should parents' due process rights change when they cross state borders. Lacking a uniform national answer denies parents' rights and jeopardizes children's best interests.

A. This Case is an Ideal Vehicle for Resolving this Issue.

This case cleanly presents the question of when a judge may deny a parent visitation. The trial court denied Petitioner visitation. She objected. The trial court found only a few additional facts but still denied her visitation. This appeal is not about those facts. Due process was the only issue before the North Carolina Supreme Court. *Routten v. Routten*, 372 N.C. 718, 831 S.E.2d 77 (2019) (denying discretionary review on other issues).

The North Carolina Supreme Court could have also decided a collateral issue—whether a trial court can give a custodial parent discretion to allow visitation—but it declined to do so. The North Carolina Court of Appeals has held a trial court cannot delegate the discretion to allow visitation to a parent. *Routten,* 374 N.C., at 579, 843 S.E.2d., at 159. The North Carolina Supreme Court did not affect this precedent. Because a trial court can "deny any visitation," the North Carolina Supreme Court held discretionary visitation was "mere surplusage" here. *Id*. The North Carolina Supreme Court decided the only issue it had to decide: whether the trial court violated Petitioner's due process rights by denying her all visitation. And Petitioner raised that issue at every stage of this case.

The North Carolina Supreme Court only addressed legal issues. It did not address whether the evidence was sufficient to support the findings of fact

or the findings of fact supported the conclusion of law. Petitioner preserved her arguments, so the court did not address issue preservation. No court ruling on this case has noted jurisdictional defects because there are none. Instead, those courts cleanly addressed the legal issues. This case cleanly presents those same legal issues here, making it an ideal vehicle to address them.

B. Allowing Courts to Separate Children from Fit Parents Harms Children.

Denying a fit parent custody and visitation does not just harm the parent, it harms the children too. This Court protects parents' rights to protect children's interests.

This Court has "historically recognized that natural bonds of affection lead parents to act in the best interests of their children." *Troxel*, 530 U.S., at 66 (*citing Parham v. J. R.*, 442 U.S. 584, 602 (1979)). Thus, a fit parent is presumed to act in the best interests of her children. *Id*. Requiring a finding of unfitness before separating parent from child not only vindicates the parent's rights, it protects the child.

The State's interest in separating parents and children is protecting the best interests of the children. But the State "registers no gain…when it separates children from the custody of fit parents." *Stanley*, 403 U.S., at 652 (1972). Rather than promoting the best interest of the children, the State "spites its own articulated goals when it needlessly separates [a fit

mother] from [her] family" *Id.*, at 652-653. Parents' rights do not simply protect parents; they protect children from being needlessly separated from their parents.

Parental rights are ultimately about both parent and child. North Carolina's rule allows a trial court to substitute its beliefs about children's best interests without considering either parent or child. The trial court did not enter any findings of fact about Petitioner's fitness as a mother. It did not find that she had harmed her children. It did not find that she neglected her children. In fact, it made no finding that any visitation ever had any effect on her children.

Nor did the trial court consider its order's effect on Petitioner's children. Separating children from fit parents harms them. The trial court made no finding of fact about how denying Petitioner visitation would affect her children. Nor did the trial court make any finding justifying this denial as promoting her children's best interests. It largely ignored Petitioner's children and simply substituted its own determination of their best interests for a factual analysis of their best interests.

North Carolina's rule treats parents' rights and children's interests as irrelevant. Allowing a trial court to inject itself into the family with no findings of fact justifying its interference vitiates parents' rights and endangers children.

More than twenty-two million children have separated parents. *Grall, Timothy*, "CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015," Current Population Reports, P60-262, U.S. Census Bureau, Washington, DC, 2018. And nearly fourteen million parents are separated. *Id*. This case implicates the rights of every separated parent and the best interests of every child with separated parents. The interests of thirty-six million parents and children—more than one in ten Americans—are at stake. This Court should grant certiorari to vindicate those parents and protect those children.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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