No.

IN THE
SUPREME COURT OF THE UNITED STATES

A.M., A/K/A A.G.,
PETITIONER,
v.

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:
J.G. AND C.G.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COLORADO COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this petition have been percolating in State courts of last resort for the past couple decades. The result has been a deep split among the States on whether to treat children as mere creatures of the State by restricting or terminating parents' rights using the "best interest of the child" test, or to apply a "harm-based" test to determine whether parent's actions (unfitness) have created safety concerns for their children, acknowledging the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Recognizing the grave impact of the applicable test on the fundamental constitutional rights of Petitioner and her children, the Colorado Court of Appeals addressed it head on, further widening the split.

This case offers an appropriate vehicle to address the split and provide guidance on the circumstances under which the "best interest of the child" standard fails to provide sufficient constitutional protections for parent-child relationships.

The questions presented are:

1. Whether it infringes on a fit parent's fundamental constitutional rights to, in the absence of clear and convincing evidence of unfitness or harm caused by the parent and based only on the children's best interest, restrict a fit parent's rights and award sole parental and decision-making rights to a non-parent.

2. Whether it infringes on a fit parent's fundamental constitutional rights to grant non-parents automatic standing to request allocation of parental rights because of their status as intervenor based on the State's previous placement of the

children with intervenors, over the parent's objection.

PARTIES TO THE PROCEEDINGS

Petitioner is the mother, A.M. Respondent is the Weld County Department of Human Services ("Department"), represented by the Weld County Attorney, acting in the interest of Mother's children on behalf of the People of the State of Colorado.

RELATED PROCEEDINGS

There are no related proceedings.

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OPINIONS BELOW

The opinion of the Colorado Court of Appeals (App. A) is published in the Pacific Reporter. *See People In Int. of J.G.*, 2021 COA 47. The opinion of the Colorado Supreme Court (App. B), denying writ of certiorari, is not published in the Pacific Reporter but is available at 2021 WL 2189038.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

The Colorado Supreme Court entered its order on May 24, 2021. The Court's March 19, 2021 order extended the deadline to file petitions for writs of certiorari in cases in which the order denying discretionary review was issued before July 19, 2021 to 150 days from the date the denial was entered.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process and Equal Protection Clauses of the United States Constitution. 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."

STATEMENT OF THE CASE[1]

Father shot Mother. While Mother was being treated in the hospital, the

[1] The facts are taken from Mother's Opening (App. C, pp 9-18) and Reply (App. D) briefs, which provide citations to the record and specific findings of the court in its July 14, 2019 Order regarding Mother's Motion to Return Home ("July 14 Order") (App. E), which were adopted in the final

Department placed her children with the family of Father. This decision led to parental alienation at the hands of the paternal family. During the first visits the caseworker described the children's reaction to seeing their mother and their tears of joy as the most "raw" and "beautiful" things she had seen in her entire professional career. In the following months, the paternal family manipulated these very young children's emotions by leading them to believe that their mother shot their father, was dangerous, and could not be trusted—despite the fact that he was convicted and sent to prison for shooting Mother.

When it was brought to the court's attention that the paternal family had alienated the children for two years, the state removed the children from the care of paternal aunt and uncle—and placed them with the perpetrator's mother!

The expert psychologist and the caseworker found Mother fit and recommended accelerated reunification. The Department and court-appointed Guardian ad Litem for the children ("GAL") disregarded the specific direction of the psychologist to stop the alienation and accelerate the reunification process. They instead sided with the paternal family to block Mother's efforts to seek reunification and reintegration therapy—and then used the resulting symptoms of alienation to prevent reunification of Mother with her children.

When Mother requested return of her children, the Department, instead of following the direction of the caseworker and expert, fired the caseworker. And the GAL filed a motion to allocate parental rights to paternal grandmother.

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judgment ("Comprehensive Order Regarding Allocation of Parental Responsiblities [sic]") (App. F), which adopted the July 14 Order.

When the court found the actions of the Department and GAL questionable and ordered them to address the underlying issue of alienation, so that the children could return home to their mother, the Department, GAL, and the paternal grandmother instead prepared for moving for allocation of parental responsibilities to paternal grandmother. When Mother took matters in her own hands and requested permission to hire a provider who could address the layers of trauma imposed on her and her children, the Department, GAL, and perpetrator's mother blocked her efforts.

By the time of the second hearing, a new trial judge had been assigned to the case. The new judge expressed regret about how the case had been handled. Nonetheless, in direct contradiction to the experts' advice, he closed the Dependency and Neglect ("D&N") case, depriving Mother (who had become indigent as a result of the cost of the D&N proceedings) of state-provided resources to address the alienation and trauma. Even though the court was aware that the perpetrator would soon be released from prison, it granted sole custody and decision-making rights to his mother. In doing so, it limited the parental rights of Mother—who had successfully completed her treatment plan and was found fit—to only supervised visitation.

Mother appealed, raising three issues: (1) whether non-parents have standing to request allocation of parental rights and responsibilities after a child is placed with them over the parent's objection; (2) whether before allowing any parenting time to non-parents, the court must (A) make findings of fact identifying those

"special factors" on which it relies, (B) determine if the non-parent proved, by clear and convincing evidence, that special facts and circumstances constituting an extraordinary reason exist to overcome the constitutional presumption that custody of children should be awarded to their natural parent, and (C) address whether awarding custody to a non-parent is in the best interests of the child; and (3) whether it infringes on a fit parent's fundamental constitutional rights to grant a non-parent sole custody and sole decision-making powers over her child.

A division of the Colorado Court of Appeals (COA) rejected Mother's first and third arguments but agreed with her second argument and remanded the case for further proceedings.

The COA pointed out that the third issue was not raised below but, acknowledging the importance of the constitutional argument and its inevitable relevance and impact on the trial court's treatment of Mother's constitutional rights on remand (and in order to avoid further delay by a second appeal), it addressed and rejected it. (This is the basis for the first question presented in this petition.) The COA also rejected the standing issue which raises similar constitutional concerns as it allows non-parents to disrupt the lives of fit parents by subjecting them to lengthy and expensive court proceedings. (This is the basis for the second question presented in this petition.)

The Colorado Supreme Court denied Petitioner's petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

Only this Court has the power to settle the nationwide disagreement over the constitutional limits on non-parents' standing to seek allocation of parental responsibilities, in the absence of any allegations of safety concerns caused by a fit parent; the standards of review governing such proceedings, which aim at restricting or terminating parent-child relationships; and the tests that can balance the constitutional and statutory rights and interests of the parties involved.

I. It infringes on a fit parent's fundamental constitutional rights to, in the absence of clear and convincing evidence of unfitness or harm caused by the parent and based only on the children's best interest, restrict a fit parent's rights and award sole parental and decision-making rights to a non-parent.

It is undisputed that Mother is a fit parent.

> MOTHER'S FINDINGS OF PARENTAL FITNESS: Mother is in compliance with her treatment plan and has made significant progress in this case. Mother is a fit parent but her relationship with the Children is compromised.

App. E (the July 14 Order), p. 18 #10; App. F (Final Judgment), p. 2 (adopting the July 14, 2019, including its findings regarding Mother's fitness); *see also* App. A (COA opinion), ¶¶ 25, 27.

It is also undisputed that the paternal family compromised and undermined Mother's relationship with her children by alienating them and leading them to believe, among other things, that Mother shot their father. (It is also undisputed that Father shot Mother and served prison time for doing so). *See, e.g.,* App. A (COA opinion), ¶ 41; App. E, p. 15; *id.*, p. 17.

Mother acknowledged the difficulties resulting from the alienation and requested that the court issue an order to develop and implement a transition plan (consistent with that mentioned in the court's July 14 Order) to return her children home. *See, e.g.,* App. A (COA opinion), ¶¶ 32-33, 44; App. E (July 14 Order), p. 18 ("All parties shall research reintegration/clarification services. The Court would note that this case may need the services such as those provided at ChildSafe.").

Without addressing fit Mother's request, the trial court granted sole decision-making and custody to the paternal grandmother and restricted fit Mother's parental rights to only supervised visitation. App. F, ¶ 36 ("Ms. B. is awarded sole decision making but is to confer with Mother before any decisions are made."), ¶ 35 ("The Court will find that the allocation of parental responsibilities should be awarded to Ms. B."), ¶ 55 ("[T]he children are residing with Mrs. B and that they going to continue seeing Mother, but this is where they'll be living with Mrs. B."); ¶ 39 ("The Court will order that the supervised visits with Mrs. A at Mother's home are to continue on Wednesdays or another day per week that works for the parties and Mrs. A."); App. A, ¶ 10.

On appeal Mother argued that, in the absence of clear and convincing evidence of harm or unfitness, award of sole decision-making and custody to the paternal grandmother and limiting fit Mother's parental rights to only supervised visitation violated Mother's fundamental constitutional rights to rear and have custody of her children. App. C, pp. 26-34; App D, 17-23.

The COA held:

> [W]e turn to mother's constitutional argument. As previously discussed, the Children's Code authorizes a court to allocate parental responsibilities to a nonparent in accordance with the child's best interests. *L.B.*, 254 P.3d at 1208. **The court may do so, even over the objection of a parent, without requiring the demonstration of parental unfitness or significant harm to the child.** *See People in Interest of M.D.*, 2014 COA 121, ¶¶ 43-44; *see also C.M.*, 116 P.3d at 1283.

People In Int. of J.G., 2021 COA 47, ¶ 50 (emphasis added).

The COA's holding directly contradicts this Court's teachings in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982), and *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).

> We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, ***without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest***.

Quilloin, 434 U.S. at 255 (emphasis added) (internal citations, alteration, and quotation marks omitted); *Santosky*, 455 U.S. at 760, n. 10 (quoting *Quilloin*); *Troxel*, 530 U.S. 57, 68–69 ("so long as a parent adequately cares for his or her children (i.e., ***is fit***), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (emphasis added)); *see also Troxel*, at 101 (Kennedy, J., dissenting) ("I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship."); *Smith v. Org. of*

Foster Fams. For Equal. & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, Burger, Rehnquist, JJ., concurring) ("If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on the private realm of family life which the state cannot enter." (internal citation and quotation marks omitted).

Paternal grandmother is not a parent to this child. As such, neither Colorado statutory or case law nor any provision in United States constitutional law gives her any parental rights to the child (beyond visitation rights upon satisfaction of the strict requirements of Title 14)—let alone rights equivalent to those of a fit, biological parent.

COA's statutory interpretation has allowed *de facto* termination of a fit parent's fundamental constitutional rights (restricting her parental rights to only supervised visitations) without enforcing the necessary constitutional safeguards, i.e., application of the strict scrutiny test, which requires clear and convincing evidence that such restriction (i.e., de facto termination) is the least restrictive mean to achieve a state compelling interest to protect the children from an identified harm which has been caused by Mother. *See also* Colo. Rev. Stat. § 19–3–604(2) (clear and convincing evidence that Mother's conduct or decisions have an actual reasonable potential to cause "grave risk

of death or serious bodily injury to the child."); *M.C. v. Cabinet for Health & Family Servs.*, 614 S.W.3d 915 (Ky. 2021) (same).

In addition, such interpretation finds no support in the language of the statute. Nothing in section 19–3–702 (the COA relies on *M.D.* and *C.M.*, which rely on 19–3–702(4)(a)) allows restricting a fit parent's constitutional rights to supervised visitation *without applying the strict scrutiny test.*

Section 19-3-702(4)(a) merely allows the state to identify "allocation of parental responsibilities" to a relative as a *concurrent goal* to "return home"—the primary statutory and constitutional goal—in case the parent does *not* become fit within a reasonable time. Colo. Rev. Stat. § 19-3-702(4)(a) (cross-referencing § 19-3-508(7) ("Efforts to place a child for adoption or with a legal guardian or custodian, including identifying appropriate in-state and out-of-state permanent placement options, may be made concurrently with reasonable efforts to preserve and reunify the family.")). Nothing in the statute allows a court to allocate parental rights to children of a ***fit parent*** to anyone other than a legal parent. *See id.*

COA's application of "best interest of child" standard allows Colorado courts to go beyond the constitutionally allowed limits to allocate to non-parents sole decision making and primary caregiver rights—equal to the rights of biological parents—without identifying any constitutional (or other) source for such a power and without, at the very least, requiring clear and convincing evidence of parental unfitness and harm to the child. Such broad statutory interpretation, however, does not pass the strict scrutiny test.

The right to parent one's children is a fundamental liberty interest. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *Santosky*, 455 U.S. at 758-59. Strict scrutiny review is required for situations like this, where government practices and statutes, if misconstrued, infringe on the fundamental constitutional rights of parents and their children. *See, e.g., City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997) (Souter, J., concurring); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16–17 (1973).

Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible. *Rodriguez*, 411 U.S. at 17; *Plyler v. Doe*, 457 U.S. 202, 217 (1982); *Evans v. Romer*, 854 P.2d 1270, 1275 (Colo. 1993).

The cornerstone of the state's *parens patriae* authority is the interest in protecting children from harm caused by an unfit parent. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (recognizing when circumstances place child in "some clear and present danger" or affect the child's well-being, state could properly intrude on that "private realm of family life" to protect child from harm); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Nonetheless, 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."); *Santosky*, 455 U.S. at 767, n. 17 ("[a]ny parens

patriae interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit.").

As such, for its statutory interpretation, which allows restriction of parental rights in the absence of safety concerns, based solely on the "best interest of the child" to be constitutional, the court should have first identified the compelling state interest that would allow interreference with fit parents' constitutional rights in the absence of harm or parental unfitness and then require the moving party to prove with clear and convincing evidence that the scope of the interference is the least restrictive means available to address that specified compelling interest.

If not tied to clear and convincing proof of harm and unfitness, the best interests standard delegates to judges unfettered authority to apply their own essentially unreviewable personal and lifestyle preferences in resolving such disputes.[2] As this Court has explained, however, "the Due Process Clause does not permit a State to infringe on the fundamental right of

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> In future cases, circuit courts in Wisconsin must follow Troxel and presume that the decisions of fit parents as to what is best for their child is correct, and must give the parents' determinations "special weight" (whatever that means). Then the circuit court must merely find that a petitioning grandparent has overcome the Troxel presumption by clear and convincing evidence, which affords the circuit court the discretion to overrule the decisions of fit parents and instead impose on the family the circuit court's view of the best interests of the child. Surely the fundamental liberty interest of parents in being free from State interference in the care, custody, and upbringing of their families—"perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court—deserves much more protection than this.

Matter of Visitation of A. A. L., 927 N.W.2d 486, 507–08 (Bradley, J., concurring).

parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000). And *Troxel*, it should be emphasized, involved only visitation rights, not parental rights, let alone sole parental rights. The extent of the infringement of constitutional rights in this case is much greater than the infringements that alarmed the Court in *Troxel*.

The COA's statutory interpretation, limiting the courts' analysis to the "best interest of the child" standard, both grants equal footing to non-parents—in the absence of clear and convincing evidence of harm caused by the fit parent—and fails to provide adequate protection for fundamental constitutional rights of fit parents—thereby, depriving them of fundamentally fair substantive and procedural due process, required by *Santosky*. It presents the very circumstances this Court has identified as unconstitutional in *Quilloin*, *Santosky*, and *Troxel*.

This case provides the Court an appropriate vehicle to address the split among the States[3] and to demonstrate under what circumstances the "best interest

[3] *Compare, e.g., In re Herbst*, 1998 OK 100, ¶ 13, 971 P.2d 395, 398 ("Without the requisite harm or unfitness, the state's interest does not rise to a level so compelling as to warrant intrusion upon the fundamental rights of parents."); *Stacy v. Ross*, 798 So.2d 1275, 1280 (Miss. 2001) (forced visitation "cannot be ordered absent compelling circumstances which suggest something near unfitness of custodial parents."); *Griffin v. Griffin*, 581 S.E.2d 899, 903 (2003) ("Absent a showing of actual harm to the child, the constitutional liberty interests of fit parents 'take precedence over the "best interests" of the child.'" (citation omitted and emphasis added)), *with People In Int. of J.G.*, 2021 COA 47 (Courts may "allocate parental responsibilities to a nonparent in accordance with the child's best interests" "even over the objection of a parent, without requiring the demonstration of parental unfitness or significant harm to the child."); *Routten v. Routten*, 576, 843 S.E.2d 154, 157–58, *cert. denied*, 141 S. Ct. 958, 208 L. Ed. 2d 495 (2020), *reh'g denied*, 141 S. Ct. 1456, 209 L. Ed. 2d 175 (2021) ("in a dispute between two parents if the trial court determines that visitation with one parent is not in a child's best interests, then the trial court is authorized to deny visitation to said parent without a requirement to find the existence of the alternative circumstance that the parent in question is unfit.").

of the child" standard fails to provide the necessary constitutional protections for parent-child relationships.

II. It infringes on a fit parent's fundamental constitutional rights to grant non-parents automatic standing to request allocation of parental rights because of their status as intervenor based on the State's previous placement of the children with intervenors, over the parent's objection.

The Court has long recognized that the substantive due process required by the Fourteenth Amendment protects against government interference with a fit parent's fundamental rights. *See, e.g.*, *Troxel*, 530 U.S. at 65 ("The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." (internal quotation marks and citation omitted)); *Stanley*, 405 U.S. at 652 ("the State registers no gain towards its declared goals when it separates children from the custody of fit parents."). Consistent with this constitutional principle, the Colorado Revised Statute allows only visitation rights/parenting time to non-parents (not sole parental and decision-making rights)—and even then only upon satisfaction of the strict requirements of section 14-10-123 (standing) and section 14-10-124(1.5)(a) and while also applying the *Troxel* presumption. This is also consistent with the language of section 19-1-117, which "limits standing to grandparents and allows a petition for visitation only if there is or has been a 'child custody case or a case concerning the allocation of parental responsibilities.'" *In re D.C.*, 116 P.3d 1251, 1253 (Colo. App. 2005).

As the Colorado Supreme Court has explained

> Although section 19-3-507(5)(a) permits foster parents to intervene in dependency and neglect proceedings following adjudication, foster parents here do not have a legally protected interest in the outcome of termination proceedings, and section 19-3-507(5)(a) does not automatically confer standing to them to appeal the juvenile court's order denying the termination motion at issue . . . .

C.W.B., Jr. v. A.S., 2018 CO 8, ¶ 2, 410 P.3d 438, 440. By the same analysis, section 19-3-507 does not (cannot, constitutionally) automatically confer standing for APR. Grandparent intervenors must still meet the Title 14 requirements, which includes constitutional protections, before they can request APR for a fit parent's children.

It is undisputed that the paternal grandmother obtained physical custody of the children as a result of a state action, and over Mother's objection. To grant standing to grandparents without including the constitutional protections of Title 14 renders section 19-3-507 unconstitutional as applied to this fit mother.

Granting automatic standing for APR to individuals who temporarily care for children while parents complete their treatment and the family awaits reunification enables interference with the constitutional rights of fit parents and their children, imposes often debilitating financial and emotional burdens on parent-child relationships, and rewards those who contribute to the alienation of children and sabotage reunification. It does everything *Troxel* aimed to prevent—and more.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges the Court to grant this writ of certiorari.

Respectfully submitted,

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