

In the Supreme Court of
the United States

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MICHAEL VECHERY,
Petitioner,

v.

FLORENCE COTTET-MOINE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a Virginia trial court erred in its decision in a custody and visitation trial by:

(1) Not reopening the evidence after the trial had concluded to receive evidence related to an altercation between the parties;

(2) Not conducting an *in-camera* interview of the minor child at issue; and

(3) Restricting the minor child at issue from playing competitive golf for one-year.

TABLE OF CONTENTS

	Page:
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF FACTS	1
I. Procedural History and Preservation of Arguments	1
II. Motion to Reopen the Evidence.....	2
III. <i>In-Camera</i> Interview	3
IV. Competitive Golf Restriction.....	5
V. Further Corrected and Amplified Facts	6
REASONS FOR DENYING THE PETITION	7
I. This Court Lacks Jurisdiction Because Father’s Constitutional Arguments Were Not Argued or Preserved Below, are Vague and Unfounded, are of No Precedential Value, and Involve a Moot Issue	8
A. <i>This Court Lacks Jurisdiction Because No Constitutional Arguments Were Preserved Below</i>	8
B. <i>This Court Lacks Jurisdiction Because No Colorable Constitutional Issues Exist in This Matter, and This Case Has No Precedential Value</i>	10

<i>C. This Court Lacks Jurisdiction Because the One-Year Golf Restriction Issue is Moot</i>	12
II. Independent and Adequate State Grounds Dispose of the Controversies Father Asserts, Requiring the Denial of His Petition.....	13
CONCLUSION	15
RELIEF REQUESTED.....	16

TABLE OF AUTHORITIES

Page(s):

Cases:

<i>Cardinale v. Louisiana</i> , 394 U.S. 437 (1969)	9
<i>Cleveland Board of Educ. v. LaFleur</i> , 414 U.S. 632 (1974)	10-11
<i>Department of Mental Hygiene v. Kirchner</i> , 380 U.S. 194 (1965)	9
<i>Eichelberger v. Eichelberger</i> , 2 Va. App. 409 (1986)	15
<i>Ferguson v. Stafford Cty. Dep't of Soc. Servs.</i> , 14 Va. App. 333 (1992)	15
<i>Fisher v. Commonwealth</i> , 16 Va. App. 447 (1993)	13, 14
<i>Holley v. Lawrence</i> , 317 U.S. 518 (1943)	14
<i>Klinger v. Missouri</i> , 80 U.S. (13 Wall.) 257 (1871)	13
<i>Lawson v. Lawson</i> , 198 Va. 403 (1956)	14
<i>Lynch v. New York</i> , 293 U.S. 52 (1934)	9, 15
<i>M.E.D. v. J.P.M.</i> , 3 Va. App. 391 (1986)	14
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	12
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	10

<i>Sochor v. Florida</i> , 504 U.S. 527 (1992)	13
<i>States Parole Comm’n v. Geraghty</i> , 445 U.S. 388 (1980)	12
<i>Taylor v. Commonwealth</i> , 208 Va. 316 (1967).....	13, 14
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000)	10
<i>Vechery v. Cottet-Moine</i> , No. 1143-16-4, 2017 Va. App. LEXIS 95 (Ct. App. Apr. 4, 2017)	1
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	10, 11
Statutes:	
28 U.S.C. § 1257.....	12
28 U.S.C. § 1257(a)	1, 8
Va. Code § 17.1-410(B)	2
Va. Code § 17.1-413	11
Rules:	
S. Ct. R. 10	7
S. Ct. R. 14(g)(i)	9
S. Ct. R. 43	16
Va. Sup. Ct. R. 5:25	13
Va. Sup. Ct. R. 5A:18.....	13

OPINIONS BELOW

On August 28, 2017, the Supreme Court of Virginia summarily dismissed a petition for appeal from the opinion of the Court of Appeals of Virginia. (Pet. 23a). The Court of Appeals of Virginia issued an unpublished opinion on April 4, 2017, (Pet. 1a-14a), which is available at *Vechery v. Cottet-Moine*, No. 1143-16-4, 2017 Va. App. LEXIS 95 (Ct. App. Apr. 4, 2017). The Loudoun County, Virginia Circuit Court (the “trial court”) made a custody and visitation ruling on May 2, 2016, which was memorialized by an Order entered on June 9, 2016. (Pet. 15a-22a).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a). Respondent maintains that jurisdiction is not proper in this Court because Petitioner’s alleged constitutional arguments were not argued or preserved below, are unfounded, are moot in part, and independent and adequate state grounds exist as a basis for the lower court’s decision.

STATEMENT OF FACTS

I. Procedural History and Preservation of Arguments

This matter arises out of a bitter and protracted custody and visitation dispute between Petitioner Michael Vechery (“Father”) and Respondent Florence Cottet-Moine (“Mother”), which culminated in the June 9, 2016 Custody and Visitation Order (the “Order”) central to this matter. (App. 152-53, 155, 289-91, 315, 317-18, 483-84, 493). Lauren Cottet-Moine (the “minor child”), who was ten years old at the time of trial and the subject of the Order, has been involved in almost constant custody and visitation

litigation for over eight years. (App. 289-91). Since 2010, Mother has had either sole custody or “tie breaking” authority. (App. 256, 523). Father has appealed the custody and visitation decisions regarding the minor child all the way through Virginia’s judicial system, starting from a juvenile court and ending in the Supreme Court of Virginia, with each separate court granting custody to Mother, affirming the lower court’s decision, or denying the petition for the appeal. (App. 2-3, 291, 629-30); (Pet. Cert. 1a-13a, 23a).

On May 4, 2017, Father filed a discretionary appeal to the Supreme Court of Virginia, which was summarily dismissed for lack of jurisdiction because the appeal did not involve a substantial constitutional issue and was not of significant precedential value per Va. Code § 17.1-410(B). (Pet. Cert. 23a). Relevant here, the Court of Appeals of Virginia issued an unpublished opinion on April 4, 2017 fully affirming the trial court’s decision. (Pet. Cert. 14a). The constitutional arguments Father now raises were not argued in the Court of Appeals of Virginia or the trial court. (Pet. Cert. 1a-14a); (Appellant Va. Ct. App. Br. 1-18); (App. 1-642).

II. Motion to Reopen the Evidence

Father has not and cannot point to where in the record the trial court ruled on his motion seeking to reopen evidence, because no such ruling was ever made. (App. 1-642). The Court of Appeals acknowledged that no such ruling was made. (Pet. Cert. 8a-9a). Contrary to Father’s assertions, Mother argued in the Court of Appeals that Father failed to properly preserve any arguments related to reopening evidence because he did not obtain a ruling. (Pet. Cert. 7); (Appellee Va. Ct. App. Br. 19-20).

The motion to reopen the evidence, filed seven days after the trial, sought to have the trial court receive evidence of an altercation between the parties and also renewed Father's request for an *in-camera* interview of the minor child. (App. 459-73). The physical altercation happened four days after the trial at the minor child's soccer match. (App. 460-462, 470). The injuries Father claims from the altercation, human bite wounds, (Pet. Cert. 3, 7); (App. 461, 465-67), are consistent with an injury called a "fight bite," which Father could have received by punching Mother (or another person) in the mouth, causing that person's teeth to break the skin over and around Father's knuckles. (App. 472).

Contrary to Father's contention that the charge would have served to directly rebut "[Mother's] portrayal of [Father] as an aggressor," (Pet. Cert. 3), the facts underlying the charge suggest a much less clear cut altercation, wherein Father may have been the main instigating force, as the charge was based solely on Father's statement to law enforcement. (App. 460-462, 470). Tellingly, Father makes no mention of the final disposition of the assault charge anywhere in his Petition and no such mention can be found in the record below. (Pet. Cert. 1-11); (App. 1-642). To the extent that Father suggests that the charge relates to an actual assault or any finding of guilt, (Pet. Cert. *i*, 3, 7), Mother vehemently denies these allegations and submits that the record does not support this assertion nor do the facts underlying this case. (App. 1-642).

III. *In-Camera* Interview

Before the trial court hearing, Father filed a motion for an *in-camera* interview of the minor child

on April 7, 2016. (App. 23-25). On April 14, 2016, the trial court deferred the ruling on the motion until trial on April 20, 2016, and then at trial entered another Order that day deferring a decision on the *in-camera* interview motion until the trial court heard further evidence. (App. 26-27, 36-37). Contrary to Father's assertion, the trial court did not enter this Order "over [Father's] objections," (Pet. Cert. 8), as the only objection noted on the Order was that of Mother's counsel, Jonathan Rochkind, Esq., who noted that having the child testify was not in her best interest. (App. 27). In actuality, Father's counsel, Ryan M. Schmalzle, Esq., signed the Order as "seen and agreed." *Id.*

Midway through the April 20, 2016 trial, Father's counsel unequivocally withdrew the motion for an *in-camera* interview of the minor child, stating:

Your Honor, I have one other issue that I discussed with my client over the lunch break and that's regarding the in-camera [sic] interview. If it's okay with [the opposing party] we'll withdraw a request for an in-camera [sic] interview. We feel that there's been sufficient evidence submitted and we...we wanted to set it up but preferred, preferred not to do it and now I feel that [the minor child's] voice has been heard sufficiently that we don't need to.

(App. 228).

Father's vague assertion that he only temporarily and conditionally withdrew "it" (assuming this "it" refers to his request for an *in-camera* interview) is simply not supported by the record. (Pet. Cert. 5); (App. 1-642). The effect of this withdrawal was argued

by Mother below and was noted by the Court of Appeals of Virginia. (Pet. Cert. 11a); (Appellee Va. Ct. App. Br. 31-32). Only after the trial had concluded did Father seek to have the minor child testify. (App. 23-25).

IV. Competitive Golf Restriction

The Order only imposed a one-year competitive golf restriction, not a complete ban. (Pet. Cert. 20a, 22a); (App. 569, 572.1-72.2). This restriction is no longer in effect because more than one-year has passed since the trial court's ruling. Opposite Father's position, the testimony suggesting the ten-year-old minor child could obtain a golf scholarship was held as far too speculative to be accepted into evidence, (Pet. Cert. 3, 13), (App. 126-129), and Father additionally expressed his willingness to forego golfing with the minor child for one-year if it meant he would have more time with her and if it was "okay" with her. (App. 221).

In sum, and as noted by the Court of Appeals of Virginia, competitive golf was shown at trial to be a unique cause of stress in the child's life. (Pet. Cert. 14a). Briefly, the substantial evidence supporting this finding includes, but is not limited to: Father attempting to force Mother to leave golf events, (App. 179, 203-06, 330-33), Father causing an embarrassing confrontation to take place in front of the minor child at golf events, (App. 255-56, 332), Father yelling at Mother in front of the minor child at golf events, (App. 328), Father withholding the minor child from other events if she did not attend golf events, (App. 188), Father becoming upset if the minor child did not practice golf on vacation, (App. 182-83, 315), Father placing the child in nineteen golf

tournaments in a year, but seeking to raise the number to twenty or twenty-five, (App. 218), Father wanting to have golf be the only activity the minor child participated in, (App. 306), Father stating that he would be willing to have the minor child miss school to play golf (App. 174, 224), Father attempting to exclude Mother from golf events, (App. 341-42), Father failing to provide adequate notice to Mother of golf event times and locations, (App. 330, 378), Father encouraging the minor child to lie to Mother about golf events, (App. 330-31), Father attempting to restrict Mother from playing golf with the minor child and from placing the child in golf tournaments, (App. 191-92, 308-10), Father becoming upset when Mother placed the child in a single golf lesson because Father thought it hurt the minor child's swing, (App. 176), and the minor child being unusually tired after summer visitation with Father (App. 338-39). The trial court record is replete with evidence of the stress competitive golf placed on the minor child.

V. Further Corrected and Amplified Facts

Contrary to Father's contention that he was wrongly painted as "violent and hot-tempered," (Pet. Cert. 2-3, 7), Father was shown to have violent outbursts (Father was shot with a Taser and arrested at the minor child's baptism after trespassing and trying to disarm a police officer; a protective order was granted against Father for hitting Mother in the face, breaking her nose, and leaving bruises all over her body), a substance abuse problem (Father received two DUIs and for one such DUI Father denied all responsibility, suggesting he was drugged even though he admitted to drinking in bars for approximately four to five hours before his arrest), and an inability to co-parent (Father failed to select a

co-parenting coordinator and unilaterally enrolled and withheld the minor child in and from activities). (App. 136-39,147, 199, 217, 275-77, 291-94, 306, 311, 315, 483-85).

REASONS FOR DENYING THE PETITION

At base, Father seeks to have the highest court in the land review what equates to his dissatisfaction with the factual findings underlying a Virginia trial court's custody and visitation decision by thinly glossing this case with unpreserved, not asserted, and unfounded constitutional arguments.

While the basis for these constitutional arguments is amorphous, one thing is clear: Father never presented any of these constitutional arguments, in any way, to the trial court or to the Court of Appeals of Virginia. Indeed, an even less comprehensible version of these unpreserved arguments first appeared in Father's petition for a discretionary appeal to the Supreme Court of Virginia, which predictably denied that petition summarily. Even if Father's constitutional arguments were preserved and were well founded, independent and adequate state legal grounds were the basis for the lower court's decision, removing this Court's jurisdiction.

In addition to these bars to review, Father's Petition only asserts either errors in the factual finding of the trial court or a misapplication of properly stated law. These arguments do not present "compelling reasons" for review, as they are not of the character and nature that this Court should deem worthy of consideration per Supreme Court Rule 10. As such, Father's Petition must be dismissed.

I. This Court Lacks Jurisdiction Because Father's Constitutional Arguments Were Not Argued or Preserved Below, are Vague and Unfounded, are of No Precedential Value, and Involve a Moot Issue

Father's Petition for Appeal is unfounded because each constitutional argument and issue he presents was not asserted in any form in either of the lower courts. These arguments, as presented, do not even present colorable constitutional issues, especially when considering the actual facts underlying this matter. In fact, the competitive golf restriction issue is now moot, as it is no longer in effect.

A. This Court Lacks Jurisdiction Because No Constitutional Arguments Were Preserved Below

Father did not raise any of the constitutional arguments or issues in the trial court or in the Court of Appeals of Virginia that he now relies on to meet the jurisdictional mandate of this Court pursuant to 28 U.S.C. § 1257(a), which provides that state court decisions:

may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

As such, the alleged constitutional elements of the Questions Presented here are insufficient to meet the jurisdictional requirements.

It is well established that this Court “will not decide federal constitutional issues raised here for the first time on review of state court decisions.” *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (citation omitted). There must be an affirmative showing on the record from the highest reviewing state court that a federal question was presented, decided, and essential to the lower court’s decision for this Court to have jurisdiction. *Lynch v. New York*, 293 U.S. 52, 54 (1934). Father did not assert these constitutional arguments in the trial court, in his assignments of error, opening brief, or at oral argument in the Court of Appeals of Virginia. (Appellant Va. Ct. App. Br. 1-19); (App. 1-642). Neither of these courts ever ruled on any of the constitutional issues presented here. (Pet. Cert. 1a-22a); (App. 561-72.10).

Father further failed to comply with Supreme Court Rule 14(g)(i), which requires, *inter alia*, that his Petition include specifications of where the federal questions sought to be reviewed were raised, how such questions were raised, how the lower courts addressed such questions, the quotations in the record where such questions appeared, and specific references to where in the record the matters appeared. “This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.” *Dep’t of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965). Father did not

comply with this mandate because he could not; the constitutional issues were never raised.

The emergence of these constitutional arguments is an attempt by Father to meet the jurisdictional requirements for review in this Court, just as he sought to meet similar requirements in the Supreme Court of Virginia. This Court should deny Father's Petition, just as the Supreme Court of Virginia denied his petition there. (Pet. Cert. 23a).

B. This Court Lacks Jurisdiction Because No Colorable Constitutional Issues Exist in This Matter, and This Case Has No Precedential Value

Father's purported constitutional arguments are undeveloped and rest on the weakest of premises. While unclear from Father's petition, the thrust of his constitutional arguments seems to be that (1) there are certain constitutional protections provided to parents in custody and visitation litigation and (2) because these constitutional dimensions exist, courts may not rule against a parent based on "technicalit[ies]" or when a party disagrees with the sufficiency of the evidence presented. (Pet. Cert. 5, 7-11).

In support of this argument, Father cites four Supreme Court cases: *Troxel v. Granville*, 530 U.S. 57 (2000), which addresses the constitutionality of a statute giving standing to nonparents to seek custody of children, *Washington v. Glucksberg*, 521 U.S. 702 (1997), which addresses the constitutionality of a state's ban on physician assisted suicide, *Santosky v. Kramer*, 455 U.S. 745 (1982), which addresses the constitutionality of a certain evidentiary standard in parental rights termination proceedings, and *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632

(1974), which addresses the constitutionality of a school board's maternity leave regulations.

Undeniably, these cases make a nod to certain constitutional protections given to the parent-child relationship. *E.g. Glucksberg*, 521 U.S. at 720. However, simply saying that this case involves "matters of profound constitutional and precedential significance" does not make it so. (Pet. Cert. 4). While invariably most, if not all, legal subjects involve constitutional issues when discussed at some level of abstraction, Father's Petition does little more than attempt to circumvent his failure to obtain a ruling on an issue, failure to offer the minor child as a witness, and failure to obtain favorable factual findings regarding the minor child participating in competitive golf. Father seeks to have this Court mandate that judges also act as counsel whenever a child custody matter is litigated, placing the burden on judges to ensure that attorneys obtain rulings on motions for their clients, offer witnesses, or gain adequate factual findings to satisfy their clients' expectations. The relief Father seeks is contrary to this country's adversarial judicial system, and citing a few cases that reference the constitutional dimensions of the parent-child relationship does cure this defect.

Indeed, the Court of Appeals of Virginia did not even designate its opinion in this matter for publication. (Pet. Cert. 1a). Va. Code § 17.1-413 provides that "opinions designated by the Court of Appeals as having precedential value or as otherwise having significance for the law or legal system shall be expeditiously reported in separate Court of Appeals Reports in the same manner as the decisions and opinions of the Supreme Court." The lack of publication reflects the case's absence of precedential

value. The decision from the Court of Appeals of Virginia created no new law and did not establish any binding precedent. The petition before this court does not contain matters of “precedential significance,” (Pet. Cert. 4), and any arguments by Father that this Court should grant an appeal based on such are unfounded.

Again, the constitutional arguments and suggestion of precedential value are a blatant attempt to shoehorn a case—that previously did not involve any constitutional issues—into this court’s jurisdiction. This must not be allowed and this Court must either dismiss this petition based on Father’s reliance on constitutional arguments not made or preserved in the lower courts or because Father’s constitutional arguments are not sufficient to provide jurisdiction to this court under 28 U.S.C. § 1257.

C. This Court Lacks Jurisdiction Because the One-Year Golf Restriction Issue is Moot

The minor child was only restricted from playing competitive golf for one-year by a ruling pronounced on May 2, 2016 and entered on June 9, 2016, (Pet. Cert. 20a, 22a); (App. 569, 572.1-72.2). Question Three is moot because more than one-year has passed.

There are two aspects to mootness: “when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *States Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

The Order provided for only a one-year long competitive golf restriction (App. 633). This controversy is no longer live because more than one-

year has passed, requiring this Court to deny Father's Petition as it relates to the competitive golf restriction.

II. Independent and Adequate State Grounds Dispose of the Controversies Father Asserts, Requiring the Denial of His Petition

Assuming *arguendo* that Father had preserved actual constitutional issues that are not now moot, Virginia law adequately disposed of the matters presented in Father's petition on legal grounds independent of any federal basis. When "it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case...." *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1871).

Question One involves a motion seeking to reopen the evidence filed after trial had concluded. (Pet. Cert. i). Father never obtained a ruling on this motion, (App. 1-642), thus the Court of Appeals of Virginia could not review the trial court's decision. (Pet. Cert. 8a-9a). It is well established under Virginia law that failing to obtain a ruling on an issue results in a failure to preserve that issue. Va. Sup. Ct. R. 5:25; Va. Sup. Ct. R. 5A:18; *see Fisher v. Commonwealth*, 16 Va. App. 447, 454 (1993); *see also Taylor v. Commonwealth*, 208 Va. 316, 324 (1967). The failure to preserve an issue for appeal is recognized as an independent and adequate state ground for the denial of relief. *Sochor v. Florida*, 504 U.S. 527, 534 (1992).

Father does not and cannot point to the portion of the record wherein the trial court ruled on his motion seeking to reopen the evidence. (Pet. Cert. 1-11); (App. 1-642). There must be a ruling as to enable an

appellate court to review the denial of relief. *Fisher*, 16 Va. App. at 454; *see also Taylor*, 208 Va. at 324. The Court of Appeals of Virginia correctly found that the Father had not obtained a ruling on his motion, precluding it from reviewing the issue and precluding this Court from reviewing this issue.

Question Two involves the trial court's refusal to conduct an *in-camera* interview with the minor child. (Pet. Cert. i). In the absence of an attempt to elicit testimony from a child at trial, it is not an abuse of discretion for a court not to conduct an *in-camera* interview. *M.E.D. v. J.P.M.*, 3 Va. App. 391, 404 (1986); *see also Lawson v. Lawson*, 198 Va. 403, 409 (1956). The failure to offer a witness at trial, thus not challenging the underlying rule regarding who may be allowed to testify, is recognized as an independent and adequate state ground. *Holley v. Lawrence*, 317 U.S. 518, 518 (1943).

Father withdrew his motion for an *in-camera* interview of the minor child midway through trial and never offered the minor child as a witness at trial. (App. 228). Father's attorney stated, in withdrawing this motion, that the minor child's voice "has been heard sufficiently." *Id.* There was no "procedural trickery," (Pet. Cert. 8), only an affirmative act by Father to exclude the minor child from testifying. (App. 228). The Court of Appeals correctly upheld the trial court's decision not to conduct an *in-camera* interview because the minor child was never offered as a witness at trial.

Question Three involves the trial court's restriction on the child from playing competitive golf for one-year, which is now moot. Even so, Virginia law addresses restrictions on visitation, and such

restrictions are proper when the activity in question presents a danger to the child or affects the child's welfare. *Eichelberger v. Eichelberger*, 2 Va. App. 409, 412 (1986). "Where the record contains credible evidence in support of the findings made by that court, we may not retry the facts or substitute our view of the facts for those of the trial court." *Ferguson v. Stafford Cty. Dep't of Soc. Servs.*, 14 Va. App. 333, 336 (1992). In order to overcome the independent and adequate state grounds bar to jurisdiction, a federal issue must have actually been presented to the highest state court for decision. *Lynch*, 293 U.S. at 54.

As articulated in the Statement of Facts above, substantial evidence was submitted to the trial court that supported the finding that competitive golf was proving to be too stressful for the minor child and negatively affecting the minor child's welfare. (Pet. Cert. 14a). Father only sought to challenge the sufficiency of this evidence in the courts below, and had made no challenge to this ruling on constitutional grounds in the trial court or in the Court of Appeals of Virginia. Accordingly, this decision was based on independent and adequate state grounds and should not be heard by this Court.

CONCLUSION

This Court should deny Father's Petition because he (1) failed to preserve the constitutional arguments he now raises, (2) these constitutional arguments are unfounded, (3) the one-year golf restriction issue is now moot, and (4) even if constitutional issues were preserved and had a viable legal basis, the rulings from the lower courts were based on independent and adequate state grounds.

RELIEF REQUESTED

Mother requests that this Court deny Father's Petition for Writ of Certiorari, deem Father's Petition frivolous, and grant Mother an award of just damages and double costs under Supreme Court Rule 43.

Dated: December 29, 2017

Respectfully submitted,

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