No. 17-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourteenth Amendment gives adoptive parents the same right as biological parents to direct the upbringing of their children.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner D.T. respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Civil Appeals.

Pursuant to this Court's Rule 29.4(c), petitioner states that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of Alabama is drawn into question, and the State of Alabama, while it filed a brief in the proceedings before the Alabama Court of Civil Appeals, is not a party. Petitioner has served a copy of this petition on the Attorney General of Alabama.

OPINIONS BELOW

The opinion of the Alabama Court of Civil Appeals, Pet. App. 1a, as modified on denial of rehearing, was entered on April 21, 2017. It is not yet published but is available at 2017 WL 836557. The opinion of the probate court, entered September 29, 2016, is unpublished and under seal.

JURISDICTION

The Alabama Supreme Court denied certiorari on August 25, 2017. Pet. App. 33a. On October 31, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 26, 2017, No. 17A463. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Code Section 26-10A-30 provides:

Post-adoption visitation rights for the natural grandparents of the adoptee may be granted when the adoptee is adopted by a stepparent, a grandfather, a grandmother, a brother, a half-brother, a sister, a half-sister, an aunt or an uncle and their respective spouses, if any. Such visitation rights may be maintained or granted at the discretion of the court at any time prior to or after the final order of adoption is entered upon petition by the natural grandparents, if it is in the best interest of the child.

INTRODUCTION

This Court has held that the Fourteenth Amendment requires states to respect parents' judgments regarding the upbringing of their children. This case presents a question on which state high courts are intractably divided: whether parents who have adopted their children are among the "parents" whom the Constitution protects. The Supreme Court of Alabama has held that the judgments of adoptive parents, in contrast to the judgments of biological parents, are entitled to no special weight. This is so, according to the court, because adoptive parenthood is nothing more than "a status created by the state." Pet. App. 40a (internal quotation marks omitted).

STATEMENT OF THE CASE

1. In 2013, petitioner D.T. legally adopted her granddaughter, A.K.S. Pet. App. 4a.[1] Born in 2008, the child had lived most of her life in petitioner's custody even before her adoption because her biological parents were unable to care for her. *Id.* 7a. Petitioner and her adopted daughter have lived as a family in Tuscaloosa, Alabama, throughout this time.

Respondent W.G. is the mother of the child's biological father. When she lived in Alabama, respondent's contact with A.K.S. varied in frequency. Much of that contact has occurred at petitioner's home. Pet. App. 4a. Although petitioner allowed some overnight visits at respondent's home, a series of concerns led her to end those visits in 2012. *Id.* 6a. In order to care for a relative and pursue employment prospects, W.G. moved to Louisiana shortly thereafter. *Id.* 5a.

2. Sometime after her move, respondent decided to seek court-ordered visitation with A.K.S. (Alabama law, like the law in every state, provides a process by which grandparents can seek visitation rights in certain circumstances.)

Under Alabama law, there are two different regimes that govern visitation cases.

The current general regime for adjudicating visitation appears in Alabama Code Section 30-3-4.2.

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[1] The Alabama Civil Court of Appeals record, which contains the parties' full names and other sensitive information, is sealed pursuant to state law. *See* Ala. Code § 26-10A-31 (providing that "all papers, pleadings, and other documents pertaining to [an] adoption shall be sealed").

This regime covers all cases in which a grandparent can seek visitation with a child being raised by a biological parent.

Section 30-3-4.2 contains stringent and detailed standards for when a court can order visitation. The court must "presum[e] that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child." Ala. Code § 30-3-4.2(c)(1). The statute recognizes that "a fit parent's decision" regarding grandparent visitation is "entitled to special weight due to a parent's fundamental right to make decisions concerning the rearing of his or her child." *Id.* § 30-3-4.2(p). A person seeking visitation cannot overcome the presumption in favor of the parent's judgment unless she has proved two things "by clear and convincing evidence." *Id.* § 30-3-4.2(c)(2). First, she must prove that she already has "a significant and viable relationship with the child." *Id.* § 30-3-4.2(d). Second, as part of the inquiry into the child's interests, she must show that denying visitation "has caused or is reasonably likely to cause harm to the child." *Id.* § 30-3-4.2(e)(2).

This case was subject to a very different regime. Because A.K.S. had been adopted by a relative, Ala. Code § 26-10A-30 governed whether a court could order grandparent visitation.

Section 26-10A-30 provides that visitation may be "granted at the discretion of the court at any time" if the judge decides that visitation is in "the best interest of the child." Ala. Code § 26-10A-30. In contrast to Section 30-3-4.2, it provides no presumption in favor of the parent's decision, still less a requirement that that presumption be overcome by clear and convincing evidence. Nor does it demand proof either of a

preexisting "significant and viable relationship" between the person seeking visitation and the child or of likely harm to the child from denial of the requested visitation. *See also* Ala. Code § 30-3-4.2(i)(1) (expressly exempting visitation orders sought under Ala. Code § 26-10A-30 from the general protections provided to parents in visitation proceedings under Section 30-3-4.2).

Alabama's two visitation regimes also differ with respect to who adjudicates visitation petitions. Petitions filed under the statute that applies to biological parents are decided by circuit courts, Ala. Code § 30-3-4.2(b), whose judges have legal training and experience, *see* Ala. Const. Art. VI, § 146.

By contrast, petitions filed under Section 26-10A-30 are decided by county probate courts. Unlike the judges on circuit courts, probate judges need not be licensed to practice law. *Bowater Inc. v. Zager*, 901 So.2d 658, 670 (Ala. 2004) (interpreting Ala. Code § 12-13-31). Moreover, probate courts need not have full-time, official court reporters. *See* Pet. App. 11a n.4.

3. In 2015, respondent filed a visitation action in the Tuscaloosa Probate Court pursuant to Section 26-10A-30. She failed to serve petitioner as required by Alabama law. Pet. App. 24a-26a. Nevertheless, without hearing from petitioner, the probate judge—who is not an attorney—issued an order granting W.G. significant unsupervised contact with A.K.S. The order gave W.G. the right to take the child to Louisiana for two summer weeks of W.G.'s choosing and also required D.T. to give up her daughter for every other Thanksgiving and for part of the Christmas holidays each year. *See* Brief of Appellant

D.T. at 3, *D.T. v. W.G.*, 210 So.3d 1143 (Ala. Civ. App. 2016) (No. 2150349).

Upon being served with the visitation order, petitioner appealed. *See* Pet. App. 26a. The Alabama Court of Civil Appeals held that the order was void because the lack of required notice to D.T. had deprived the probate court of personal jurisdiction. Pet. App. 28a.

In 2016, respondent re-filed her Section 26-10A-30 visitation action, this time with proper service on petitioner. Pet. App. 2a.

In her answer, petitioner opposed court-ordered visitation and argued that Section 26-10A-30 abridges adoptive parents' rights under the Fourteenth Amendment. Pet. App. 9a. In support of that contention, her answer cited this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). There, this Court struck down a Washington State statute that permitted a court to order grandparent visitation without regard to a fit parent's judgment whenever the court concluded that "visitation may serve the best interest of the child." *Id.* at 60 (quoting the statute). This Court declared that state courts must give "at least some special weight to the parent's own determination" regarding visitation, *id.* at 70 (plurality opinion); *see also id.* at 79 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment).

The probate court rejected petitioner's constitutional argument, relying on the Alabama Supreme Court's decision in *Ex parte D.W. and*

J.C.W., 835 So.2d 186 (2002).[2] In *D.W.*, the Alabama high court had held that this Court's decision in *Troxel* provides no protection to adoptive parents. The starting point for its analysis was that "*Troxel* involved the rights of a natural mother." *Id.* 39a. The *D.W.* court saw a constitutionally "significant distinction" in cases involving adoptive parents. *Id.* "[T]he rights of adopting parents are purely statutory." *Id.* 40a-41a (internal quotation marks omitted). Thus, once the Alabama Legislature in Section 26-10A-30 "limit[ed] the rights" adoptive parents had with respect to visitation petitions, adoptive parents in Alabama "must be treated differently than natural parents." Pet. App. 42a.

After an evidentiary hearing that was not transcribed—and without appointing a guardian ad litem for A.K.S. as petitioner had requested, Pet. App. 13a—the probate court ruled again in respondent's favor. It made no finding that petitioner was unfit. Nor did it find that A.K.S. would be harmed unless visitation were ordered. It nonetheless decided that A.K.S.'s best interest would be served by reinstating, this time over her mother's objection, precisely the same visitation order it had initially issued ex parte. *See* Brief of Appellant D.T. at 3, *D.T. v. W.G.*, 2017 WL 836557 (Ala. Civ. App. Mar. 3, 2017) (No. 2160082) ("Brief of D.T.").

Petitioner filed a motion to alter, amend, or vacate the probate court's order. Brief of D.T. at 3. In this motion, she renewed her due process objection and

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[2] For the convenience of the Court, the opinion in *D.W.* appears at Pet. App. 34a-43a. All further citations to *D.W.* are to the pages in the Pet. App.

argued that Section 26-10A-30 also violates the Equal Protection Clause because Alabama law "provides completely disparate treatment for similar statutory classes of individuals, i.e. parents[,] conditioned upon how they obtained their parental rights." Brief of D.T. at 4.[3] The probate court denied this motion. *Id.* at 5.

4. On appeal, petitioner again raised her due process and equal protection claims. Brief of D.T. at 12. The Alabama Court of Civil Appeals nonetheless affirmed the judgment of the probate court. Pet. App. 22a-23a. Like the probate court, the appeals court held that petitioner's claims were foreclosed by the Alabama Supreme Court's decision in *D.W. Id.* 9a-10a.

In applying *D.W.* to petitioner's case, the Court of Civil Appeals reiterated that "the legislature is free to define the rights of adoptive parents as it sees fit." Pet. App. 10a. Accordingly, it held that the Fourteenth Amendment does not require "[a] probate court considering grandparent visitation under § 26–10A–30" to afford "any special weight to the wishes of the adoptive parent." Pet. App. 18a. The Court of Civil Appeals recognized that petitioner had pointed to numerous contrary decisions. But the court explained that it was "bound by the holding of *Ex parte D.W.*" and "therefore not at liberty to reach the conclusion that the adoptive parent urges." *Id.* at 10a.[4]

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[3] Under Alabama law, "a trial court has the discretion to consider a new legal argument in a post-judgment motion." *Alfa Mut. Ins. Co. v. Culverhouse*, 149 So. 3d 1072, 1077 (Ala. 2014).

[4] The Court of Civil Appeals also rejected petitioner's argument that placing her visitation case in the probate court where no transcript is available violated "her due process right to meaningful review of the evidence." Pet. App. 11a.

5. Petitioner sought review from the Alabama Supreme Court. Her petition for review brought to its attention the "large body" of intervening law, including high court decisions from other states, "demonstrating [*D.W.*] was wrongly decided." Ala. S. Ct. Cert. Pet. 3. Over the dissent of two justices, the Alabama Supreme Court denied review. Pet. App. 33a.

REASONS FOR GRANTING THE WRIT

This Court has long recognized that parents have the fundamental right under the Fourteenth Amendment to direct the upbringing of their children. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). This right includes making decisions about third-party visitation, *Troxel v. Granville*, 530 U.S. 57, 66-67 (2000) (plurality opinion); *id.* at 78 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment).

The Alabama Supreme Court has held that adoptive parents do not possess this right. As a result, the Fourteenth Amendment and this Court's decision in *Troxel* have no bearing on how Alabama courts decide grandparent visitation disputes involving adopted children. And the Alabama Supreme Court's refusal here to revisit this holding solidifies an intractable split among state courts.

This Court should resolve the conflict. Whether adoptive parents possess the same fundamental right as biological parents to direct the upbringing of their children is an exceptionally important question. Indeed, it has profound consequences for a large number of families. Moreover, the courts that have

refused to accord full parental rights to adoptive parents are wrong. The Constitution protects all parents, and prohibits the unfair and stigmatizing regimes that some states have established.

I. An intractable conflict exists among state courts as to whether adoptive parents have the same constitutional right as biological parents to direct the upbringing of their children.

In the nearly two decades since this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), a sharp conflict has emerged among state courts over whether the Fourteenth Amendment requires that states afford the judgments of adoptive parents the same respect as they afford the judgments of biological parents.

1. Three states have concluded that adoptive parents do not have the fundamental Fourteenth Amendment right to direct the upbringing of their children. They apply the constitutional protection recognized in *Troxel* to biological parents only.

In the decision that controlled the outcome below, the Alabama Supreme Court upheld a grandparent visitation statute, Ala. Code § 26-10A-30, that gives no deference to the judgments of adoptive parents. Pet. App. 40a-42a. In so doing, it rejected the claim that "adopting parents have the same right as the natural mother in *Troxel* to make decisions concerning the care, custody, and control of their child." *Id.* 41a. The basis for that conclusion was its view that adoptive parents' rights regarding their children "are purely statutory." *Id.* 40a-41a. Thus, even though Alabama's statute—like the Washington law struck down in *Troxel*—gives no special weight to the views of an

adoptive parent, the Alabama court upheld it because the legislature had decided to "limit the rights" of parents raising adopted children. Pet. App. 42a.

In Mississippi, the same constitutional rule governs. In *Woodell v. Parker*, 860 So.2d 781 (Miss. 2003) (en banc), the trial court had entered an extensive visitation order over the objection of an adoptive couple. The couple argued on appeal that this Court's decision in *Troxel* required giving deference to their decision against permitting the requested visitation with their daughter (whose name was Shelby). *Id.* at 787.[5]

In a decision with "binding precedent[ial]" weight on all Mississippi courts, *see Bridges ex rel. Bridges v. Park Place Entm't*, 860 So.2d 811, 814 (Miss. 2003) (en banc), a plurality of the Mississippi Supreme Court disagreed, and upheld the visitation order. It recognized that judges must "defer[] to the opinions and judgments of 'natural parents' when it concerns the amount of visitation to be afforded grandparents." *Woodell*, 860 So.2d at 788. But it declared that "[u]nlike the 'parent' defendants" in cases like *Troxel*, "the Woodells are not the 'natural parents' of Shelby. They are the adoptive parents of Shelby." *Id.* For that reason, a court could override their decision as to their daughter's best interest without affording their judgment any special weight. *Id.* at 787-88.

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[5] The visitation order in *Woodell* is strikingly similar to the order entered in petitioner's case. The Mississippi order required the parents to turn their child over for "one weekend per month, every other Spring Break/Easter holiday, two weeks every summer, the Friday and Saturday following Thanksgiving and the four days after Christmas." *Woodell*, 860 So.2d at 785, 791.

In addition, the Arizona Court of Appeals has upheld that state's third-party visitation scheme against an equal protection challenge. *Jackson v. Tangreen*, 18 P.3d 100, 106-07 (Ariz. Ct. App. 2000), *cert. denied*, 534 U.S. 953 (2001). This holding, which the Arizona Supreme Court declined to review, is binding statewide. *See State v. Patterson*, 218 P.3d 1031, 1037 (Ariz. Ct. App. 2009) (citing *Scappaticci v. Sw. Sav. & Loan Ass'n*, 662 P.2d 131, 136 (1983)); *see also* Ariz. Rev. Stat. Ann. §§ 12-120(A), 12-120.07(A). Like the Alabama court, the Arizona court emphasized that "because adoption is a statutory creation entirely subject to legislation, it is within the legislature's power" to regulate how adopted children are raised. *Jackson*, 18 P.3d at 105 (internal quotation marks omitted). Thus, "adoptive parents' rights exist only because the legislature created them," and those rights are not "coextensive with a natural parent's fundamental right." *Id.* at 106.

The Arizona court therefore dismissed the adoptive parent's constitutional challenge as an "attempt to engraft *Troxel*'s reiteration that parents have a fundamental right to the 'care, custody, and control of their children' onto Arizona's adoption scheme." *Jackson*, 18 P.3d at 106 (quoting *Troxel*, 530 U.S. at 66).[6]

2. Six state courts of last resort—in Colorado, Illinois, Minnesota, New Hampshire, New Jersey, and

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[6] The parents' petition to this Court, after the Arizona Supreme Court denied review, *see* Pet. at 1, *Jackson v. Tangreen*, 534 U.S. 953 (2001) (No. 01-256), 2001 WL 34116645, was filed less than a year after *Troxel*, before any of the other cases on either side of the conflict had been decided.

West Virginia—have reached the opposite conclusion. These courts have held that "natural *and* adoptive parents" have a fundamental right to direct the upbringing of their children. *In the Matter of P.B.*, 117 A.3d 711, 716 (N.H. 2015). Therefore, they have held that the Fourteenth Amendment requires giving adoptive parents the same deference accorded biological parents with respect to decisions about third-party visitation. *See In re Adoption of C.A.*, 137 P.3d 318, 326 (Colo. 2006) (en banc); *In re Scarlett Z.-D.*, 28 N.E.3d 776, 786, 793 (Ill. 2015); *SooHoo v. Johnson*, 731 N.W.2d 815, 824 (Minn. 2007); *P.B.*, 117 A.3d at 715-16; *In re D.C.*, 4 A.3d 1004, 1007, 1017 (N.J. 2010); *Visitation of Cathy L.M. v. Mark Brent R.*, 617 S.E.2d 866, 874-75 (W. Va. 2005) (per curiam); *In re Hunter H.*, 744 S.E.2d 228, 234 (W. Va. 2013).

In holding that the Fourteenth Amendment protects both adoptive and biological parents, these courts have rejected the idea that there is any distinction between the two groups of parents that can justify different constitutional entitlements. As the New Jersey Supreme Court explained, "[a]ll of the attributes of a biological family are applicable in the case of adoption; adoptive parents are free, within the same limits as biological parents, to raise their children as they see fit, including choices regarding religion, education and association." *D.C.*, 4 A.3d at 1007. Similarly, the Colorado Supreme Court has declared that parents' right to "control[] the upbringing of their child" does not depend on whether that child was born to them or adopted. *C.A.*, 137 P.3d at 326. It rejected the argument that when a child's "natural parents" have died, any decision made by the

person who has adopted them is "not the decision of a parent." *Id.* at 330 (Coats, J., dissenting).

In light of this principle, grandparent visitation disputes are decided quite differently in these jurisdictions from the way they are decided in Alabama, Mississippi, and Arizona. For example, in a case from New Hampshire, the grandparents of a boy whose birth parents had both died secured a temporary visitation order while he was living with his guardians (the sister and brother-in-law of one of his deceased birth parents). *P.B.*, 117 A.3d at 712. Ultimately, the guardians legally adopted the child and determined that bi-weekly, half-day mandated visitation was not in their child's best interest. *Id.* at 712-13. The trial court agreed. After considering the parents' testimony, it vacated its prior order, leaving it to the parents to "utilize appropriate judgment" in deciding the question of visitation. *Id.* at 713.

The New Hampshire Supreme Court affirmed that decision. It held that "*Troxel* accords natural *and* adoptive parents the same constitutional protections." *P.B.*, 117 A.3d at 716. It therefore rejected the grandparent's argument that *Troxel* should not apply in a case where a child's "natural parents" have died and an adoptive parent is objecting to visitation. *Id.* "A trial court cannot simply substitute its judgment for that of fit parents, regardless of whether those parents are natural or adoptive." *Id.* at 715.

So, too, in West Virginia. *Cathy L.M.* involved grandparent visitation for a child who had been adopted by a great aunt and uncle. 617 S.E.2d at 868. The trial court ordered visitation over their objection. *Id.* In reversing the trial court, the West Virginia high court read *Troxel* to require courts considering a

visitation petition to "give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis." *Id.* at 875. Because the trial court had failed to do so, the visitation order was impermissible. *Id.* In a subsequent decision, the court explained that it would be "at odds with the United States Supreme Court's ruling in *Troxel v. Granville*" to order post-adoption visitation "*solely* on a best interest of the child basis," without regard to the parents' judgment. *Hunter H.*, 744 S.E.2d at 234.[7]

3. This conflict is not going away. Faced with the weight of contrary authority, the Alabama Supreme Court refused here to revisit its position. *See* Pet. App. 33a; Ala. Sup. Ct. Cert. Pet. 6. On the other hand, there is no realistic prospect that all six state high courts that afford adoptive parents the same rights as biological parents will change their views.

II. This case presents a vital question of federal constitutional law.

The question presented is important because it potentially affects millions of people. In 2016, there were 1.4 million adopted children under the age of eighteen living in the United States. United States Census Bureau, *2016 American Community Survey 1-*

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[7] In jurisdictions that treat biological and adoptive parents equally, the decisions of both biological and adoptive parents normally control. But as *Troxel* contemplated, courts occasionally order visitation over the objections of adoptive and biological parents alike. *Compare SooHoo*, 731 N.W.2d at 821 (visitation ordered over adoptive parent's objection) *with In re A.B.*, No. A14-1656, 2015 WL 3649279, at *1, *2, *6 (Minn. Ct. App. June 15, 2015) (visitation ordered over biological parent's objection).

Year Estimates, https://tinyurl.com/dt-pet-1. And as of 2015, 1.1 million adults were adoptive parents. Centers for Disease Control and Prevention, *Key Statistics from the National Survey of Family Growth*, https://tinyurl.com/dt-pet-2.

As is true here, many parents adopt children who are already related to them. In 2007, the United States Department of Health and Human Services reported that of the children adopted from foster care, 23 percent were adopted by relatives. Sharon Vandivere et al., *Adoption USA: A Chartbook Based on the 2007 National Survey of Adoptive Parents*, U.S. Dep't of Health and Human Servs., https://tinyurl.com/dt-pet-3. And relative adoptions accounted for 41 percent of private adoptions. *Id.*[8]

1. The answer to the question presented may often be decisive in visitation disputes involving adoptive families. Visitation disputes are litigated in every state. *See* Julie A. Braun, *Petitioning for Grandparent Visitation State by State*, 1 Marquette Elder's Advisor 5, 5 (2000), https://tinyurl.com/dt-pet-4. And grandparent visitation is a mainstay of this litigation. In the one state that has reported grandparent visitation litigation data, there were sixty-two cases in a single year. *See* Utah State Legislature Office of the Legislative Fiscal Analyst, *Financial Assistance or Services to Low-Income Individuals & Families* 10 (2011), https://tinyurl.com/dt-petn-5. The cases in the split show that grandparent visitation for adopted

[8] The survey results represent findings with respect to children "who were adopted and living with neither biological parent." *Id.* (introduction). Thus, they exclude most stepparent adoptions.

children is a hotly contested issue. *See supra* pages 10-15.

This Court has recognized that "[i]n all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall,* 357 U.S. 513, 525 (1958). Visitation disputes are no exception. This is why the burden of proof in visitation cases has "constitutional import." *Troxel*, 530 U.S. at 64 (plurality opinion). A "State's recognition of an independent third-party interest in a child can place a substantial burden" on a parent's fundamental right to raise her child. *Id.* The presumption ensures that a parent's constitutional right is not overridden absent a very strong reason for doing so.

The decision in *Kansas Dep't of Social and Rehabilitation Servs. v. Paillet*, 16 P.3d 962 (Kan. 2001), shows the real-world force of the presumption. There, the Kansas Supreme Court held that a trial judge had erred by failing to "presum[e], as required by *Troxel*, that a fit parent will act in the best interests of his or her child." *Id.* at 971. Applying the presumption, the supreme court reversed the visitation order. And, once the presumption was applied, "it would serve no purpose to remand;" given the record below, there could be no doubt that the grandparents had failed to overcome the presumption. *Id.*; *see also Oliver v. Feldner*, 776 N.E.2d 499, 509 (Ohio App. 7 Dist. 2002).

Even when visitation is not litigated, the weight afforded adoptive parents' judgments can affect parents' decisionmaking. "[T]he burden of litigating" visitation disputes is already "substantial" in both financial and emotional terms. *Troxel*, 530 U.S. at 75

(plurality opinion). If an adoptive parent learns (say, after consulting an attorney) that a court will not respect her parental judgment, she may acquiesce to a visitation demand that she would otherwise oppose—rather than submit to a hopeless legal battle where she is treated as if she is not a "real parent."

2. The question presented is vital in human terms as well. A court's decision ordering visitation can profoundly affect families' lives. This case illustrates the point. A.K.S. must now spend two weeks a year, every other Thanksgiving, and part of her Christmas holiday away from her mother, and potentially out of state. A court has also committed her to spending a weekend a month with respondent. For both petitioner and respondent, as for every party who litigates a visitation case, the question whether and to what extent they should each exercise control over a child's upbringing is deeply important.

3. Finally, the uniformity of parents' federal constitutional rights matters. The scope of parents' right to direct the upbringing of their children should not depend on where a family lives. Take a parent with an adopted child who lives in Jackson, New Hampshire, and is offered a better job in Jackson, Mississippi. As the law stands now, she faces a Hobson's choice between submitting to a visitation regime in Mississippi that does not fully respect her decision about her child's best interest or maintaining her full parental rights by remaining in New Hampshire but thereby forgoing income that would enable her to better provide materially for that child. Indeed, given the current uncertainty about adoptive parents' rights, a parent who has adopted a child can be sure that she will be treated as the full equal of a

biological parent only by choosing to live in one of those six states that have clearly held so. *See supra* pages 12-15. In light of the right to move to any state "for the establishment of permanent residence therein," *Saenz v. Roe*, 526 U.S. 489, 511 n.27 (1999) (internal quotation marks omitted), no parent's choice regarding where to raise her child should be so fraught and so restricted.

III. This case is an excellent vehicle for answering the question presented.

This case gives this Court the right opportunity to decide whether the Fourteenth Amendment fully protects decisions made by parents who have adopted their children.

Fifteen years ago, the Alabama Supreme Court definitively construed Section 26-10A-30, Pet. App. 40a-42a, so there are no remaining questions of state law. Both in the probate court and before the Court of Civil Appeals, petitioner pressed her argument that Section 26-10A-30 violates both the Due Process and Equal Protection Clauses. *See supra* pages 7-8. The Court of Civil Appeals also received briefing defending the constitutionality of Section 26-10A-30 from the Alabama Attorney General. Br. of Ala. Att'y Gen. 8-10, *D.T. v. W.G.*, 2017 WL 836557 (Ala. Civ. App. Mar. 3, 2017) (No. 2160082). The constitutional arguments were therefore fully presented to the Alabama Court of Civil Appeals before it passed upon them.

The sole issue before this Court is what the Fourteenth Amendment requires. Whether respondent is entitled to a visitation order should be resolved on remand, after this Court holds that petitioner's

judgment about visitation must be given the weight Alabama accords the judgment of biological parents.

IV. Section 26-10A-30 is unconstitutional because it violates both the Due Process Clause and the Equal Protection Clause.

The Alabama Supreme Court held that "the rights of adopting parents are purely statutory," and therefore the federal Constitution has no bearing on how the State treats the decisions of adoptive parents. *See* Pet. App. 40a-42a. That holding is wrong.

A. Individuals who adopt a child are parents.

1. The Alabama Supreme Court began its analysis by observing that the right of adoption "is purely statutory." Based on that premise, it held that adoptive parenthood "is a *status* created by the state acting as *parens patriae*, the sovereign parent," and therefore that "the rights of adopting parents are purely statutory, as defined in the Alabama Adoption Code." Pet. App. 40a-41a (citations and internal quotation marks omitted). In other words, the federal Constitution imposes no limit on a state legislature's "power to qualify the rights of adopting parents." *Id.* 40a.

The Alabama Supreme Court was of course correct that the right of adoption "is purely statutory." Pet. App. 40a. There is no constitutional right to adopt a child. *See, e.g.*, *Mullins v. Oregon*, 57 F.3d 789, 794, 796 (9th Cir. 1995). States have wide latitude to regulate the adoption process, including restricting who can adopt. *See* 2 Am. Jur. 2d *Adoption* § 17 (2017); *see also* Cynthia R. Mabry & Lisa Kelly, *Adoption Law: Theory, Policy, and Practice* 154-55 (2006)

(describing the extensive vetting prospective parents must undergo in order to adopt a child).

But the court went wrong when it then held that because a state can enact statutes regulating the adoption process, it has plenary power to control forever the relationship between parents and their adopted children. Not so. However a state regulates the adoption process, a state's role changes once an adoption decree is entered.

The whole point of an adoption is that the person who adopts a child "assumes the legal relationship of parent to the child." 2 Am. Jur. 2d *Adoption* § 170 (2017); *see also* Ala. Code § 26-10A-29; *Law v. Bush*, 195 So. 885, 887 (Ala. 1940). Having satisfied the criteria that the state has imposed, she "obtains all the legal rights and obligations of a natural parent," 2 Am. Jur. 2d *Adoption* § 170 (2017). In short, she is a parent.

This parental relationship is "permanent in nature," 2 C.J.S. *Adoption of Persons* § 134 (2017). It is wholly unlike forms of temporary custody that states may establish for a child who either has no parent or whose parents are unable to care for him. With respect to foster care, for example, the state delegates "day-to-day supervision" to the foster family, but "care and custody" remains with the state. *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 827 (1977). Once an adoptive family is formed, however, the state's relationship to that family is no different than if the family had been formed by birth: care and custody belongs to the parent, not the state.

2. In fact, there is a long-standing consensus that this is what adoptive parenthood means. The 1851

Massachusetts' adoption law—which served as a model for other states' adoption codes—confirmed adoptive parents' decisionmaking role by "conferring upon adopters the rights and duties of parents." *See* Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 Nw. U. L. Rev. 1038, 1043, 1045 (1979). And that law was itself designed to formalize "already existing methods of establishing families." *See* Barbara Bennett Woodhouse, *Waiting for* Loving*: The Child's Fundamental Right to Adoption*, 34 Cap. U. L. Rev. 297, 309 (2005).

For decades, courts in general—and this Court in particular—have rejected arbitrary distinctions between families formed by adoption and those formed by birth. *Woodward v. United States*, 341 U.S. 112 (1951) (per curiam), involved a federal statute providing life insurance to servicemembers. One category of eligible beneficiaries under the statute was the "brother or sister of the insured." *Id.* at 112 n.* (quoting the statute). This Court held that Woodward, the adopted brother of an insured servicemember, could recover on the policy. In doing so, it rejected the argument that an insured's choice of beneficiaries should be restricted to "brothers of the blood." *Id.* at 113. The Court was "persuaded by the policy against drawing such a distinction in the family relationship," especially given the "[c]ontemporaneous legal treatment of adopted children as though born into the family." *Id.*

State courts have also long embraced this principle. *See, e.g.*, *Calhoun v. Bryant*, 133 N.W. 266, 274 (S.D. 1911) (holding that an adoptive parent inherits from her deceased child just as a biological

parent would on the grounds that adoptive parenthood "is in no manner differentiated from the same relationship arising from birth"); *Denton v. James*, 193 P. 307, 310-11 (Kan. 1920); *City of St. Petersburg v. Jaeck*, 84 So. 622, 623 (Fla. 1920).

3. The law's treatment of legal parenthood closely parallels its treatment of another important legal status under our constitutional system—legal citizenship. Most persons who are citizens become so at birth. *See* U.S. Const. amend. XIV, § 1. The Constitution also expressly contemplates a purely statutory process by which a person who is not born a citizen becomes one: naturalization. Under the Constitution, Congress has sweeping authority to regulate who can become a citizen through naturalization and the means by which that occurs. U.S. Const. art. I, § 8. But, as this Court has long held, all citizens, no matter how they become citizens, are entitled to the "privileges and immunities of citizenship," U.S. Const. amend. XIV. In *Schneider v. Rusk*, 377 U.S. 163 (1964), the Court recognized "that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Id.* at 165.

The same is true for parenthood. Biological parents and adoptive parents differ with respect to how they become parents. The former become parents automatically by birth; the latter, through an adoption decree that "creates a legal parent/child relationship," 2 C.J.S. *Adoption of Persons* § 134 (2017). But once an individual adopts a child, that individual is the child's parent. And once she is a parent, she must be treated as one.

Alabama's failure to treat families formed through adoption like birth families violates both the Due Process Clause and the Equal Protection Clause.

B. Adoptive parents have a fundamental due process right to make decisions regarding the care, custody, and control of their children.

Parents cannot be denied their due process right to direct the upbringing of their children because those children are adopted. Nothing in this Court's jurisprudence supports Alabama's denial of full due process protection to petitioner.

1. Parents have an "essential" constitutionally-protected liberty interest in the upbringing of their children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 842 (1977); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J.R.*, 442 U.S. 584, 602 (1979). It is therefore a "cardinal" principle under the Constitution "that the custody, care and nurture of the child reside first in the parents." *Prince*, 321 U.S. at 166. This is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

2. The Court's decision in *Troxel* established that one dimension of this constitutional right requires courts to afford special weight to parents' decisions regarding visitation.

Troxel involved a Washington State statute that "plac[ed] hardly any limit on a court's discretion to

award visitation rights" at any time, so long as the court thought visitation was in a child's best interest. *Troxel*, 530 U.S. at 77 (plurality opinion). Applying that statute, a state judge had awarded grandparents extensive visitation with their grandchildren, despite the mother's judgment that this was not in her children's best interest. *Id.* at 61. The judge overrode the mother's determination because he thought the grandparents would "provide opportunities for the children in the areas of cousins and music." *Id.* at 61-62.

When the case reached this Court, six Justices agreed that uninhibited judicial authority to "disregard and overturn *any* decision" by a parent, *Troxel*, 530 U.S. at 67 (plurality opinion), violates the parent's constitutional right. This Court concluded that the decision whether visitation "would be beneficial in any specific case is for the *parent* to make in the first instance." *Id.* at 70 (plurality opinion) (emphasis added); *see also id.* at 78-79 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment). Accordingly, a fit custodial parent's decision regarding visitation "must [be] accord[ed] at least some special weight." *Id.* at 70; *see also id.* at 78-79, 80.

3. The Alabama Supreme Court held that *Troxel* simply does not apply to parents who have adopted their children. It held that nothing in this Court's opinion "compelled" courts to give special weight to adoptive parents' judgments regarding visitation. *See* Pet. App. 42a. In reaching that holding, the Alabama Supreme Court simply asserted, without any support, that this Court's decision in *Troxel* somehow rested on a blood relationship between parent and child. *Id.* 39a.

To the contrary: *Troxel* rested explicitly on cases involving individuals who were not biological parents but whose decisions were nonetheless given constitutional protection because they were the adult responsible for raising a child. In *Pierce*, for example, this Court referred to "interfere[nce] with the liberty of parents *and guardians* to direct the upbringing and education of children under their control." 268 U.S. at 534-35 (emphasis added) (cited in *Troxel*, 530 U.S. at 65 (plurality opinion)). And in *Prince*, this Court recognized the fundamental liberty interest that a child's aunt and legal custodian had in the child's "custody, care, and nurture." 321 U.S. at 166 (cited in *Troxel*, 530 U.S. at 65).

It cannot be right that the aunt in *Prince* had a constitutional liberty interest in decisions about how to raise her niece but that petitioner, who is A.K.S.'s mother, has no such liberty interest. What is more, the Alabama Supreme Court's reasoning that adoptive parents' rights are "purely statutory" compels the conclusion that parents who adopt their children do not have *any* constitutional right to direct the upbringing of their children—with respect to visitation or otherwise.

If the Alabama Supreme Court is correct, an adoptive parent's ability to choose whether her child attends a parochial school or receives a particular medical treatment is solely a matter of legislative grace. *But see Pierce*, 268 U.S. 510 at 534-35 (parent has a due process right to send child to a religious school); *Parham v. J.R.*, 442 U.S. at 602 (parent has a due process right to make medical decisions). Thus a state could force an Amish family with both adopted and biological children to comply with the state's

compulsory education law with respect to the former, but not the latter. In *Yoder*, this Court rejected an invocation of the "power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents." *Yoder*, 406 U.S. at 229. It should similarly reject the Alabama Supreme Court's assertion that the state has unlimited power with respect to visitation because it is "acting as *parens patriae*, the sovereign parent." Pet. App. 40a (internal quotation marks omitted). Simply to state the implications of the Alabama Supreme Court's position is to call for its swift reversal.

C. Equal protection requires that states give adoptive parents the same right as biological parents to direct the upbringing of their children.

This Court's equal protection jurisprudence reinforces the conclusion that Alabama cannot deny adoptive parents' decisions the respect it accords biological parents' choices.

The Equal Protection Clause demands "close consideration" of government classifications that burden the "undeniably important" rights of "family association." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996); *see also Zablocki v. Redhail*, 434 U.S. 374, 386-88 (1978); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). By definition, grandparent visitation decisions are about "family association." Therefore, Alabama's differential treatment of adoptive and biological parents is unconstitutional unless it is necessary to achieving a compelling government interest.

To be sure, states have a vital interest in ensuring the welfare of children who live within their borders. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981). But the strength of that interest is not at issue here. Rather, the question is whether Alabama can have a regime that sharply differentiates between biological and adoptive parents, and then provides the former with a suite of protections it denies the latter. *See supra* pages 3-5 (laying out the stark differences between Section 30-3-4.2 and Section 26-10A-30). It cannot.[9]

1. The state has no basis to suppose that adoptive parents are any less committed than other parents to the best interests of their children. Indeed, the state has already vetted these individuals to ensure that they *are* committed to the welfare of the child they are seeking to adopt. Accordingly, treating the decisions of parents who have adopted their children as less worthy of deference does nothing to further the state's interest in ensuring the welfare of children.

It is true, of course, that birth parents are always biologically related to their children, and that adoptive parents need not be. But this Court has refused to give decisive weight to "the mere existence of a biological link." *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). What entitles parenthood to constitutional protection has little to do with genetics. Rather, the Constitution

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[9] In the visitation context, most states pursue their interest in protecting children by honoring parental authority over a child's upbringing, subject to laws that apply neutrally to all parents. As *Troxel v. Granville* explained, "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" interfere with the parental relationship. 530 U.S. 57, 68 (2000) (plurality opinion).

protects parenthood to safeguard an "actual relationship of parental responsibility." *Id.* at 260.

The virtues of parenthood bind adoptive families, just as they bind all families. As this Court observed forty years ago, "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977). More recently, the Court reaffirmed that parents "provide loving and nurturing homes to their children, *whether biological or adopted*." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (emphasis added). Unsurprisingly, then, empirical studies have found no real difference in the "[l]evels of warm, supportive parent communication and parental control" provided by adoptive and biological parents.[10]

2. In the Alabama Court of Civil Appeals, the State defended the constitutionality of Section 26-10A-30 by arguing that child welfare "requires" that a pre-existing "connection and bond" between a grandparent

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[10] "The finding that adoptive families were rated highly on nurturance and involvement is consistent with prior research." Seth J. Schwartz & Gordon E. Finley, *Father Involvement, Nurturant Fathering, and Young Adult Psychosocial Functioning: Differences Among Adoptive, Adoptive Stepfather, and Nonadoptive Stepfamilies*, 27 J. Fam. Issues 712, 726 (2006). This may be so because "[a]doptive parents are self-selected and must endure a lengthy and difficult process, including extensive screening and legal procedures." *Id.* Further, the quality of parenting does not differ depending on whether the adoptive parent is a stranger to the child or a family member. *Id.* at 725.

and an adopted child "not only continue, but be permitted to grow and flourish." Br. of the Ala. Att'y Gen. 10, *D.T. v. W.G.*, 2017 WL 836557 (Ala. Civ. App. Mar. 3, 2017) (No. 2160082).[11]

Even assuming the legitimacy of an interest in protecting grandparent-grandchild bonds in the face of a parent's judgment to the contrary, Alabama's decision to treat adopted parents differently is no better tailored to serve that interest than "a burlap bag," *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1685 (2015) (Alito, J., dissenting).

On the one hand, Alabama permits judges to order visitation under Section 26-10A-30 with no proof of any pre-existing connection between the grandparent and the adopted child. An Alabama probate court has discretion to order visitation in a case like *Nelson v. Nelson*, 674 N.W.2d 473 (Neb. 2004). The grandparent there had "not much contact at all" with the children she was seeking to visit. *Id.* at 480. She admitted that "she did not even acknowledge the children's presence" during a prior visit, and the court saw "no evidence of affection, kindness, tenderness, or even civility" between them. *Id.* But if an Alabama probate judge were to believe, based on his "personal experiences," that visiting grandparents can "turn[] out" to be "enjoyable," *Troxel*, 530 U.S. at 72, he would be free to order visitation.

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[11] The state has never articulated a defense of its relegation of post-adoption visitation petitions filed under Section 26-10A-30 to probate courts. Probate judges need not have legal training or experience—or a college degree—and probate courts are not required to have a full-time, official court reporter. *See supra* page 5.

On the other hand, under Section 30-3-4.2, Alabama does not permit visitation orders over a biological parent's objection even if a grandparent proves by clear and convincing evidence that she has a "significant and viable relationship" with the child—unless that grandparent can also show that the child will likely be harmed if the grandparent's petition is denied. The two are not synonymous: "[P]roof that a grandparent has a close, beneficial relationship with a child is not equivalent to proof that the child will suffer harm if that relationship is limited or terminated." *Ex parte Gentry*, No. 2160300, 2017 WL 1787932, at *13 (Ala. Civ. App. May 5, 2017).[12]

In sum, there is no real fit between Alabama's classification and the interest it purports to serve.

Such loose tailoring is especially unwarranted here. Alabama's visitation regime, like every other state's, already requires that visitation be adjudicated on an individualized basis. Every case has its own facts and is deeply personal. Against this backdrop, no claim to administrative convenience can justify the

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[12] States have chosen a variety of formulations for how to protect the constitutional right of parental decisionmaking this Court has identified. Alabama has adopted an especially parent-protective regime for biological parents in Section 30-3-4.2. It requires clear and convincing evidence and a showing of likely harm if visitation is denied. Some states have not gone quite so far in the burden they impose. *See, e.g.*, Ark. Code Ann. § 9-13-103(c)(2) (requiring a person seeking visitation to meet her burden by only a preponderance of the evidence). Petitioner takes no position as to whether the special weight afforded to a parent's judgment under *Troxel* requires a showing of harm to be overcome. But *if* Alabama affords such an extensive degree of deference to biological parents, it must afford that same deference to adoptive parents as well.

crude distinction Alabama draws between adoptive and non-adoptive parents. *Cf. United States v. Virginia*, 518 U.S. 515, 541-46 (1996) (holding, in the context of a military academy with an individualized admissions process, that stereotypical judgments about women's interests and capabilities were especially unwarranted).

3. Lastly, treating adoptive parenthood as an inferior form of parenthood implicates the Equal Protection Clause's concern with expressive harm.

Alabama's legal regime sends a pernicious message. It declares that an adoptive parent's decisions as to her child's upbringing are unworthy of respect, and that her parental status is somehow incomplete—in effect, that she is not a "real" parent. It writes into law a demeaning perception with which adoptive families are well acquainted: that a decision of a parent who has adopted a child is "not the decision of a parent." *In re Adoption of C.A.*, 137 P.3d 318, 330 (Colo. 2006) (en banc) (Coats, J., dissenting); *see also* Katarina Wegar, *Adoption, Family Ideology, and Social Stigma: Bias in Community Attitudes, Adoption Research, and Practice*, 49 Fam. Rel. 363, 363-64, 368 (2000).

Alabama's regime, as definitively construed by its supreme court, displays "depressing insensitivity" toward "a very large part of our society," *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) (plurality) (Brennan, J., concurring). This Court should intervene to ensure that adoptive parents and children not "suffer the stigma of knowing their families are somehow lesser," *Obergefell*, 135 S. Ct. at 2600. They deserve full protection of the laws.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

APPENDIX A

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2160082

D.T.

v.

W.G.

Appeal from Tuscaloosa Probate Court
(PC-16-610)

March 3, 2017

As Modified on Denial of Rehearing April 21, 2017

OPINION

THOMAS, Judge.

This is the second time that these parties have appeared before this court. *See D.T. v. W.G*, [Ms. 2150349, May 27, 2016] ___ So.3d ___ (Ala. Civ. App. 2016). As we explained in *D.T.*:

> "In November 2013, the Tuscaloosa Probate Court ('the probate court') entered a judgment approving the adoption of A.S. ('the child') by the child's maternal grandmother, D.T. ('the adoptive parent'). In July 2015, W.G. ('the paternal grandmother') filed a petition seeking an award of grandparent visitation with the child pursuant to Ala. Code 1975, § 26–10A–30. The paternal grandmother did not

> request that a summons be issued or serve the adoptive parent with the petition by certified mail as required by Rule 4(a)(1), Ala. R. Civ. P. Instead, the paternal grandmother served the petition on the adoptive parent as one would serve a motion under Rule 5, Ala. R. Civ. P., by mailing a copy of the petition to the attorney who had served as the adoptive parent's counsel in the adoption proceeding. After a hearing, which the adoptive parent did not attend, the probate court entered a judgment on November 2, 2015, awarding visitation to the paternal grandmother."[1]

(Footnotes omitted.) We dismissed the adoptive parent's appeal in *D.T.* based on our conclusion that the November 2, 2015, judgment was void because the paternal grandmother had not properly instituted her action and had not properly served the adoptive parent. *D.T.*, ___ So. 3d at ___.

After the issuance of our opinion in *D.T.*, the paternal grandmother instituted a new action seeking grandparent visitation under Ala. Code 1975, § 26–10A–30, and properly served the adoptive parent. The adoptive parent answered the complaint; in her answer, she included a constitutional challenge to § 26–10A–30. The probate court held a trial on the paternal grandmother's complaint on August 9, 2016, after which it entered a judgment on September 29, 2016, awarding the paternal grandmother visitation with the child. On October 6, 2016, the adoptive parent

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[1] In this opinion, we use the same defined terms we used in *D.T.*

filed a postjudgment motion, which the probate court denied. The adoptive parent timely appealed the September 29, 2016, judgment to this court.

The trial testimony was either not recorded or not transcribed. Pursuant to Rule 10(e), Ala. R. App. P.,[2] the parties have submitted, and the probate court has approved, an agreed statement of the case. The facts contained in the statement of the case are as follows.

The paternal grandmother testified that she was present at the birth of the child in September 2008 and that she visited with the child every other weekend during the first six months of the child's life. According to the paternal grandmother, she had offered financial assistance to the child's parents by supplying them with diapers, wipes, food, and clothing for the child. The paternal grandmother also said that she babysat the child at her home during the day and, on occasion,

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[2] Rule 10(e) provides:

> "In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and how they were decided in the trial court and *setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented*. If the statement conforms to the truth, it, together with such additions as the court may consider necessary to present fully the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the appellate court to which the appeal is taken as the record on appeal, and it shall be transmitted thereto by the clerk of the trial court within the time provided by Rule 11."

(Emphasis added.)

overnight during the early months of the child's life. After the child's parents, who had lived together but were not married, separated, the paternal grandmother said, the mother and the child had lived in the home of the mother's great-grandmother. The paternal grandmother testified that she had continued to assist the mother with the needs of the child.

In March 2010, when the child was approximately 18 months old, the adoptive parent sought and was granted custody of the child through the Tuscaloosa Juvenile Court. Since that time, the adoptive parent said, the child has resided with her. The adoptive parent formally adopted the child in 2013. At the time of the child's adoption, the child's father was incarcerated.

The paternal grandmother testified that she had hosted birthday parties for the child each year until 2013. She also testified that she had been allowed overnight visits in her own home with the child until January 2012. After the adoption was finalized, the paternal grandmother testified, the adoptive parent began to severely limit her access to the child. During 2013 and 2014, the paternal grandmother said, the adoptive parent allowed only six visits with the child; two of those visits were two-hour supervised visits in the adoptive parent's home. According to the paternal grandmother, after September 2014, the adoptive parent refused to allow the paternal grandmother to visit with the child.

The paternal grandmother testified that her last unsupervised visit with the child was on the child's fifth birthday in 2012. According to the paternal

grandmother, when she was returning the child to the adoptive parent's home, she told the child that she might not be able to visit with her for a long time. The paternal grandmother said that the child responded by stating that she "could pack a bag, climb out her window and the [paternal] grandmother could come pick her up." The paternal grandmother said that she had discouraged the child's idea.

The paternal grandmother moved from Demopolis to Louisiana in 2013 for employment-related reasons and to care for her ailing father. The paternal grandmother does not own a home in Louisiana and lives with her fiancé. She testified that the child's father is no longer incarcerated and that he is in a rehabilitation program. She stated that "she would 'absolutely not' restrict access to the child by her biological father during her visits." She also said that she intended to reunite the child with her father at some point in the future. The paternal grandmother stated that she would be present when the child visited with the father.

The adoptive parent explained that she had discontinued overnight visits with the paternal grandmother after the child had told her that, when she had become scared one night, she had gone into the paternal grandmother's bedroom, where the paternal grandmother was in bed with a man to whom the paternal grandmother was not married. The adoptive parent said that the paternal grandmother had admitted that the man had been in her bed and that he had been in her home during other overnight visits.

The adoptive parent said that she had several concerns about allowing the paternal grandmother unsupervised or overnight visitation with the child. She expressed discomfort with the fact that the paternal grandmother lives in another state and about the paternal grandmother's cohabitation with a man to whom she is not married. The adoptive parent also testified that she did not want the child to have contact with her father. The adoptive parent admitted that she had "blocked" the paternal grandmother's telephone number because the adoptive parent had become frustrated over the paternal grandmother's continual text messages requesting telephone visitation with the child and the paternal grandmother's refusal to "take 'no' for an answer."

The probate court made the following factual findings in its judgment:

> "[The child] was born on September 18, 2008, to [the biological mother] and [the father] [(referred to collectively as 'the natural parents')]. The adoptive parent is the maternal grandmother of the . . . child and [the paternal grandmother] is the natural paternal grandmother of the . . . child. Both [the adoptive parent and the paternal grandmother] were present at the . . . child's birth, and provided substantial support to her natural parents during the . . . child's infancy. [The paternal grandmother] had a visible and active presence in the . . . child's life since her birth. While the . . . child was under the care and custody of her [biological] mother, [the paternal grandmother] visited [the child] every other

weekend, assisted the . . . child's natural parents financially, provided babysitting services during the day and overnight, gifts, and paid for necessities, such as food, diapers, wipes, and clothes.

"In or about 2010, it became evident that the . . . child's natural parents could not provide the necessary care to the . . . child. [The adoptive parent], without objection from the [the paternal grandmother], obtained custody of the . . . child through the Tuscaloosa County Juvenile Court. After [the adoptive parent] was awarded custody, [the paternal grandmother] continued to see the . . . child on a regular basis and continued to provide emotional and financial support to the . . . child. [The paternal grandmother] hosted the . . . child's birthday parties at [her] home every year until 2013. The testimony of the [adoptive parent] and [the paternal grandmother] clearly established that [the paternal grandmother] had a close and loving relationship with the . . . child that benefited the . . . child.

"In 2013, unbeknownst to the [paternal grandmother], [the adoptive parent] filed a petition in this Court to adopt the . . . child. This Court granted the adoption in Case No. PC–2013–700 on November 12, 2013. After [the adoptive parent] became the . . . child's adoptive parent, [she] refused to allow [the paternal grandmother] to maintain her relationship with the . . . child. [The adoptive parent] refused to respond to text messages

> from [the paternal grandmother] seeking to talk to and visit with the . . . child for weeks. [The adoptive parent] also blocked [the paternal grandmother's] [tele]phone number because [the adoptive parent] believed that the text messages from [the paternal grandmother] were 'annoying' and because [the paternal grandmother] 'refused to take "no" for an answer,' when it came to [her] requests to see her granddaughter.
>
> "[The adoptive parent] offered no evidence to support her decision to cut-off [the paternal grandmother's] long-standing relationship with the . . . child. Nor did [the adoptive parent] offer any evidence that having a relationship with [the] paternal grandmother . . . would not be in the . . . child's best interest. Furthermore, [the paternal grandmother] is the only connection the . . . child has to the paternal side of her family and familial relationships are beneficial to the . . . child."

On appeal, the adoptive parent asserts four arguments. She first contends that the probate court erred by not appointing a guardian ad litem for the child. She next argues that § 26–10A–30 is unconstitutional, both facially and as applied to her. Finally, the adoptive parent complains that the probate court's decision to award visitation to the paternal grandmother is not supported by clear and convincing evidence that such visitation would be in the child's best interest.

We will first consider the adoptive parent's arguments regarding the constitutionality of § 26–10A–30. Although she argues that the statute is both facially unconstitutional and unconstitutional as applied to her in this particular instance, the adoptive parent's arguments regarding constitutionality are premised almost entirely on the principle that she, as the child's parent, has the fundamental right to the child's care, custody, and control, which right the United States Supreme Court, in *Troxel v. Granville*, 530 U.S. 57, 73 (2000), concluded had been violated by a Washington statute allowing third parties to seek visitation with a child over the objection of the child's parent.[3] The *Troxel* Court concluded that the judgment awarding visitation under the Washington statute amounted to an "unconstitutional infringement on [the parent's] fundamental right to make decisions concerning the care, custody, and control of her [children]." *Troxel*, 530 U.S. at 72. However, as admitted by the adoptive parent, our supreme court

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[3] In her argument that § 26–10A–30 is unconstitutional as applied to her, the adoptive parent specifically contends that the fact that § 26–10A–30 allows a request for visitation to be brought "at any time" "poses the same problem . . . as it did in *Troxel*," namely that the State has no compelling interest in promoting visitation well after a child has adjusted to her adoptive family, and that the probate court's statement in its judgment that the adoptive parent had not presented evidence indicating that visitation would not be in the child's best interest suffers from the same problem as did the judgment at issue in *Troxel*, namely that the probate court failed to give sufficient weight to the adoptive parent's decision to deny visitation or to her concerns about allowing visitation. As explained in the text, *infra*, because these arguments are premised on the application of the principles announced in *Troxel*, they are inapplicable to § 26–10A–30.

has already rejected the argument that § 26–10A–30 is unconstitutional based on the holding in *Troxel*. *See* Ex parte D.W., 835 So.2d 186 (Ala. 2002). Our supreme court explained in *Ex parte D.W.* that § 26–10A–30 did not violate the principles articulated in *Troxel* because the adoptive relationship is a status created by statute and, thus, that the legislature is free to define the rights of adoptive parents as it sees fit, even to the extent of limiting those rights to allow for the possibility of court-ordered visitation with grandparents in certain instances. *Ex parte D.W.*, 835 So.2d at 190-91; *see also Weathers v. Compton*, 723 So.2d 1284, 1286 (Ala. Civ. App. 1998) (stating that, in enacting former Ala. Code 1975, § 26–10–5, the predecessor statute to § 26–10A–30, the legislature "acknowledge[d] an exception to the general rule that an adoption order that terminates the rights of the natural parents also terminates the rights of the natural grandparents"). Although the adoptive parent argues that "a large body of law has evolved that makes clear that *Ex parte D.W.* was wrongly decided," this court is bound by the holding of *Ex parte D.W.*, and we are therefore not at liberty to reach the conclusion that the adoptive parent urges. *See* Ala. Code 1975, § 12–3–16 ("The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals . . . .").

The adoptive parent also contends that the fact that the statute places jurisdiction over such visitation issues in the probate court, which, she says, is not a

court of record[4] "in Tuscaloosa County," fails to protect her due-process right to meaningful review of the evidence. She rests her argument on one citation to authority: *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1999), in which the United States Supreme Court determined that a parent appealing the termination of his or her parental rights cannot be denied meaningful review of that judgment by a requirement that he or she prepay the costs of compiling the record on appeal. *M.L.B.* is inapposite. The adoptive parent has appealed and, as provided for in Rule 10(e), has presented an agreed statement of the case in lieu of a transcript of the proceedings. The adoptive parent has provided no authority demonstrating how the probate court's jurisdiction over adoption matters has deprived the adoptive parent of any of her rights to due process. We are not required to perform that research for her. *See Brooks v. Brooks*, 991 So.2d 293, 303 (Ala. Civ. App. 2008) ("[I]t is neither our duty nor our function to perform legal research for an appellant."). We conclude, therefore, that she has not convincingly demonstrated that the legislature's choice to place adoptions and ancillary matters under the jurisdiction of the probate court renders § 26–10A–30 unconstitutional as applied to her.

The adoptive parent next argues that § 26–10A–30 is unconstitutional as applied to her in the present case because, she says, the probate court violated her

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[4] We note that a probate court is a court of record. *See Terry v. Gresham*, 254 Ala. 349, 351 (1950); and *Whitaker v. Kennamer*, 229 Ala. 80 (1934). The fact that a probate court lacks a full-time or official court reporter does not change that fact. *Terry*, 254 Ala. at 351.

right to due process by considering ex parte communications with the paternal grandmother during the proceedings leading up to the entry of the November 2015 judgment that we reversed in *D.T.* Although a court's consideration of ex parte communications might violate a party's due-process rights, *see Ex parte R.D.N.*, 918 So.2d 100, 105 (Ala. 2005), we cannot see how a court's inappropriate consideration of ex parte communications would compel the conclusion that a *statute* was unconstitutional as applied. In any event, the adoptive parent did not make any argument to the probate court that its judgment was based on improper ex parte communications. Thus, we cannot further consider the adoptive parent's argument that the probate court violated her due-process rights by engaging in what the adoptive parent characterizes as "ex parte communications" when the paternal grandmother gave testimony at the earlier trial in this matter or otherwise communicated with the probate court. *See M.G. v. J.T.*, 90 So.3d 762, 764 (Ala. Civ. App. 2012) (declining to consider a mother's argument that a juvenile court's judgment was void because the juvenile court had allegedly engaged in ex parte communications with a guardian ad litem because the mother had failed to raise the argument in the juvenile court).

We turn now to the adoptive parent's argument that the probate court's judgment should be reversed because the probate court failed to appoint a guardian ad litem for the child, which she contends was required

by Rule 17(c), Ala. R. Civ. P.[5] The adoptive parent filed a motion seeking the appointment of a guardian ad litem for the child on August 5, 2016, four days before the date set for trial. The probate court declined to appoint a guardian ad litem for the child.[6]

Rule 17(c) reads, in pertinent part, as follows: "The court shall appoint a guardian ad litem (1) for a minor defendant, or (2) for an incompetent person not otherwise represented in an action and may make any other orders it deems proper for the protection of the minor or incompetent person." Thus, the rule *requires* the appointment of a guardian ad litem for a minor *defendant*.[7] However, the record does not indicate that the child in the present case was a defendant in the action. We therefore cannot agree with the adoptive

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[5] The adoptive parent cites other statutes that require the appointment of a guardian ad litem in other types of actions: Ala. Code 1975, § 12–15–304 (requiring appointment of a guardian ad litem for a child in dependency and termination-of-parental-rights cases when the child is a party); 26–10A–22(b) (requiring appointment of a guardian ad litem for the child in a contested adoption proceeding); and § 26–17–612(b) (requiring appointment of a guardian ad litem for a child who is a party to a paternity proceeding). However, none of those statutes are applicable to visitation proceedings in the probate court under § 26–10A–30.

[6] The adoptive parent indicates that the probate court denied her motion; however, no ruling on the motion appears in the record. The paternal grandmother appears to admit that the motion was, in fact, denied, and no order appointing a guardian ad litem is contained in the record. Thus, for purposes of this opinion, we will consider the motion seeking appointment of a guardian ad litem for the child as having been denied.

[7] Rule 17(c) permits a court to "make any other orders it deems proper for the protection of the minor"; however, the rule does not require that such an order be entered.

parent that the probate court violated Rule 17(c) by declining to appoint a guardian ad litem for the child.

The adoptive parent also relies on *English v. Miller*, 370 So.2d 968 (Ala. 1979), to support her argument that appointment of a guardian ad litem was required in the present case. At issue in *English* was the ownership of the funds in two savings accounts. *English*, 370 So.2d at 969. Ora Mae English contended that her deceased brother, Leroy English, had given the funds in the accounts to her. *Id.* Leroy's former wife, Edna Faye English, claimed that the funds had been awarded to her and their two children in a divorce action. *Id.* Each account indicated that the account holders were Leroy or Ora Mae as trustee for one of the two children. *Id.* Our supreme court reversed the trial court's judgment awarding the funds to Ora Mae because the trial court had failed to make the children, who had a potential interest in the funds and were therefore indispensable parties under Rule 19(a), Ala. R. Civ. P., parties to the action or to appoint a guardian ad litem for them. *Id.* The supreme court noted that a guardian ad litem should be appointed on remand because of "[t]he possibility that the children's interest, if any, is adverse to the interest of those made parties, including their mother, Edna Faye English." *Id.*

English is inapposite here, however, because the basis for the supreme court's reversal of the trial court's judgment was its conclusion that the children in *English* were indispensable parties to the action. Because the supreme court ordered that the children be made parties to the action, Rule 19(a) would require appointment of a guardian ad litem for them. The child

in the present case is not a party to the action; nor does the adoptive parent argue that the child is a necessary or indispensable party to the action. We conclude, therefore, that *English* does not require the probate court to appoint a guardian ad litem for the child.

Finally, we turn to the adoptive parent's argument that the probate court's decision to award the paternal grandmother visitation was not supported by the evidence. The adoptive parent admits that § 26–10A–30 does not indicate the burden of proof imposed upon the party seeking visitation under that statute. She then asserts that "that standard would have to be at least 'clear and convincing evidence.'" To support her assertion, she relies on cases interpreting former Ala. Code 1975, § 30–3–4.1, to require a clear-and-convincing-evidence burden of proof.[8] *See L.B.S. v. L.M.S.*, 826 So.2d 178 (Ala. Civ. App. 2002); and *J.W.J., Jr. v. P.K.R.*, 976 So.2d 1035, 1042 n.4 (Ala. Civ. App. 2007).

However, in light of our supreme court's holding in *Ex parte D.W.*, we cannot agree that the burden of proof required under former § 30–3–4.1 is also required to support the award of visitation to a grandparent under § 26–10A–30. Our supreme court explained in *Ex parte D.W.* that the adoptive-parent status created

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[8] Former § 30–3–4.1, a general grandparent-visitation statute, was declared unconstitutional in *Weldon v. Ballow*, 200 So.3d 654 (Ala. Civ. App. 2015). The legislature has enacted another grandparent-visitation statute, *see* Ala. Code 1975, § 30–3–4.2, which became effective August 1, 2016. The paternal grandmother did not seek visitation under the newly enacted statute, which had not become effective at the time she instituted the underlying action in the probate court.

by the adoption code specifically limited the rights of adoptive parents "by allowing the possibility of court-ordered grandparent visitation over the objections of the adopti[ve] parents," and it concluded that adoptive parents and natural parents "must be treated differently" as a result of the purely statutory nature of the adoption relationship. *Ex parte D.W.*, 835 So.2d at 191. Because the rights of adoptive parents are not equivalent to those of natural parents, the need for the clear-and-convincing-evidence burden of proof—to overcome the fundamental right of a parent to the care, custody, and control of his or her child—is not present in a grandparent-visitation case arising under § 26–10A–30. Thus, we reject the adoptive parent's argument that the probate court's judgment determining that visitation with the paternal grandmother was in the best interest of the child was required to be supported by clear and convincing evidence.

The adoptive parent further argues that the paternal grandmother failed to establish that visitation with the child would be in the child's best interest. Relying on *In re Grandparent Visitation of Cathy L.(R.)M. v. Mark Brent R.*, 217 W.Va. 319 (2005) ("*Cathy*"), and *Mizrahi v. Cannon*, 375 N.J.Super. 221 (App. Div. 2005), the adoptive parent contends that the paternal grandmother failed to demonstrate that she and the child had a recent, close relationship worth preserving or that a connection with the child's biological paternal relatives was worth maintaining. We will examine both *Cathy* and *Mizrahi*.

In *Cathy*, the West Virginia Supreme Court of Appeals considered whether an award of grandparent

visitation after an adoption of the child was proper under W. Va. Code § 48–10–502, the West Virginia statute governing grandparent visitation. The child in *Cathy* had been adopted by her paternal great-uncle and his wife. *Cathy*, 217 W.Va. at 321. The child's paternal grandmother and her husband sought visitation with the child after the adoptive parents terminated their contact with the child. *Id.* The trial court awarded visitation to the paternal grandmother and her husband, and the adoptive parents appealed. *Id.*

The *Cathy* court reversed the award of grandparent visitation based on its conclusion that the trial court had not given proper weight to the adoptive parents' preference that the child not visit with the child's biological paternal grandparents. 217 W.Va. at 328. Like the adoptive parent in the present case, the adoptive parents in *Cathy* objected to visitation, in part, because of the risk of involvement with the child's biological father. 217 W.Va. at 327. The *Cathy* court indicated that the trial court had "dismissed" the concerns of the adoptive parents, "primarily upon the basis of the court's disagreement with the [adoptive] parents regarding the degree of family strain to be occasioned by visitation and the court's perception that visitation would not seriously undermine any plans the [adoptive] parents envisioned for [the child] or her familial associations." 217 W.Va. at 328. Such dismissal of the adoptive parent's concerns based on the judge's perceptions of the best interest of the child, the *Cathy* court explained, was the basis for the decision to invalidate the Washington grandparent-visitation statute at issue in *Troxel*. *Id.* Because the

trial court did not give proper consideration to the adoptive parents' wishes and concerns, the *Cathy* court concluded, the evidence at trial did not demonstrate that visitation was in the best interest of the child. *Id.*

The adoptive parent in the present case argues that we should look to the decision in *Cathy* and determine, as that court did, that the evidence before the probate court does not support a conclusion that the child's best interest will be served by visitation with the paternal grandmother. Her concerns about the child's exposure to the paternal grandmother's fiancé and potential contact with the biological father, she says, were not given the appropriate weight or proper consideration by the probate court. Therefore, she concludes, a reversal of the award of visitation to the paternal grandmother is warranted.

We must disagree. The decision in *Cathy* is rooted in the holding of *Troxel*. As we have already explained, our supreme court has clearly differentiated the rights of a natural parent from the rights of an adoptive parent, which flow from the adoption code. *Ex parte D.W.*, 835 So.2d at 191. A probate court considering grandparent visitation under § 26–10A–30 is not required to give any special weight to the wishes of the adoptive parent. Instead, its only concern is whether the requested visitation will serve the best interest of the child.

The adoptive parent's reliance on *Mizrahi* is not as easily dismissed. In *Mizrahi*, the Appellate Division of the New Jersey Superior Court examined the propriety of a grandparent-visitation order awarding visitation to the paternal grandparents of a child who, after the

death of her mother, was being adopted by the child's great-aunt and her husband. *Mizrahi*, 375 N.J.Super. at 227. The New Jersey court determined that, under the applicable statute, N.J. Stat. Ann. § 9:2–7.1, and the caselaw interpreting it, grandparents seeking an award of visitation "must establish that denying visitation would wreak a particular identifiable harm, specific to the child, to justify interference with a parent's fundamental due process right to raise a child free from judicial interference and supervision." 375 N.J.Super. at 234. Based on its review of the record, the New Jersey court concluded that the trial court had considered the child's best interest as opposed to whether she would suffer harm if she were not allowed to visit with her paternal grandparents. 375 N.J.Super. at 232. Near the conclusion of the opinion reversing the award of grandparent visitation, the New Jersey court stated: "That the [paternal grandparents] may have had a warm relationship with [the child] until January 2001, when [the child] was three years old, does not mean that [the child] will experience harm now if visitation is not ordered." 375 N.J.Super. at 234.

The adoptive parent admits that the harm standard discussed in *Mizrahi* is inapplicable here. However, she contends that we should consider, as the New Jersey court did, that the fact that a warm and loving relationship existed between the paternal grandmother and the child in the present case during the first 18 months of the child's life does not compel the conclusion that it is in the best interest of the child to reestablish that relationship through court-ordered visitation. The adoptive parent further contends that the probate court did not have before it evidence

relating to the *specific* best interest of the child at issue; that is, she contends that the paternal grandmother failed to present evidence[9] indicating that "it was in the best interest of this particular child to have visitation with this particular grandparent." Instead, she says, the paternal grandmother "asserted only vague generalities about the benefit of adopted children having relationships with their biological relatives."

This court has set out guidelines to assist courts applying § 26–10A–30. *See Weathers*, 723 So.2d at 1287. In *Weathers*, this court explained that a trial court considering whether to grant visitation rights to a grandparent pursuant to § 26–10A–30 "must determine, after a careful consideration of all the evidence, whether [the grandparent's] continued participation in [his or her] grandchild's life after that child has been adopted by [a relative listed in § 26–10A–30] is a benefit to the child that outweighs any potential detriment." *Weathers*, 723 So.2d at 1287. In addition, the *Weathers* court noted that "[s]upportive family relationships are vital to the growth and development of a child." *Weathers*, 723 So.2d at 1287.

We must begin our review of the probate court's determination that visitation with the paternal

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[9] The adoptive parent contends that the paternal grandmother failed to present clear and convincing evidence relating to the best interest of the child. In light of our determination that the clear-and-convincing-evidence burden of proof is not applicable, we have recast the mother's argument as one contending that the burden of proof was not met because of the lack of sufficient evidence relating to the specific best interest of the child at issue.

grandmother would be in the child's best interest by noting that our review is limited to considering whether the probate court abused its discretion. *Loftin v. Smith*, 590 So.2d 323, 326 (Ala. Civ. App. 1991). Because the probate court took oral testimony, we are constrained by the ore tenus rule to presume that the factual findings of the probate court are correct unless they are "so unsupported by the evidence as to be plainly and palpably wrong." *Snipes v. Carr*, 526 So.2d 591, 592 (Ala. Civ. App. 1988). According to its judgment, the probate court found that, based on the evidence presented, the paternal grandmother and the child had "a close and loving relationship . . . that benefited the . . . child" until late 2013. The probate court also noted that the paternal grandmother was the only connection the child had to her paternal relatives and found, consistent with *Weathers*, that "familial relationships are beneficial to the . . . child."

The adoptive parent contends that the probate court improperly placed on her the burden of proving that visitation with the paternal grandmother would not be in the best interest of the child. Indeed, the probate court's judgment states that the adoptive parent had not "offer[ed] any evidence that having a relationship with [the] paternal grandmother . . . would not be in the . . . child's best interest" and had "offered no evidence to support her decision to cut off [the paternal grandmother's] long-standing relationship with the . . . child." Although we understand why the adoptive parent might believe that these statements indicate that the probate court was, in fact, requiring her to establish a basis to deny the requested visitation, we cannot agree that the

probate court placed the burden of proof on the adoptive parent. Instead, it appears that the probate court concluded that the paternal grandmother and the child had enjoyed a close, loving relationship, that that relationship was a benefit to the child, and that the adoptive parent had not presented evidence satisfying the probate court that her decision to terminate that relationship was warranted or necessary. Thus, we read the judgment as concluding that an award of visitation to the paternal grandmother was warranted because of the close, loving, and beneficial relationship that the child had enjoyed with her, that the relationship should be allowed to continue so that the child could maintain a connection with her paternal relatives, and that no evidence indicated that the child's best interest would be better served by denying the requested visitation. Based on our limited record and our deferential standard of review, we cannot conclude that the probate court abused its discretion in awarding the paternal grandmother vitiation with the child under § 26–10A–30.

Based on our supreme court's holding in *Ex parte D.W.*, we have rejected the adoptive parent's constitutional challenges to § 26–10A–30. We have also rejected her argument that the judgment should be reversed because of the probate court's failure to appoint a guardian ad litem for the child. We have further rejected the adoptive parent's contention that the appropriate burden of proof under § 26–10A–30 is the clear- and-convincing-evidence standard. Under our limited standard of review, we have determined that the evidence before the probate court supports the probate court's conclusion that the child's best interest

would be served by allowing visitation with the paternal grandmother. Accordingly, the judgment of the probate court is affirmed.

AFFIRMED.

Pittman, Moore, and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result, without writing.

APPENDIX B

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2015-2016

2150349

D.T.

v.

W.G.

Appeal from Tuscaloosa Probate Court
(PC-13-700)

May 27, 2016

THOMAS, Judge.

In November 2013, the Tuscaloosa Probate Court ("the probate court") entered a judgment approving the adoption of A.S. ("the child") by the child's maternal grandmother, D.T. ("the adoptive parent"). In July 2015, W.G. ("the paternal grandmother") filed a petition seeking an award of grandparent visitation with the child pursuant to Ala. Code 1975, § 26–10A–30. The paternal grandmother did not request that a summons be issued or serve the adoptive parent with the petition by certified mail as required by Rule 4(a)(1), Ala. R. Civ. P.[1] Instead, the paternal

[1] Rule 4(a)(1) provides, in pertinent part: "Upon the filing of the complaint, or other document required to be served in the manner of an original complaint, the clerk shall forthwith issue the required summons or other process for service upon each defendant." The Alabama Rules of Civil Procedure provide that service on an individual may be accomplished by process server,

grandmother served the petition on the adoptive parent as one would serve a motion under Rule 5, Ala. R. Civ. P.,[2] by mailing a copy of the petition to the

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see Rule 4(i)(1), by certified mail, *see* Rule 4(i)(2), or, in certain instances, by publication, *see* Rule 4.3, Ala. R. Civ. P.

[2] Rule 5 reads, in pertinent part, as follows:

> "(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. . . .
>
> ". . . .
>
> "(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or the party or by mailing it to the attorney or the party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. . . .
>
> ". . . .
>
> "(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court either before service or within a reasonable time thereafter. . . .
>
> "A certificate of service shall list the names and addresses, including the e-mail addresses of registered

attorney who had served as the adoptive parent's counsel in the adoption proceeding. After a hearing, which the adoptive parent did not attend, the probate court entered a judgment on November 2, 2015, awarding visitation to the paternal grandmother. On November 20, 2015, the adoptive parent filed a motion to set aside the November 2, 2015, judgment, arguing that the probate court lacked jurisdiction to entertain the paternal grandmother's petition because more than 30 days had elapsed since the entry of the adoption judgment in 2013[3] and because the adoptive parent had not been properly served with the petition. The probate court denied the adoptive parent's motion, and she appealed.[4]

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electronic-filing-system users, if known, of all attorneys or pro se parties upon whom the paper has been served."

[3] We note that, because an appeal of an adoption judgment must be taken within 14 days of the entry of that judgment, the probate court would have had jurisdiction to alter, amend, or vacate that judgment on its own motion for only 14 days and that the parties involved in the adoption proceeding would have had only 14 days to file postjudgment motions directed to that judgment. *See Ex parte A.M.P.*, 997 So. 2d 1008, 1013 n.3 and accompanying text (Ala. 2008) (explaining that the adoption judgment was entered on November 8, 2005, that the postjudgment motion was "timely filed" on November 22, 2005, that the postjudgment motion was denied by operation of law, and that the appeal, which was filed on December 16, 2005, had been timely filed).

[4] Based on this court's holding in *J.B.M. v. J.C.M.*, 142 So. 3d 676, 681 (Ala. Civ. App. 2013), because the judgment in the present case is not an adoption judgment, the appeal from that judgment was not required to be taken within 14 days of the entry of the judgment, and, in fact, the usual time periods applicable to probate-court judgments under the Rules of Civil Procedure apply.

On appeal, the adoptive parent argues that the November 2, 2015, judgment of the probate court is void for two reasons. First, she contends that the probate court lacks jurisdiction to entertain an action for grandparent visitation pursuant to § 26–10A–30 after the expiration of 30 days after the entry of an adoption judgment. Second, the adoptive parent argues that the paternal grandmother's failure to properly serve her with the petition under Rule 4 violated the her [sic] right to due process and, therefore, that the November 2, 2015, judgment is void.

The language of § 26–10A–30 does not support the adoptive parent's argument that the jurisdiction of the probate court to entertain a petition for grandparent visitation under that statute is limited to the time during which the adoption proceeding is pending or within 30 days after entry of the adoption judgment. Section 26–10A–30 states:

> "Post-adoption visitation rights for the natural grandparents of the adoptee may be granted when the adoptee is adopted by a stepparent, a grandfather, a grandmother, a brother, a half-brother, a sister, a half-sister, an aunt or an uncle and their respective spouses, if any. Such visitation rights may be maintained or granted at the discretion of the court *at any time prior to or after the final order of adoption is entered* upon petition by the natural grandparents, if it is in the best interest of the child."

(Emphasis added.) The plain language of the statute compels us to conclude that a probate court may

entertain an action seeking grandparent visitation under § 26–10A–30 at any time before or after a judgment of adoption is entered.[5] We must therefore reject the adoptive parent's first argument.

However, we agree with the adoptive parent that the paternal grandmother was required to comply with Rule 4(a)(1) by serving the adoptive parent with the petition seeking grandparent visitation. The paternal grandmother contends that, pursuant to § 26–10A–30, she had her choice of instituting a separate action, which, she admits, would have required service of process, or presenting a "corollary claim" within the original adoption action, which, she contends, requires only Rule 5 service of her initial pleading. Not surprisingly, the paternal grandmother has presented no authority for the startling contention that she could seek an order awarding grandparent visitation without having to perfect service on the adoptive parent

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[5] We note that the predecessor statute to § 26–10A–30, former Ala. Code 1975, § 26–10–5(b), also provided that grandparent visitation could be established after the entry of an adoption judgment:

> "Although at one time in this state adoption automatically cut off the grandparents' visitation rights, such has not been the case since 1984 when the legislature enacted what is now codified as Ala. Code (1975), § 26–10–5(b) (1986 Repl. Vol.). Under this statute, following a final order of adoption, 'at the discretion of the court, visitation rights for the natural grandparents of the minor grandchildren may be maintained, or allowed upon petition of modification at any time after the final order of adoption is entered.'"

Snipes v. Carr, 526 So. 2d 591, 593 (Ala. Civ. App. 1988).

because her claim is "corollary" to the original adoption action. Our attempt to locate a reference in Alabama law to a "corollary claim" has failed to reveal the use of that term in any reported opinion.

If the paternal grandmother is under the impression that she could institute a new action seeking grandparent visitation by motion and serve the adoptive parent pursuant to Rule 5, she is mistaken. The document the paternal grandmother filed in the probate court cannot be construed as a mere motion. "As one court concisely has stated, 'the office of a motion is not to initiate new litigation, but to bring before the court for some ruling some material but incidental matter arising in the progress of the case in which the motion is filed.' " *Aqleh v. Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 96 (2010) (quoting *State v. McNerny*, 239 Neb. 887, 890 (1992)).

> "A motion is distinguishable from the more formal application for relief by petition or complaint. A motion is not an independent right or remedy; it is confined to incidental matters in the progress of a cause. A motion relates to some question that is collateral to the main object of the action and is connected with and dependent upon the principal remedy. It is not consonant with regular procedure to raise in a motion wholly distinct and independent matters which generally should be the subject of a formal petition or complaint."

Donald J. v. Evna M., 147 Cal. Rptr. 15, 18 (1978) (citations omitted). No action was pending before the probate court at the time the paternal grandmother

filed the document requesting visitation, and the document requested specific relief based on her right to visitation under § 26–10A–30 as opposed to some collateral or incidental relief arising during the pendency of litigation. Thus, the document that the paternal grandmother filed was not a motion.

In Alabama, "[a] civil action is commenced by filing a complaint with the court." Rule 3(a), Ala. R. Civ. P. A "complaint" is defined as "[t]he initial pleading that starts a civil action. . . . In some states, this pleading is called a *petition*." *Black's Law Dictionary* 344 (10th ed. 2014).

> "In general, a 'petition' is a formal document filed in court and served on all parties, which commences the process by which a party may obtain judicial relief, and provides the opposing party with notice of the requested relief. As a pleading, it is the plaintiff's or claimant's written statement of fact which invokes the jurisdiction of the court, sets out the cause of action, and seeks relief. A party may initiate, bring, or create a suit, where before no suit existed, by filing an original petition to invoke judicial process, or, after someone else creates a lawsuit by filing an original petition, may seek to intervene for good cause."

61A Am. Jur. 2d *Pleading* § 110 (2010) (footnotes omitted). The document the paternal grandmother filed invoked the jurisdiction of the probate court to adjudicate her claim for grandparent visitation

pursuant to § 26–10A–30, and, therefore, it was a petition.

The paternal grandmother's filing of the *petition* commenced an action for grandparent visitation.[6] According to Rule 4(a)(1), "[u]pon the filing of the complaint, . . . the clerk shall forthwith issue the required summons or other process for service upon each defendant." We explained in *Farmer v. Farmer*, 842 So. 2d 679, 681 (Ala. Civ. App. 2002), that Rule 4(a)(1) requires that, "after a proper filing, service be made by use of a summons or other process issued by the clerk of the court."

Furthermore, it is well settled that an action instituted to *modify* an existing judgment based on changed circumstances is "a separate action that requires a proper filing, the payment of a filing fee, and service." *Estrada v. Redford*, 855 So. 2d 551, 554 (Ala. Civ. App. 2003) (citing *Ex parte Davidson*, 782 So. 2d 237, 240 (Ala. 2000), and *Farmer*, 842 So. 2d at 680-81). The paternal grandmother's petition requests modification of the adoption judgment, which did not

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[6] We recognize that the filing of a complaint is not always sufficient to amount to the commencement of an action. *See*, *e.g.*, *Weaver v. Firestone*, 155 So. 3d 952, 963 (Ala. 2013) (explaining that "the mere filing of a complaint is *not* a sufficient act in and of itself to commence an action for purposes of satisfying the statute of limitations"). However, because we are not here confronted with an issue regarding the commencement of an action within the applicable limitations period, we are using the term "commencement" to indicate that the paternal grandmother's action of filing the petition instituted a new action seeking independent relief as opposed to merely requesting a ruling on a collateral or incidental matter in pending litigation. *See* discussion of the term "motion," *supra*.

include an award of visitation, to award her visitation with the child. Therefore, the paternal grandmother's petition commenced a new modification action, and she was required to properly serve the adoptive parent pursuant to Rule 4(a)(1). *Farmer*, 842 So. 2d at 681.

> "'One of the requisites of personal jurisdiction over a defendant is "perfected service of process giving notice to the defendant of the suit being brought." *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 884 (Ala. 1983) . . . . A judgment rendered against a defendant in the absence of personal jurisdiction over that defendant is void. *Satterfield v. Winston Industries, Inc.*, 553 So. 2d 61 (Ala. 1989).'"

Austin v. Austin, 159 So. 3d 753, 759 (Ala. Civ. App. 2013) (quoting *Horizons 2000, Inc. v. Smith*, 620 So. 2d 606, 607 (Ala. 1993)). The paternal grandmother's failure to serve the adoptive parent with the petition pursuant to Rule 4(a)(1) deprived the probate court of jurisdiction, and its judgment is therefore void. *Ex parte Pate*, 673 So. 2d 427, 428-29 (Ala. 1995) ("Failure of proper service under Rule 4 deprives a court of jurisdiction and renders its judgment void."). Because the probate court's judgment is void, it will not support an appeal. *Farmer*, 842 So. 2d at 681. Accordingly, the adoptive parent's appeal is dismissed.

APPEAL DISMISSED.

THOMPSON, P.J., and MOORE and PITTMAN, JJ., concur.

DONALDSON, J., concurs in the result, without writing.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
[SEAL]
August 25, 2017

1160679

Ex parte D.T. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: D.T. v. W.G.) (Tuscaloosa Probate Court: PC-16-610; Civil Appeals : 2160082).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 25, 2017:

Writ Denied. No Opinion. Stuart, C.J. – Bolin, Parker, Shaw, Main, and Sellers, JJ., concur. Murdock and Bryan, JJ., dissent. Wise, J., recuses herself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 25th day of August, 2017.

Julia Jordan Weller
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

Ex parte D.W. and J.C.W. (In re J.S. and E.S.

v.

D.W. and J.W.)

1001467

Decided: February 8, 2002

Rehearing Denied April 12, 2002

OPINION

WOODALL, Justice.

This Court granted certiorari review to determine whether § 26–10A–30, Ala. Code 1975, is unconstitutional, as the Court of Civil Appeals held in this case that it was. *J.S. v. D.W.*, 835 So. 2d 174 (Ala. Civ. App. 2001). Presiding Judge Yates adequately stated the relevant facts in that opinion; there is no need to repeat them here. The issue presented is one of first impression before this Court. We reverse the judgment of the Court of Civil Appeals.

I.

The Alabama Adoption Code, which became effective January 1, 1991, is codified at § 26–10A–1 *et seq.*, Ala. Code 1975. The constitutionality of the following section of the Alabama Adoption Code is at issue in this case:

> "Post-adoption visitation rights for the natural grandparents of the adoptee may be granted when the adoptee is adopted by a stepparent, a grandfather, a grandmother, a brother, a half-

> brother, a sister, a half-sister, an aunt or an uncle and their respective spouses, if any. Such visitation rights may be maintained or granted at the discretion of the court at any time prior to or after the final order of adoption is entered upon petition by the natural grandparents, if it is in the best interest of the child."

§ 26–10A–30, Ala. Code 1975. In short, that section allows the "natural grandparents of the adoptee" to petition for "post-adoption visitation rights" in the context of intrafamily adoptions. The section clearly abrogates, under certain circumstances, the common-law rule, which did not allow grandparents a legal right of visitation. *See Ex parte Bronstein*, 434 So. 2d 780, 783 (Ala. 1983).

II.

Under the authority of § 26–10A–30, the trial court granted the petitioners visitation rights. The adopting parents appealed to the Court of Civil Appeals. That court reversed the judgment of the trial court, holding that § 26–10A–30 unconstitutionally infringes upon the adoptive parents' fundamental right to parent. The Court of Civil Appeals based its holding upon its interpretation and application of the recent decision of the United States Supreme Court in *Troxel v. Granville,* 530 U.S. 57 (2000). The Court of Civil Appeals discussed *Troxel* at length in its opinion, stating in part:

> "While this appeal was pending, the United States Supreme Court handed down an opinion in which six Justices of that Court affirmed the Washington Supreme Court's decision striking

down Washington's nonparental-visitation statute as an unconstitutional infringement on parents' fundamental rights to rear their children. *Troxel v. Granville*, 530 U.S. 57 (2000). In *Troxel,* the Supreme Court stated that, with regard to child-visitation rights, 'the right of parents to make decisions concerning the care, custody, and control of their children' is a fundamental right protected by the Due Process Clause. The Supreme Court struck down the Washington statute, which allowed 'any person' at 'any time' to seek visitation rights with a child and provided that visitation might be awarded if 'visitation may serve the best interest of the child.' 530 U.S. at 67.

"The plaintiffs in *Troxel* were the paternal grandparents of two illegitimate children of their deceased son; they sought visitation with the children. The grandparents requested two weekends of overnight visitation per month and two weeks of visitation during the summer. The mother did not oppose the visitation, but, instead, objected to the amount of visitation requested by the grandparents. The mother requested that the grandparents have one day of visitation per month, with no overnight stay. The trial court granted the grandparents visitation for one weekend per month, one week during the summer, and four hours on each grandparent's birthday.

"The mother appealed. The Washington Court of Appeals reversed the trial court's order and dismissed the grandparents' petition for lack of

standing. On review, the Washington Supreme Court held that the grandparents had standing but that the statute was unconstitutional for two reasons. First, the court found that the statute did not require that a person seeking visitation make a showing that in the absence of the requested visitation the child was at risk, and such a showing, the court held, is required before the state can interfere with parents' rights to rear their children. Second, the court held that the statute was too broad in allowing 'any person' at 'any time' to seek visitation and requiring only that the visitation serve the best interests of the child.

"The Supreme Court of the United States affirmed the Washington Supreme Court's judgment, concluding that what it called the 'breathtakingly broad' statute, as applied to the mother, violated her due-process rights to make decisions concerning the care, custody, and control of her children. In reaching its decision, the Supreme Court noted that the statute contained no requirement that the parent's decision be given any presumption of validity or any special weight. 530 U.S. at 70. The Supreme Court held that because the grandparents had not alleged that the mother was unfit, it must be presumed that the mother had acted in the best interests of her children. 530 U.S. at 68. The problem, the Supreme Court said, was not that the trial court intervened, but that in so doing it gave no special weight to the mother's determination of

her children's best interests. 530 U.S. at 69-70. Indeed, the trial court presumed the opposite and placed the burden on the mother to prove that visitation would not be in the best interests of her children. 530 U.S. at 69-70.

"The Supreme Court's plurality opinion in *Troxel* is also notable for the issues it left unanswered. First, the Court declined to determine whether, as a condition precedent to visitation, the Due Process Clause requires a showing of harm or potential harm to the child. The Court did not define 'the precise scope of the parental due process right in the visitation context.' 530 U.S. at 73. The Court did not issue a per se holding that all nonparental visitation statutes are unconstitutional. 530 U.S. at 73-74. The members of the plurality agreed with Justice Kennedy's statement in his dissent that the 'constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied.' 530 U.S. at 73. The reason the Court did not make a per se ruling on constitutionality is that states, in ruling on the constitutionality of their own nonparental-visitation statutes, have made these determinations in the past on a case-by-case basis, because the outcome depends on the application of those statutes. 530 U.S. at 73-74. The *Troxel* Court noted differing provisions in various state statutes governing grandparent visitation. 530 U.S. at 73-74. This too, would

> affect the constitutionality of a particular statute."

J.S. v. D.W., 835 So. 2d at 179-80.

The Court of Civil Appeals focused upon the fundamental right of parents to rear their children, the linchpin of the United States Supreme Court's holding in *Troxel.* However, *Troxel* involved the rights of a natural mother, while this case involves the rights of adopting parents in the limited context of intrafamily adoptions. In our opinion, the Court of Civil Appeals erred in overlooking this significant distinction.

III.

In considering the constitutionality of § 26–10A–30, we must remember that "[i]t is well established that this Court should be very reluctant to hold any act unconstitutional." *Ex parte Boyd*, 796 So. 2d 1092, 1094 (Ala. 2001). In *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 9-10 (1944), cert. dismissed, 325 U.S. 450 (1945), this Court stated:

> "Uniformly, the courts recognize that [the] power [to strike down a statute as unconstitutional] is a delicate one, and to be used with great caution. . . . It follows that, in passing upon the constitutionality of a legislative act, the courts uniformly approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government. All these principles are embraced in the simple statement that *it is the recognized duty of the court to sustain the act unless it is clear*

> *beyond reasonable doubt that it is violative of the fundamental law.*
>
> "Another principle which is recognized with practical unanimity, and leading to the same end, is that the courts do not hold statutes invalid because they think there are elements therein which are violative of natural justice or in conflict with the court's notions of natural, social, or political rights of the citizen, not guaranteed by the constitution itself. Nor even if the courts think the act is harsh or in some degree unfair, and presents chances for abuse, or is of doubtful propriety. All of these questions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies, and are matters with which the courts have no concern. This principle is embraced within the simple statement that *the only question for the court to decide is one of power, not of expediency or wisdom.*"

(Emphasis added.) (Citations omitted.) In light of these principles, the relevant issue is quite simple—did the Legislature have the power to qualify the rights of adopting parents by enacting § 26–10A–30? We hold that the Legislature had such power, and that it properly exercised it.

"The right of adoption . . . is purely statutory, and was never recognized by the rules of common law." *Hanks v. Hanks*, 281 Ala. 92, 99 (1967). "Adoption . . . is a *status* created by the state acting as *parens patriae,* the sovereign parent." *Ex parte Bronstein*, 434

So. 2d at 781. Therefore, the rights of adopting parents are purely statutory, as defined in the Alabama Adoption Code.

As a general rule, "the adoption of a child . . . creates the status of parent and child, with the duty of care, maintenance, training and education, along with the right to the custody, control and services of the child. *Buttrey v. West*, 212 Ala. 321 (1924)." *Law v. Bush*, 239 Ala. 612, 614 (1940). In fact, the Alabama Adoption Code provides that "[a]fter adoption, the adoptee shall be treated as the natural child of the adopting parent or parents and shall have all rights and be subject to all of the duties arising from that relation." *See* § 26–10A–29(a), Ala. Code 1975. This general rule would appear to support the conclusion that, under Alabama law, adopting parents have the same right as the natural mother in *Troxel* to make decisions concerning the care, custody, and control of their child. However, because we are construing the statutory rights of the adopting parents, we must look beyond the general rule concerning their rights.

In construing a statute, the first rule is that the intent of the Legislature should be effectuated. *Boackle v. Bedwell Constr. Co.,* 770 So. 2d 1076 (Ala. 2000). "[W]e must consider it as a whole and must construe [the statute] reasonably so as to harmonize all of its provisions." *James v. McKinney*, 729 So. 2d 264, 267 (Ala. 1998). When two sections of an act conflict, the last in order of arrangement controls. *Alabama State Bd. of Health ex rel. Baxley v. Chambers County*, 335 So. 2d 653 (Ala. 1976). Applying these well-established principles of statutory construction, we must

determine the effect of § 26–10A–30 upon the general rule stated in § 26–10A–29(a).

It was the clear intent of the Legislature in enacting § 26–10A–30 to give the trial court the authority to grant post-adoption visitation rights to the natural grandparents of the adoptee, when the adoptee is adopted by a family member. The only reasonable conclusion is that the Legislature intended to limit the rights of the adopting parents by allowing the possibility of court-ordered grandparent visitation over the objections of the adopting parents. Any other conclusion would fail to give any effect to § 26–10A–30, in violation of this Court's duty to harmonize the statutory provisions in order to give effect to all parts of the statute.

IV.

Under the facts of this case, adopting parents, whose rights are exclusively dependent upon statutory law, must be treated differently than natural parents. The Court of Civil Appeals erred in failing to note this distinction and, as a result, erroneously held that *Troxel* compelled the reversal of the judgment of the trial court.

The judgment of the Court of Civil Appeals is reversed, and the case is remanded for an order or further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, LYONS, BROWN, HARWOOD, and STUART, JJ., concur.

JOHNSTONE, J., concurs specially.

MOORE, C.J., and SEE, J., concur in the result.

JOHNSTONE, Justice (concurring specially).

I concur in the main opinion. I add that the respondents J.S. and E.S., the adoptive parents, do not, in the certiorari review before us, challenge the standing of the petitioners D.W. and J.C.W. to sue as "natural grandparents" within the meaning of § 26–10A–30, Ala. Code 1975, to obtain rights of visitation with the baby adopted by the respondents J.S. and E.S. Before the Court of Civil Appeals, they did unsuccessfully challenge the standing of the petitioners D.W. and J.C.W. on the ground that they are not the adoptee-baby's natural grandparents, but rather his *great* grandparents.

The facts are that the adoptee-baby's mother is not the biological daughter of the petitioners D.W. and J.C.W. but is, rather, their biological granddaughter, whom they adopted as their own daughter before she conceived and bore the adoptee-baby. Because the respondents do not maintain their challenge to the petitioners' standing before us, we need not consider whether the petitioners' standing is impaired by our holding that "[u]nder the facts of this case, adopting parents, whose rights are exclusively dependent upon statutory law, must be treated differently than natural parents." That is, we need not consider whether the petitioners' not being the biological parents of their adoptive daughter, who is the mother of the adoptee-baby, impairs their standing to sue as "natural grandparents" under § 26–10A–30.

APPENDIX E

Alabama Code 1975 § 30-3-4.2
§ 30-3-4.2. Grandparent visitation

(a) For the purposes of this section, the following words have the following meanings:

(1) GRANDPARENT. The parent of a parent, whether the relationship is created biologically or by adoption.

(2) HARM. A finding by the court, by clear and convincing evidence, that without court-ordered visitation by the grandparent, the child's emotional, mental, or physical well-being has been, could reasonably be, or would be jeopardized.

(b) A grandparent may file an original action in a circuit court where his or her grandchild resides or any other court exercising jurisdiction with respect to the grandchild or file a motion to intervene in any action when any court in this state has before it any issue concerning custody of the grandchild, including a domestic relations proceeding involving the parent or parents of the grandchild, for reasonable visitation rights with respect to the grandchild if any of the following circumstances exist:

(1) An action for a divorce or legal separation of the parents has been filed, or the marital relationship between the parents of the child has been severed by death or divorce.

(2) The child was born out of wedlock and the petitioner is a maternal grandparent of the child.

(3) The child was born out of wedlock, the petitioner is a paternal grandparent of the child, and paternity has been legally established.

(4) An action to terminate the parental rights of a parent or parents has been filed or the parental rights of a parent has been terminated by court order; provided, however, the right of the grandparent to seek visitation terminates if the court approves a petition for adoption by an adoptive parent, unless the visitation rights are allowed pursuant to Section 26-10A-30.

(c)(1) There is a rebuttable presumption that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child.

(2) To rebut the presumption, the petitioner shall prove by clear and convincing evidence, both of the following:

a. The petitioner has established a significant and viable relationship with the child for whom he or she is requesting visitation.

b. Visitation with the petitioner is in the best interest of the child.

(d) To establish a significant and viable relationship with the child, the petitioner shall prove by clear and convincing evidence any of the following:

(1)a. The child resided with the petitioner for at least six consecutive months with or without a parent present within the three years preceding the filing of the petition.

b. The petitioner was the caregiver to the child on a regular basis for at least six consecutive months within the three years preceding the filing of the petition.

c. The petitioner had frequent or regular contact with the child for at least 12 consecutive months that resulted in a strong and meaningful relationship with the child within the three years preceding the filing of the petition.

(2) Any other facts that establish the loss of the relationship between the petitioner and the child is likely to harm the child.

(e) To establish that visitation with the petitioner is in the best interest of the child, the petitioner shall prove by clear and convincing evidence all of the following:

(1) The petitioner has the capacity to give the child love, affection, and guidance.

(2) The loss of an opportunity to maintain a significant and viable relationship between the petitioner and the child has caused or is reasonably likely to cause harm to the child.

(3) The petitioner is willing to cooperate with the parent or parents if visitation with the child is allowed.

(f) The court shall make specific written findings of fact in support of its rulings.

(g)(1) A grandparent or grandparents who are married to each other may not file a petition seeking an order for visitation more than once every 24 months absent a showing of good cause. The fact that a grandparent or

grandparents who are married to each other have petitioned for visitation shall not preclude another grandparent from subsequently petitioning for visitation within the 24-month period. After an order for grandparent visitation has been granted, the parent, guardian, or legal custodian of the child may file a petition requesting the court to modify or terminate a grandparent's visitation time with a grandchild.

(2) The court may modify or terminate visitation upon proof that a material change in circumstances has occurred since the award of grandparent visitation was made and a finding by the court that the modification or termination of the grandparent visitation rights is in the best interest of the child.

(h) The court may award any party reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, guardian ad litem fees, investigative fees, expenses for court-appointed witnesses, travel expenses, and child care during the course of the proceedings.

(i)(1) Notwithstanding any provisions of this section to the contrary, a petition filed by a grandparent having standing under Chapter 10A of Title 26, seeking visitation shall be filed in probate court and is governed by Section 26-10A-30, rather than by this section if either of the following circumstances exists:

a. The grandchild has been the subject of an adoption proceeding other than the one creating the grandparent relationship.

b. The grandchild is the subject of a pending or finalized adoption proceeding.

(2) Notwithstanding any provisions of this section to the contrary, a grandparent seeking visitation pursuant to Section 12-15-314 shall be governed by that section rather than by this section.

(3) Notwithstanding any provisions of this section to the contrary, a parent of a parent whose parental rights have been terminated by a court order in which the petitioner was the Department of Human Resources, shall not be awarded any visitation rights pursuant to this section.

(j) The right of a grandparent to maintain visitation rights pursuant to this section terminates upon the adoption of the child except as provided by Section 26-10A-30.

(k) All of the following are necessary parties to any action filed under this section:

(1) Unless parental rights have been terminated, the parent or parents of the child.

(2) Every other person who has been awarded custody or visitation with the child pursuant to court order.

(3) Any agency having custody of the child pursuant to court order.

(l) In addition, upon filing of the action, notice shall be given to all other grandparents of the child. The petition shall affirmatively state the name and address upon whom notice has been given.

(m) Service and notice shall be made in the following manner:

(1) Service of process on necessary parties shall be made in accordance with the Alabama Rules of Civil Procedure.

(2) As to any other person to whom notice is required to be given under subsection *(l)*, notice shall be given by first class mail to the last known address of the person or persons entitled to notice. Notice shall be effective on the third day following mailing.

(n) Notwithstanding the foregoing, the notice requirements provided by this section may be limited or waived by the court to the extent necessary to protect the confidentiality and the health, safety, or liberty of a person or a child.

(o) Upon filing an action under this section, after giving special weight to the fundamental right of a fit parent to decide which associations are in the best interest of his or her child, the court may, after a hearing, enter a pendente lite order granting temporary visitation rights to a grandparent, pending a final order, if the court determines from the evidence that the petitioner has established a significant and viable relationship with the child for whom he or she is requesting visitation, visitation would be in the best interest of the child, and any of the following circumstances exist:

(1) The child resided with the grandparent for at least six consecutive months within the three years preceding the filing of the petition.

(2) The grandparent was the caregiver of the child on a regular basis for at least six consecutive months within the three years preceding the filing of the petition.

(3) The grandparent provided significant financial support for the child for at least six consecutive months within the three years preceding the filing of the petition.

(4) The grandparent had frequent or regular contact with the child for at least 12 consecutive months within the three years preceding the filing of the petition.

(p) As a matter of public policy, this section recognizes the importance of family and the fundamental rights of parents and children. In the context of grandparent visitation under this section, a fit parent's decision regarding whether to permit grandparent visitation is entitled to special weight due to a parent's fundamental right to make decisions concerning the rearing of his or her child. Nonetheless, a parent's interest in a child must be balanced against the longrecognized interests of the state as parens patriae. Thus, as applied to grandparent visitation under this section, this section balances the constitutional rights of parents and children by imposing an enhanced standard of review and consideration of the harm to a child caused by the parent's limitation or termination of a prior relationship of a child to his or her grandparent.