

No. 17-913

IN THE
Supreme Court of the United States

D.T.,

Petitioner,

v.

W.G.,

Respondent.

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

**BRIEF OF ADOPTION SCHOLARS AND
ORGANIZATIONS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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January 26, 2018

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INTEREST OF *AMICI CURIAE*¹

The scholars and organizations submitting this brief are family law professionals who share an expertise in adoption law and policy and a commitment to promoting the best interests of adopted children, including by affording all legal parents equal dignity, rights, and responsibilities concerning the upbringing of their children.

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¹ Pursuant to Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution intended to fund preparation or submission of this brief. Pursuant to Rule 37.2, after timely notification, all parties consented to the filing of this brief.

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Advokids is a non-profit organization that advocates on behalf of children in the foster care system. It works to promote, protect, and secure for all California foster children the legal rights and protections to which they are entitled, including each child's right to safety, security, and a permanent home. By law, adoption is the preferred permanent placement for foster children who cannot be safely returned to parental custody. Advokids' programs include policy advocacy with respect to issues affecting children in the foster care system. To that end, Advokids has participated as *amicus curiae* in both state and federal court proceedings affecting the rights and interests of children in foster care.

The Center for Adoption Policy (CAP) is a New York based non-profit organization. Its mission is to provide research, analysis, advice, and education to practitioners and the public about current legislation and practices governing ethical domestic and intercountry adoption in the United States, Europe, Asia, Latin America, and Africa. CAP is an independent entity. It is not affiliated with any agency or entity involved in the placement of children.

The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and

their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

The Child Rights Project (CRP) is a project of Emory Law School engaging faculty and students in researching and writing friend of the court briefs in cases of importance to children and youth. CRP's mission is to advocate for marginalized children whose voices might otherwise not be heard. Its aim is to highlight for the judiciary and the public the often unanticipated impact of court decisions on children and youth. The CRP's goal is to train new generations of lawyers in multidisciplinary research and advocacy.

The National Council For Adoption (NCFA), founded in 1980, is an adoption advocacy nonprofit that promotes a culture of adoption through education, research, and legislative action. NCFA is an authoritative voice for adoption, passionately committed to the belief that every child deserves to thrive in a nurturing, permanent family. We serve children, birthparents, adoptive families, adult adoptees, adoption agencies, adoption professionals, U.S. and foreign governments, policy makers, media, and the general public as the authoritative voice for adoption throughout the United States.

Voice for Adoption (VFA) develops and advocates for improved adoption policies. Recognized as a national leader in special needs adoption, VFA works closely with federal and state legislators, as well as other child welfare organizations, to make a difference in the lives of the 117,000 children in foster care who are waiting to be adopted and the families who adopt children from foster care.

SUMMARY OF ARGUMENT

More than two million minor children in the United States have been adopted, many of them by their relatives, stepparents, and former foster parents. By placing children in loving homes where their parents can ensure their health, education, and well-being, adoption enables them to thrive.

Every state defines “parent” by statute. State family laws provide many ways for persons, married and single, to establish a legal parent-child relationship with children who may or may not be their biological offspring. Once established, this legal relationship confers upon all parents, including adoptive parents, the same rights and responsibilities regarding the rearing of their children. Nonetheless, the courts of Alabama permit differential treatment of biological and adoptive parents who object to third-party visitation. Alabama’s refusal to afford some adoptive parents the due deference other parents enjoy regarding the upbringing of their children undermines parental autonomy and creates harmful disincentives to adoption.

A parent is a parent. If adoption is anything, it is a final and binding commitment to a child in need of love and support. Children, too, have a liberty interest in being shielded from third-party intrusions into their families. Laws that treat adoptive parents as having inferior childrearing rights perpetuate stigmas surrounding adoption and inject legal uncertainty into familial relationships. The issue presented in this case is therefore of tremendous nationwide and constitutional importance. *Amici* respectfully urge the Court to grant the petition for a

writ of certiorari and recognize that all legal parents have the same Fourteenth Amendment rights.

ARGUMENT

I. ADOPTION IS SOCIALLY BENEFICIAL AND SHOULD BE ENCOURAGED AND PROMOTED

State and federal courts have long recognized that adoption is an essential means “to create a legal connection between the adoptive parent and a child,” “to preserve and protect the best interests of the child,” “to secure for the child a permanent, stable environment,” and “to achieve finality in the placement of children.” 2 Am. Jur. 2d *Adoption* § 8 (Nov. 2017 update) (collecting cases).

The most recently available U.S. Census data indicate that approximately two million children, or 2% of minors in the United States, live with adoptive parents.² Every year, about 135,000 children are adopted in the United States, including by relatives and stepparents.³ In 2016, more than 50,000 children were adopted out of the foster care system,⁴

² See Rose M. Kreider & Daphne A. Lofquist, *Adopted Children and Stepchildren: 2010*, Current Population Reports, P20-572, 4 (Table 1), U.S. CENSUS BUREAU (Apr. 2014), <https://tinyurl.com/yc2w4vtp>.

³ See *Adoption Statistics*, Adoption Network Law Ctr. (2013), <https://tinyurl.com/y7tchdst>.

⁴ U.S. Dep’t of Health & Human Servs., Admin. for Children & Families, Admin. on Children, Youth & Families, Children’s Bureau, AFCARS Report No. 24, Preliminary Estimates for FY 2016 as of Oct. 20, 2017 (Nov. 30, 2017), <https://tinyurl.com/ycrtuld3> (“AFCARS Report”).

and more than 5,000 international adoptions occurred.⁵ The need to encourage adoption is perhaps strongest in the context of the foster care system, where many children continue to hope for the stability of a permanent family, but remain unplaced. In 2016, almost 118,000 children in foster care were awaiting adoption.⁶

Adoption offers innumerable benefits to children and their families, nurturing familial relationships that might otherwise not be possible. It should be no surprise that those relationships pay dividends: adopted children generally demonstrate improved outcomes, as they are integrated into families with the emotional and material resources to provide for them:

A substantial body of research testifies to the success of adoption. On a variety of outcome measures, adopted children do as well as children living with their biogenetic parents and significantly better than children whose parents are indifferent or abusive, or children who spend years in foster care, group homes, or other institutional settings. Love and nurture do indeed temper nature and mitigate the effects of any ... history of maltreatment.⁷

⁵ U.S. Dep't of State, *Annual Report on Intercountry Adoptions Narrative* (2017), <https://tinyurl.com/y8hvt78y>.

⁶ AFCARS Report, *supra* note 4.

⁷ Joan Heifetz Hollinger, *Adoption: Legal and Public-Policy Perspectives* in *The Child: An Encyclopedic Companion* 28, 28 (Richard A. Shweder, ed., Univ. of Chicago Press, 2009).

Once an adoption is finalized, children receive all of the legal benefits of a permanent family. They are entitled to receive care and support, they will inherit from their adoptive parents,⁸ and they may be involuntarily removed from their parents only by a judicial determination of abuse, neglect, or unfitness.⁹

II. ALABAMA'S DISTINCTION BETWEEN NATURAL AND ADOPTIVE PARENTS HARMS THE NATION'S ADOPTION SYSTEM AND JEOPARDIZES PARENTAL RIGHTS

A judicial decree of adoption severs the relationship of a child to his or her biological parents and establishes, for all legal purposes, a new family.¹⁰ Adoption occurs only after an individualized judicial assessment of parental fitness. At that point, Alabama law itself 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.” Ala. Code § 26-10A-29(a).

⁸ See *Intestate Inheritance Rights for Adopted Persons*, Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., Children’s Bureau (2016), <https://tinyurl.com/navjav9>.

⁹ See *Grounds for Involuntary Termination of Parental Rights*, Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., Children’s Bureau (2016), <https://tinyurl.com/y7kavx4f>; see also *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (clear and convincing evidence required to terminate parent-child relationship).

¹⁰ See Margaret C. Jasper, *The Law of Adoption* § 1:1 (2012).

“Like marriage, adoption is a means of family formation that is no less fundamental because it is characterized by choice and commitment rather than blood ties and procreation.”¹¹ Once that legal parental relationship is established, there should be no doubt that “the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).¹²

This Court has previously explained that “[a]doption ... is recognized as the legal equivalent of biological parenthood.” *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 n.51 (1977). And as the Supreme Judicial Court of Massachusetts has recognized: “Adoptive parents have the same protected interest in their relationship with the adoptive child as biological parents, and are entitled to the same presumption they will act in the best interest of the child in making decisions regarding the child, including decisions about visitation.” *In re Adoption of Ilona*, 459 Mass. 53, 64 (2011).

Alabama’s “grandparent visitation” statute, Ala. Code § 26-10A-30, as interpreted and upheld by the

¹¹ Barbara Bennett Woodhouse, *Waiting for Loving: The Child’s Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 328 (2006).

¹² Accord, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

Alabama Supreme Court, *Ex parte D.W.*, 835 So. 2d 186 (Ala. 2002), trespasses on these fundamental rights. It provides for “[p]ost-adoption visitation rights for the natural grandparents of the adoptee” if the adoptee is adopted by a relative or a stepparent. Ala. Code § 26-10A-30; *Ex parte D.W.*, 835 So. 2d at 188 (“In short, that section allows the ‘natural grandparents of the adoptee’ to petition for ‘post-adoption visitation rights’ in the context of intrafamily adoptions.”). This law reduces adoptive family autonomy through an unconstitutional distinction. The statute permits the state to override some adoptive parents’ judgment regarding the care, custody, and control of their children, even in circumstances where the state would protect other legal parents’ identical judgment.

The Alabama Supreme Court concluded that this statutory distinction between natural and adoptive parents was intentional, holding 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. ... [A]dopting parents, whose rights are exclusively dependent upon statutory law, must be treated differently than natural parents.” *Ex parte D.W.*, 835 So. 2d at 191. Following the Alabama Supreme Court’s holding and rejecting any constitutional challenges, the court below ordered parental grandparent visitation, over the adoptive parent’s reasoned objection, because “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.” Pet. App. 18a.

Alabama’s reasoning that adoptive rights may be limited because adoption is a creature of statute is

unpersuasive. *All* legal definitions of parentage are derived from statutes.¹³ It is state law that defines married couples as the legal parents of their biological offspring, and it is state law that requires unmarried fathers to first establish their paternity and a substantial relationship to their child before affording them parental rights.¹⁴ State laws do not interpret “parentage” to “place the genetic relationship of the parties above all other considerations.” *Leguillon v. Leguillon*, 707 N.E.2d 571, 579 (Ohio Ct. App. 1998). “A biological parent is not necessarily a child’s parent under [state] law.” *Astrue v. Capato*, 566 U.S. 541, 552 (2012).

State laws recognize many legal parents who have no biological connections to their children. This includes individuals whose children are conceived through assisted reproduction that involves donor eggs or sperm.¹⁵ State laws also presume that a husband is a legal parent of a child born to his wife during their marriage (even in some circumstances

¹³ See *Definitions of “Parent” and Related Variations in Child Welfare*, Nat’l Conference of State Legislatures, <https://tinyurl.com/ycxh5jmc> (50-state survey).

¹⁴ See generally *The Rights of Unmarried Fathers*, Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., Children’s Bureau (2014), <https://tinyurl.com/yeh7rybc>.

¹⁵ Acts adopted in about half of U.S. states have “determined that the sperm donor is excluded from paternity status, including any related parental obligations and rights. ... [T]he legal father is the inseminated wife’s husband who agreed to the insemination of his wife.” Yehezkel Margalit, *Artificial Insemination from Donor (Aid) – From Status to Contract and Back Again?*, 21 B.U. J. SCI. & TECH. L. 69, 83-84 (2015).

where the husband is not the biological father).¹⁶ And states recognize the legal parentage of same-sex couples raising children.¹⁷ The Uniform Parentage Act has long recognized that parent-child relationships can be legally formed outside of natural reproduction.¹⁸ As this Court said decades 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 blood relationship.” *Smith*, 431 U.S. at 844.

In examining the statutory question, the Alabama courts failed to appreciate the *constitutional* import of the statute’s disparate treatment of parents. Under the U.S. Constitution, differentiation between

¹⁶ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (plurality opinion) (upholding California law providing that a child born to a married woman living with her husband is presumed to be a child of the marriage); *Boone v. Ballinger*, 228 S.W.3d 1, 10 (Ky. Ct. App. 2007) (husband’s parental status upheld against biological father “in order to prevent the harm that inevitably results from the destruction of the bond that develops between a ‘psychological father’ and a child who was born during his marriage, and who has been raised as his own daughter or son”).

¹⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (“Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents.”). This Court previously reversed an Alabama Supreme Court opinion refusing to extend full faith and credit to the parental rights of a same-sex couple as established by adoption in Georgia. *V.L. v. E.L.*, 136 S. Ct. 1017, 1022 (2016).

¹⁸ See Uniform Parentage Act § 201 (2017), <https://tinyurl.com/yaxpf34u>; Uniform Parentage Act § 201 (2002), <https://tinyurl.com/ybr25cuw>.

a “natural parent” and an “adoptive parent” is untenable. As *Troxel* recognized, “the traditional presumption [is] that a fit parent will act in the best interest of his or her child,” including by limiting visitation with other family members. 530 U.S. at 69-70 (plurality opinion). That presumption applies equally—no more and no less—to “natural” and adoptive parents. Nothing in *Troxel* implies, much less recognizes, a legal distinction between biological and adoptive parents. This Court previously recognized that none exists. *Smith*, 431 U.S. at 844. Alabama’s law impermissibly eliminates that presumption for some adoptive parents, allowing a court, in its discretion, to substitute its own judgment regarding the custody, care, and best interests of the child. See Ala. Code § 26-10A-30.

Petitioner has already set forth the widespread disagreement between the States regarding visitation rights as applied to biological versus adoptive parents. See Pet. Br. at 10-15. That lack of consistency alone counsels in favor of granting the writ. Certiorari is further recommended by the severe nationwide implications of permitting state interference in the permanency and autonomy of legal families. Because all parentage is statutorily defined, Alabama’s distinction between adoptive and “natural” parents threatens the constitutional rights of *all* legal parents—whether adoptive or biological—by intruding upon a legal parent’s decisions regarding deeply rooted values of family privacy and autonomy.

This Court should grant the petition for a writ of certiorari and hold that legal declarations of parenthood confer equal rights and responsibilities concerning the upbringing of adoptive children. The practical effect of any less robust regime would be to dis-

courage binding familial relationships and deter adoptions. Laws treating adoptive parents as inferior increase the fear and stigma of their family not being viewed as “real.”

Finally, there is reason to be especially concerned about protecting the autonomy of adoptive parents. Adopted children, including those adopted by a relative, often have suffered loss and trauma due to events that precipitated their adoptive placement. They may be especially in need of safety and stability and especially vulnerable to disruption or conflict. Adoptive parents, no less than biological parents, are best situated to decide when it is beneficial for children to spend time with relatives. This Court struck a delicate balance in *Troxel* and it should not be disturbed. Prospective adoptive and non-biological parents will understandably be hesitant to undertake and solidify a “parental” relationship if their decisions as to the child’s welfare, including who visits with the child, can be overridden by state court judges.

The Fourteenth Amendment commands respect for all parents’ judgment regarding the care, custody, and control of their children. Alabama’s grandparent visitation statute impinges upon that constitutional imperative.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the petition for a writ of certiorari.

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January 26, 2018