No. _____

In the
Supreme Court of the United States

E.R.G. and D.W.G.,
Petitioners,

v.

E.H.G. and C.L.G.,
Respondents.

On Petition for a Writ of Certiorari to the Alabama Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court's splintered decision in *Troxel v. Granville* expressly reserved "the primary constitutional question" presented in that case. 530 U.S. 57, 73 (2000). In the decade since *Troxel*, the States have split roughly evenly—at present, 19 to 18—over the proper resolution of the reserved question. That question, which this case squarely presents, is:

Whether, under the Fourteenth Amendment's Due Process Clause, grandparents who seek court-ordered visitation with their grandchildren over the parents' objection invariably must prove that some "compelling" circumstance—such as parental unfitness or prevention of actual harm to the children—necessitates visitation, or whether, instead, constitutional requirements are satisfied where the court considering the visitation request applies a "presumption" in favor of the parents' wishes and imposes on the petitioning grandparents the burden of proving that visitation is in the children's best interest.

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STATEMENT OF JURISDICTION

The Alabama Supreme Court rendered its decision on June 10, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In relevant part, the Fourteenth Amendment to the United States Constitution provides: "No State shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The operative text of Alabama's Grandparent Visitation Act, Ala. Code § 30-3-4.1, is reprinted in the appendix. *See* App. 264a-267a.

STATEMENT

This case arises out of what one of the concurring justices below called "the uncertain legacy of the plurality opinion" in *Troxel v. Granville*, 530 U.S. 57 (2000), App. 78a (Bolin, J., concurring in the result), and it presents the question that *Troxel* expressly reserved—and that has now generated a whopping 19-to-18 split among the States. That question is whether, under the Due Process Clause, grandparents seeking court-ordered visitation with their grandchildren over the parents' objection must invariably prove that some "compelling" circumstance—such as parental unfitness or prevention of actual harm to the children—justifies visitation, or whether, instead, constitutional requirements are satisfied where the court considering the visitation request applies a "presumption" in favor of the parents' wishes and imposes on the petitioning grandparents the burden of proving that visitation is in the children's best interest.

A. *Troxel v. Granville*

In *Troxel*, a plurality of this Court observed that "[b]ecause grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties." 530 U.S. at 64. To that end, "[a]ll 50 States have statutes that provide for grandparent visitation in some form." *Id.* at 73 n.*. The plurality recognized, however, that in certain circumstances, grandparent-visitation determinations can implicate parents' "substantive-due-process" right to "make decisions con-

cerning the care, custody, and control of their children." *Id.* at 66.

The *Troxel* plurality concluded that "as applied" in the unique circumstances of that case, *see id.* at 65, 67, 68, 73, Washington State's visitation statute violated the Due Process Clause. A "combination of … factors" drove the plurality's determination. *Id.* at 68, 72. First, the Washington statute itself was "breathtakingly broad." *Id.* at 67. In particular, it applied not just to grandparents but, rather, allowed "*any person*" to petition for visitation "*at any time*" and thereby "subject any decision by a parent concerning visitation of the parent's children to state-court review." *Id.* Worse, under the statute, a parent's determination that visitation would not be in the child's best interest was "accorded no deference" or, for that matter, "any weight whatsoever." *Id.* Second, the record revealed that, in fact, the state trial court there had given "no special weight at all" to the parent's judgment. *Id.* at 69. Not only had the trial court not applied a "presumption that fit parents act in the best interests of their children," it had "applied exactly the opposite presumption" by placing on the parent "the burden of *disproving* that visitation would be in the best interest of" her children. *Id.* at 68-69. Finally, the plurality emphasized that "there [was] no allegation" that the parent there had "ever sought to cut off visitation entirely"; rather, the parent merely intended to "restrict" the grandparents' visitation to "one short visit per month and special holidays." *Id.* at 71.

Because the plurality "rest[ed its] decision on the sweeping breadth" of the Washington statute and "the application of that broad, unlimited power in th[at] case," it reserved judgment on the "primary constitutional

question" presented—"whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73. Notably, though, while bracketing the question, the plurality stressed that "constitutional protections in th[e visitation] area are best 'elaborated with care'" and that courts should "be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.*

Justices Souter and Thomas separately concurred in the judgment. Because substantive due process is such a "'treacherous field'" of the law, Justice Souter voted to invalidate the Washington statute solely on the ground that it "swe[pt] too broadly" by allowing "any person at any time to request (and a judge to award) visitation rights …." *Id.* at 76-77 (citation omitted). Justice Thomas noted that "neither party ha[d] argued that [the Court's] substantive due process cases were wrongly decided" and concluded that under existing precedent the Washington statute did not pass constitutional muster. *Id.* at 80.

Justices Stevens, Scalia, and Kennedy each dissented. Addressing the question that the plurality had reserved, Justice Stevens emphasized that this Court has "never held that the parent's liberty interest in [the parent-child] relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm." *Id.* at 86. He said that "[i]t is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting

interests"—child, parent, and grandparent—"that give rise to disputes such as this," and he thought it "clear" that the Due Process Clause "leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child." *Id.* at 90-91.

Justice Scalia concluded that "[j]udicial vindication of 'parental rights' under a Constitution that does not even mention them" risked "ushering in a new regime of judicially prescribed, and federally prescribed, family law." *Id.* at 92-93. Like Justice Stevens, he believed that visitation issues were better left to state legislatures and judges. *Id.* at 93. Justice Kennedy likewise rejected the suggestion that the Due Process Clause imposes a "categorical rule that third parties who seek visitation must always prove the denial of visitation would harm the child." *Id.* at 96-97. He, too, preferred to leave visitation issues, at least presumptively, to the "family courts in the 50 States," which "confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise." *Id.* at 101.

Since *Troxel*'s issuance, the question reserved there—concerning the showing that grandparents must make to obtain visitation with their grandchildren over the parents' objection—has sharply divided the States. As described in detail below, 18 States to address the issue post-*Troxel* have concluded that the Due Process Clause imposes a rigid requirement that petitioning grandparents prove that some "compelling" circumstance—such as parental unfitness or prevention of actual harm to the child—necessitates visitation. *See infra* at 20-24. Nineteen States, by contrast, have concluded that constitutional requirements are satisfied by a more flex-

ible regime in which the visitation court applies a "presumption" in favor of the parents' wishes and imposes on the grandparents the burden of proving that visitation is in the child's best interest. *See infra* at 24-29.

This persistent conflict is an important one, not only because "all 50 States have statutes that provide for grandparent visitation in some form," *Troxel*, 530 U.S. at 73 n.*, but also because the visitation issue dramatically affects the lives of countless children, parents, and grandparents nationwide.

In the decision below, the Alabama Supreme Court deepened the split when it invalidated Alabama's Grandparent Visitation Act on its face.

B. Alabama's Grandparent Visitation Act

As applicable here, Alabama's Grandparent Visitation Act, Ala. Code § 30-3-4.1 ("GVA" or "Act"), operates in two steps. *First*, it narrows the class of grandparents who can seek court-ordered visitation with their grandchildren. In particular, the GVA provides that "any grandparent may file an original action for visitation rights to a minor child if it is in the best interest of the minor child" *and* one of five extenuating circumstances exists. One of those circumstances, applicable here in light of the respondent parents' outright denial of visitation, is that the child "is living with both biological parents, who are still married to each other … and either or both parents have used their parental authority to prohibit a relationship between the child and the grandparent." *Id.* § 30-3-4.1(b)(5).

Second, the GVA prescribes the conditions under which qualifying grandparents can obtain visitation. At

that step, the Act initially states a flat rule that "[v]isitation shall not be granted if the visitation would endanger the physical health of the child or impair the emotional development of the child." *Id.* § 30-3-4.1(d). The Act then goes on to provide that "[i]n determining the best interests of the child, the court shall consider the following" factors:

> (1) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents.
>
> (2) The preference of the child, if the child is determined to be of sufficient maturity to express a preference.
>
> (3) The mental and physical health of the child.
>
> (4) The mental and physical health of the grandparent or grandparents.
>
> (5) Evidence of domestic violence inflicted by one parent upon the other parent or the child. If the court determines that evidence of domestic violence exists, visitation provisions shall be made in a manner protecting the child or children, parents, or grandparents from further abuse.
>
> (6) Other relevant factors in the particular circumstances, *including the wishes of any parent who is living*.

Id. § 30-3-4.1(d) (emphasis added).[1]

C. The Facts of the Case

This case presents a pure question of federal constitutional law. There is no dispute concerning the underlying facts. "Briefly, th[ose] facts, when viewed in a light most favorable to the findings of fact entered by the trial court," are as follows:

> [The parents] were married in 1995 and … their marriage produced two children, G.C.G., who was born in 1996, and A.K.G., who was born in 1997. [The paternal grandparents] enjoyed what the trial court characterized as a loving relationship with the children for most of their young lives. The testimony of several witnesses indicates that [the paternal grandmother], largely with the consent or acquiescence of the parents, took a particularly active role in rearing the children, including fostering relationships between the children and their extended paternal family and friends. [The mother] testified that when the children were very young, the two families had basically blended together and had acted as a single unit, with the paternal grandmother asserting a great deal of control over the care of the children, sometimes even in violation of the mother's desires. However, beginning in the spring of 2004, around the time the paternal grandparents, who had long supported the parents, began having financial problems, the par-

[1] The GVA was recently amended on a prospective basis; however, those amendments do not apply to this case. *See infra* at 17 n.4.

> ents began curtailing the time the children spent with the paternal grandparents. According to the testimony of the paternal grandparents, which the trial court found to be accurate, in February 2005, after the paternal grandparents withheld from the parents the proceeds from the sale of inventory from the business operated by [the father] and [the paternal grandfather], the parents forbade the paternal grandparents from visiting with the children. The parties submitted to family counseling to resolve their impasse, which resulted temporarily in an agreement allowing the paternal grandparents to visit with the children four hours per week, subject to certain guidelines as to the children's care; however, after three or four months, the parents terminated that arrangement. The paternal grandparents have had little to no personal interaction with the children since that time, but they have placed signs communicating their continued love for the children on the route to the children's school and have seen the children at public events, such as the children's softball games.

App. 113a-115a.

In short, this is the case that Justice Kennedy said in *Troxel* was "sure to arise"—in which the "third party, by acting in caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto." 530 U.S. at 98 (Kennedy, J., dissenting).

D. The Trial Court's Decision

After the parents terminated all contact between the grandparents and the grandchildren, the grandparents filed a visitation petition in Jefferson County Circuit Court. In answering, the parents asserted that the GVA was unconstitutional both "on its face and as applied to them." App. 115a. The trial court appointed a guardian ad litem to represent the children. *Id.*

The trial court thereafter conducted a bench trial at which it heard the testimony of 13 witnesses, including both parents, both grandparents, extended family members, and family friends. App. 169a-226a. The court also interviewed the grandchildren in camera. App. 226a. Following the trial, the guardian ad litem submitted his report. Based on his review of the applicable law, "including … *Troxel v. Granville*," his discussions with counsel, and his interviews of the parents, grandparents, and children—who, he found, "ha[d] a guarded desire to see the paternal grandparents if it will not cause trouble"—the guardian concluded that visitation was "in the best interests of the children." App. 251a-252a, 256a.

After reviewing the guardian's report, the trial court rendered its decision. Pursuant to Ala. Code 30-3-4.1(e), which requires trial courts to "make specific written findings of fact in support of [their] rulings" in visitation cases, the court filed a comprehensive 49-page opinion, in which it detailed the circumstances of the case.

After briefly describing the pertinent provisions of the GVA, the trial court recounted in detail the testimony given by each of the 13 witnesses. App. 167a-226a. The court then made a series of "findings of fact." App.

226a-230a. Concerning the circumstances leading to the visitation dispute, the trial court found, among other things, that—

- the grandchildren "are perfectly normal, happy, active, intelligent young ladies";
- from 1995 to 2005, the grandparents and parents "maintained an extended family relationship in a manner which was beneficial to all parties";
- the grandparents financially "sustain[ed] both families," which "b[ound] them both together into an extended nuclear family";
- the rupture between the parents and grandparents "coincided with the collapse of the [grandparents'] financial ability to support both families";
- "[w]hen the underlying financial ability of [the grandparents] to sustain both families expired in 2005, the foundation or basis for the relationship of the parties expired with it"; and
- the parents "became more assertive and controlling in the absence of [the grandparents'] financial resources."

App. 226a-229a. Indeed, the trial court found that the parents terminated the grandparents' contact with the grandchildren *because* the grandparents could no longer subsidize the parents' lifestyle. *See* App. 238a (finding that "the confluence of the collapse of [the grandparents'] financial ability" and the parents' "exertion of

control and restricted visitation *[was] less coincidental and more causal*" (emphasis added)).

Concerning the impact of the parents' termination of the grandparents' relationship with their grandchildren, the trial court found that it was "meant to be directed toward" the grandparents and "had the effect" of "[c]ompletely alienating the minor children from their paternal grandparents, with whom they had previously established strong relationships." App. 229a-230a.

Having found the relevant facts, the trial court then made its "findings of law." It began by acknowledging that parents "have a fundamental constitutional right as those persons primarily charged with the care, custody and control of their own children." App. 230a. Then, by citation to *Troxel* and a follow-on Alabama case, the court expressly "recognize[d] the presumption that the [parents'] wishes are presumed to be in the best interests of their children." App. 234a. To meet their "burden under the [GVA]," the court held, the grandparents must present "clear and convincing evidence" rebutting the presumption that "the [parents'] wishes to terminate exposure of their children to their paternal grandparents [are] in the best interests of said minor children." *Id.*

In considering the statutory factors bearing on the "best-interest" calculation, the trial court acknowledged that the parents "do not wish [the grandparents] to have any contact with their children" and that "[u]nder the constitution, this presumption is to be entertained by the Court as in the best interests of the said minor children." App. 237a. The court concluded, however, that other factors weighed heavily on the other side of the balance. *See* App. 235a-237a. Among others, the court referred to

"the preference of the children," who were 10 and 12 at the time and who "both expressed a desire to visit with their paternal grandparents and particularly with their friends with whom they would visit at their grandparents' home." App. 236a.

After "reviewing [the grandparents'] evidence in rebuttal of th[e parental] presumption," the trial court concluded as follows: "The Court, therefore, after having engaged the presumption in favor of the … parents[,] is convinced, through clear and convincing evidence, that the [parents'] exertion of control over the lives of their children to the extent of isolating them from their relationship with their grandparents and alienating them from an otherwise loving relationship, is not in the best interests of the said minor children." App. 237a, 239a-240a. On that basis, the court granted the grandparents limited visitation rights, including in-person visits on Friday afternoons each week, the day before each child's birthday, and Christmas afternoon, as well as daily, but "not … excessive," telephone contact. App. 241a.

After the trial court heard and denied the parents' motion to vacate the visitation order (App. 147a-165a), the parents appealed.

E. The Alabama Court of Civil Appeals' Decision

Over the dissent of one of its members, the Alabama Court of Civil Appeals reversed the trial court's visitation order. The court of appeals held that the trial court's ruling—"that, in order to overcome the presumption in favor of the parents' denial of grandparent visitation, the paternal grandparents had to prove by clear and convincing evidence … that such visitation served

the children's best interests" (App. 138a)—was insufficiently protective of parents' rights under the Due Process Clause. The appellate court "agree[d] with the parents that the trial court erroneously failed to require the paternal grandparents to prove that the denial of visitation would cause the children harm." *Id.*

The court of appeals traced the post-*Troxel* history of grandparent-visitation case law, and noted that a number of States have held that visitation is permissible "when sufficiently proven by the petitioning grandparent to be in the best interests of the child." App. 123a-124a. (citing cases). Nonetheless, the court sided with the States on the other side of the divide, whose courts have held that a "compelling interest" is required to justify visitation and that "a court cannot award grandparent visitation without clear and convincing evidence demonstrating that denial of the requested visitation would harm the child." App. 131a (citing cases).

The court of appeals declined to invalidate the GVA on its face. App. 137a. Instead, it held that "[b]ecause the trial court awarded visitation to the paternal grandparents without the requisite showing of harm, the trial court unconstitutionally applied the Act to the parents." App. 139a.

F. The Alabama Supreme Court's Decision

In a divided decision that spans some 134 pages, the Alabama Supreme Court "affirm[ed] the judgment of the Court of Civil Appeals," albeit "on a rationale different from the rationale given by that court." App. 1a. In particular, rather than deciding the case narrowly on statutory or "as-applied" grounds, the Alabama Supreme

Court broadly invalidated the GVA on its face and "in its entirety." App. 29a; *accord* App. 25a ("[W]e declare the entire Act unconstitutional and therefore unenforceable."); App. 78a (Murdock, J., concurring specially) ("unconstitutional on its face"); App. 91a (Shaw, J., joined by Stuart, J., concurring in the result) ("unconstitutional on its face").[2]

The lead opinion, authored by Justice Parker, began by invoking the "right of parents to direct the upbringing of their children" as "a right protected by the Fourteenth Amendment." App. 12a. From the *Troxel* plurality's recognition that "there is a presumption that fit parents act in the best interests of their children," 530 U.S at 68, Justice Parker inferred the following rule: "[T]he Constitution requires that a prior and independent finding of parental unfitness must be made before the court may proceed to the question whether an order disturbing a parent's 'care, custody, and control' of his or her child is in that child's best interests." App. 17a. Thus, he said, "[t]he state's compelling interest is limited to overruling the decisions of unfit parents," and "[i]n the absence of clear and convincing proof that a parent is un-

[2] Although the lead opinion in the Alabama Supreme Court was a plurality opinion, there is no question that a seven-justice majority invalidated the GVA on its face on the ground that the Act violates parents' federal substantive-due-process rights. *See* App. 78a (Murdock, J., concurring specially) (explaining that "seven Justices … conclud[ed] that § 30–3–4.1 is unconstitutional"). Indeed, the Alabama Supreme Court has since unanimously confirmed that "[t]his Court, in *Ex parte E.R.G.*, __ So.3d ___ (Ala. 2011), declared the Alabama Grandparent Visitation Act unconstitutional in its entirety." *Ex parte A.S.*, No. 1091156, __ So. 3d ___, 2011 WL 2937419, at *1 (Ala. July 22, 2011).

fit, the state's basis for intervention through the judicial system evaporates." App. 17a-18a.

Justice Parker concluded that because it impacts fit parents' right to control the upbringing of their children, the GVA is "subject to strict scrutiny" (App. 19a) and must, therefore, serve a "compelling" interest (App. 19a, 20a, 23a, 24a, 25a). But, he said, the GVA "looks only to the interests of the child," and while "[t]hose interests are incredibly important … they do not rise to level of a compelling state interest." App. 23a. Because the GVA "fails to limit [its] operation … to those cases where there is a compelling state interest," he found the entire act unconstitutional on its face. App. 27a.

Justice Parker acknowledged that "the Court in *Troxel* did not apply a strict-scrutiny analysis or require the harm standard, but required only that 'special weight' be given to the determination of a fit parent as to what is in the best interests of the child." App. 26a. But he found this "special weight" criterion to be "lacking" in the GVA because "[t]he 'wishes of any parent who is living' are merely among the '[o]ther relevant factors' the court should 'consider.'" App. 22a, 26a-27a. (Curiously, the lead opinion never dealt with the fact, noted above, that the trial court here *expressly* applied "the presumption in favor of the … parents" and placed on the grandparents the "burden … to thus overcome the said presumption" through "clear and convincing evidence." App. 234a, 239a.

Justices Murdock, Bolin, and Shaw each filed concurring opinions explaining their votes to invalidate the GVA on federal constitutional grounds. *See* App. 48a-

91a.[3] Justice Bolin, who before ascending to the Alabama Supreme Court had for 16 years handled family-law matters as a probate judge, concurred "reluctantly." App. 78a. He found it "regrettable" that the parents, having initially "created, nurtured, cultivated, and encouraged" a "close and loving relationship between their children and the grandparents," then, "in apparent retaliation for the grandparents' inability to continue to provide financial support and resources to the 'fit' parents," "callously pulled the carpet of grandparental love out from under the feet of their own children." App. 84a-85a.

Justice Main dissented in an opinion joined by Chief Justice Cobb. He acknowledged the right of parents to direct the upbringing of their children, but denied that the right is "absolute" (App. 106a) or that the Due Process Clause invariably requires proof of "harm" as a prerequisite to grandparent visitation (App. 101a). Rather, he contended, visitation decisions are highly contextual determinations involving "three distinct groups of people: children, parents, and grandparents" (App. 91a), and "should be made on a case-by-case basis" (App. 102a).[4]

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[3] Justice Parker also filed a separate concurrence in his own lead opinion, in which he offered a legal and moral history of parental prerogatives. App. 30a-48a.

[4] The Alabama Legislature recently amended the GVA on a prospective basis. *See* Ala. Act. 2011-562. In relevant part, the amendment—which by its terms only became effective on September 1, 2011, well after the Alabama Supreme Court's decision here (*see id.* § 2)—provides that "[i]f the child is living with one or both biological … parents, there shall be a rebuttable presumption … that the parent or parents with whom the child is living know what is in the best interest of the child." *Id.* § 1. Because the amendment's effective

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for the following compelling reasons, which are addressed in turn below:

(1) there is a square, widespread, and entrenched split among the States concerning the question presented, which is a pure question of federal constitutional law that this Court reserved a decade ago in *Troxel*;

(2) the question is vitally important, not only because every State in the country has a grandparent-visitation statute but also because the visitation issue dramatically affects the lives of countless children, parents, and grandparents;

(3) the Alabama Supreme Court's decision invalidating the GVA on its face and "in its entirety" is erroneous on a number of levels; and

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date post-dates the decision below by nearly three months, it does not apply to petitioners' case and is thus not relevant here. Moreover, and in any event, even on a going-forward basis the amendment does nothing to resolve the massive split among the States, which persists unabated. *See infra* at 19-31. (Unlike Congress, which can settle an existing circuit split by amending a federal statute to embrace one of two competing interpretations, a single state legislature writing to a federal constitutional issue cannot—no matter what it says—resolve a broad-ranging conflict like the one at issue here.) The question presented therefore remains a "live" one, both in the context of this particular case and among the States more generally. Indeed, the recent amendment of the GVA further underscores the need for this Court's intervention: State legislatures are attempting to conform their statutes to federal constitutional requirements—often under the compulsion of state-court decisions—but *they have no idea what the true constitutional target i*s.

(4) this case presents an ideal vehicle through which to address the constitutional issue, in that it squarely presents the question and is uncomplicated by factual disputes that often plague family-law cases.

* * *

I. The Alabama Supreme Court's Decision Deepens A Gaping Split Among States Concerning The Question Presented.

As explained above, in *Troxel*, this Court invalidated a lower court's application of Washington State's "breathtakingly broad" visitation statute—which allowed "*any person*" to seek visitation "*at any time*." 530 U.S. at 67. The plurality opinion sustained the as-applied challenge because, in ruling on the visitation request before it, the lower court had given "no special weight at all" to the parent's determination that visitation was not in her children's best interest and, in fact, had "applied exactly the opposite presumption" by placing on the parent "the burden of *disproving* that visitation would be in the best interest" of her children. *Id.* at 69. This Court reserved judgment on the broader question whether the Due Process Clause invariably requires grandparents to demonstrate that some compelling circumstance—such as prevention of harm to the child—necessitates visitation. *Id.* at 73.

Almost immediately, state courts began to divide over what, exactly, the *Troxel* plurality meant in saying that parents' wishes are entitled to "special weight." As matters now stand, there is a massive divide among the States, with 18 having concluded that the Due Process

Clause imposes a rigid requirement that petitioning grandparents invariably must prove that some "compelling" circumstance justifies visitation, and 19 others having concluded, to the contrary, that constitutional requirements are satisfied so long as the court considering the visitation request applies a "presumption" in the objecting parents' favor and imposes on the petitioning grandparents the burden of proving that visitation is in the child's best interest.

A. The Split Is Square, Widespread, and Entrenched.

1. *Eighteen States require proof that some "compelling" circumstance—such as parental unfitness or prevention of actual harm to the child—necessitates visitation.*

In the decision below, Alabama joined 17 other States in concluding that the Due Process Clause requires grandparents seeking court-ordered visitation to prove that some "compelling" circumstance—such as parental unfitness or prevention of actual harm to the child—justifies visitation.

The South Carolina Supreme Court's decision in *Camburn v. Smith*, 586 S.E.2d 565 (S.C. 2003), fairly illustrates the reasoning adopted by the courts on the compelling-circumstances side of the divide. The court there began by reciting that "[u]nder *Troxel*, the court must give 'special weight' to a fit parent's decision regarding visitation" and "must allow a presumption that a fit parent's decision is in the child's best interest." *Id.* at 567. The court then went on to hold that this "presumption" in the parents' favor "may be overcome only by

showing compelling circumstances, such as significant harm to the child, if visitation is not granted." *Id.* at 568. Thus, the court concluded, "[b]efore visitation may be awarded over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest." *Id.*

The highest courts in the following States have likewise held that the Due Process Clause requires grandparents to prove that visitation is warranted by some "compelling" circumstance:

Arkansas	*Linder v. Linder*, 72 S.W.3d 841, 858 (Ark. 2002) ("[t]here must be some other special factor such as harm to the child or custodial unfitness that justifies state interference").
Connecticut	*Roth v. Weston*, 789 A.2d 431, 445 (Conn. 2002) (grandparents must prove "that the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm").
Georgia	*Clark v. Wade*, 544 S.E.2d 99, 105 (Ga. 2001) ("state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in

harm to the child").

Hawaii	*Doe v. Doe*, 172 P.3d 1067, 1079-80 (Haw. 2007) ("the party petitioning for visitation [must] demonstrate that the child will suffer significant harm in the absence of visitation").
Iowa	*In re Marriage of Howard*, 661 N.W.2d 183, 191 (Iowa 2003) ("there must be a showing of harm to the child beyond that derived from the loss of the helpful, beneficial influence of the grandparents").
Maine	*Rideout v. Riendeau*, 761 A.2d 291, 300-01 (Me. 2000) (grandparents must prove "urgent" or "compelling" reasons for visitation, including "harm consisting of a threat to physical safety or imminent danger").
Maryland	*Koshko v. Haining*, 921 A.2d 171, 192-93 (Md. 2007) (grandparents must make "a threshold showing of either parental unfitness or exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children who are the subject of the petition").
Massachusetts	*Blixt v. Blixt*, 774 N.E.2d 1052, 1060 (Mass. 2002) (grandparents must "prove that the failure to grant visita-

	tion will cause the child significant harm by adversely affecting the child's health, safety, or welfare").
Mississippi	*Stacy v. Ross*, 798 So. 2d 1275, 1280 (Miss. 2001) ("forced, extensive unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents").
New Hampshire	*In re R.A. and J.M.*, 891 A.2d 564, 580-81 (N.H. 2005) ("the custody award must be necessary for the State to enforce its compelling interest in protecting the child from … emotional harm").
New Jersey	*Moriarty v. Bradt*, 827 A.2d 203, 223 (N.J. 2003) ("in every case in which visitation is denied, the grandparents bear the burden of establishing by a preponderance of the evidence that visitation is necessary to avoid harm to the child").
Vermont	*Craven v. McCrillis*, 868 A.2d 740, 742-43 (Vt. 2005) (grandparents must "'provid[e] evidence of compelling circumstances,'" as by "proving parental unfitness or that significant harm to the child will result in the absence of a visitation order").
Virginia	*Williams v. Williams*, 501 S.E.2d

	417, 418 (Va. 1998) ("before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation").
Washington	*In re Parentage of C.A.M.A.*, 109 P.3d 405, 413 (Wash. 2005) ("the application of the 'best interests of the child' standard rather than a 'harm to the child' standard is unconstitutional").

Also on the compelling-circumstances side of the split are the States of Illinois, Michigan, and Texas, all of which, in order to alleviate constitutional concerns in light of *Troxel*, have amended their grandparent-visitation statues to require a heightened showing—typically that visitation is necessary to prevent harm to the child. *See* 750 Ill. Comp. Stat. Ann. 5/607(a-5)(3); Mich. Comp. Laws Ann. § 722.27b(4)(b); Tex. Fam. Code Ann. § 153.433(a)(2).

2. *Nineteen States have adopted a more flexible rule that requires the court considering a visitation request to apply a "presumption" in favor the parents' wishes.*

Nineteen States have rejected the notion that the Due Process Clause so rigidly constrains state courts' visitation decisions and have held that federal constitutional requirements are satisfied so long as, in the particular case, the court considering the visitation request applies a "presumption" in favor of the parents' wishes

and imposes on the grandparents the burden of proving that visitation is in the best interest of the child.

The Ohio Supreme Court's decision in *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005), is illustrative. The court there expressly refused to apply an "overwhelmingly clear circumstances" criterion. *Id.* at 1172. "[N]othing in *Troxel*," the court said, "indicates that th[e] presumption" that a fit parent acts in a child's best interest "is irrefutable"; accordingly, the "trial court's analysis of the best interests of a child need not end once a parent has articulated his or her wishes." *Id.* In other words, "[b]y stating in *Troxel* that a trial court must accord at least some special weight to the parent's wishes, the United States Supreme Court plurality did not declare that factor to be the sole determinant of the child's best interest." *Id.* On the contrary, the *Harrold* court held that *Troxel*'s "special weight" requirement was satisfied because the Ohio statute "explicitly identifies the parents' wishes regarding the requested visitation or companionship as a factor that must be considered when making its 'best interest of the child' evaluation." *Id.* In the case before it, the court concluded that the trial court had "honor[ed] the traditional presumption that a fit parent acts in the best interest of his or her child" by "plac[ing] on [the grandparents] the burden of proving that visitation would be in the best interest of" the child. *Id.*

The following States' highest courts have likewise rejected a compelling-circumstances criterion in favor of a more flexible rule that requires courts considering visitation requests to apply a "presumption" in the parents' favor, which petitioning grandparents must rebut:

Alaska	*Evans v. McTaggart*, 88 P.3d 1078, 1089 (Alaska 2004) (Due Process Clause satisfied "by imposing on the third person the burden of proving that visitation by the third person is in the best interests of the child … by clear and convincing evidence").
California	*In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) (Due Process Clause satisfied if grandparents "overcome a rebuttable presumption that visitation is not in [the child's] best interest").
Colorado	*In re Adoption of C.A.*, 137 P.3d 318, 322 (Colo. 2006) (Due Process Clause satisfied where grandparents "rebut th[e] presumption" by clear and convincing evidence that "that the parental visitation determination is not in the child's best interests").
Delaware	*Thomas v. Nichols-Jones*, 909 A.2d 595, at *2 (Del. 2006) (unpublished) (Due Process Clause satisfied where the grandparent bore the burden of proving that visitation was in the child's best interest).
Kansas	*Department of Soc. & Rehab. Servs. v. Paillet*, 16 P.3d 962, 970 (Kan. 2001) (Due Process Clause satisfied so long as trial court "ma[kes] a presumption" in favor of the parents' wishes and requires the grandparent to prove "that

	visitation would be in the child's best interests").
Missouri	*Blakely v. Blakely*, 83 S.W.3d 537, 545 (Mo. 2002) (Due Process Clause satisfied so long as the parents' wishes are accorded a "rebuttable presumption of validity" and the "grandparents bear the burden of proving that th[e] denial of visitation was 'unreasonable'").
Montana	*Polasek v. Omura*, 136 P.3d 519, 523 (Mont. 2006) (Due Process Clause satisfied so long as the "petitioning grandparent prove[s] by clear and convincing evidence that it is in the child's best interest to have contact with the grandparent" and that "the presumption in favor the parent's wishes has been rebutted").
Nebraska	*Hamit v. Hamit*, 715 N.W.2d 512, 528 (Neb. 2006) (Due Process Clause satisfied so long as grandparents rebut the "presumption" in favor of the parents' wishes and demonstrate that "visitation will not adversely interfere with the parent-child relationship").
New York	*In re E.S. v. P.D.*, 863 N.E.2d 100, 102 (N.Y. 2007) (Due Process Clause satisfied so long as the reviewing court employs a "strong presumption that the parent's wishes represent the child's best interests").

Pennsylvania	*Hiller v. Fausey*, 904 A.2d 875, 890 (Pa. 2006) (Due Process Clause satisfied where the trial court applied "the presumption that parents act in a child's best interest").
South Dakota	*Currey v. Currey*, 650 N.W.2d 273, 277 (S.D. 2002) (Due Process Clause satisfied so long as grandparents bear the burden of proving that "the visitation is in the best interests of the grandchild").
Utah	*Estate of S.T.T. v. Thurgood*, 144 P.3d 1083, 1094 (Utah 2006) (Due Process Clause satisfied where the visitation statute "incorporate[d] the parental presumption" and "provide[d] guidance to courts in determining whether the petitioning grandparents have established circumstances under which the courts can … supercede the parent's decision").
West Virginia	*Brandon L. v. Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (Due Process Clause satisfied because the visitation statute "require[d] consideration of parental preference" and a "determination that … visitation would not detrimentally affect the parent-child relationship").

In at least six other States, intermediate appellate courts have similarly rejected a stringent compelling-

circumstances requirement in favor of a more flexible "presumption"-based standard. *See, e.g.*, *McGovern v. McGovern*, 33 P.3d 506, 511-12 (Ariz. Ct. App. 2001); *McCune v. Frey*, 783 N.E.2d 752, 756 (Ind. Ct. App. 2003); *Vibbert v. Vibbert*, 144 S.W.3d 292, 294-95 (Ky. Ct. App. 2004); *Galjour v. Harris*, 795 So. 2d 350, 358 (La. Ct. App. 2001); *Ridenour v. Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App. 1995); *In re Paternity of Roger D.H.*, 641 N.W.2d 440, 445 (Wis. Ct. App. 2002).

* * *

The gaping divide over *Troxel*'s meaning now involves nearly three-quarters of the States in the country. It is inconceivable that the conflict—now a decade old—will resolve itself. It is time for this Court to step in to give States, grandparents, parents, and children much-needed clarification.

B. The Split Arises Out of the "Uncertain Legacy" of the Fractured Plurality Opinion in *Troxel*.

The conflict among the States can be traced directly to "the uncertain legacy of the plurality opinion" in *Troxel*. App. 78a (Bolin, J., concurring in the result). Immediately following the decision, commentators predicted that *Troxel*'s "failure to elaborate on the mechanics of the constitutional standard it announced will leave judges, legislators, and individual litigants without adequate guidance." *The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 179, 229 (2000). So too, in the years since, observers have criticized "[t]he plurality opinion in *Troxel*, one of six opinions issued in the case," for failing "to deliver a clear, unambiguous standard under which to assess nonparental visitation

statutes," and have noted that *Troxel* "has been the source of much confusion and debate." *Developments in the Law—The Law of Marriage and Family*, 116 Harv. L. Rev. 2052, 2056 (2003). At present, "the entire nation is a virtual 'wild west' of wide-ranging trial court interpretations and appellate court decisions"—all of which are "attempt[ing] to reconcile the language in the one United States Supreme Court case that has touched upon [the grandparent-visitation] issue." Daniel R. Victor & Keri L. Middleditch, *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. Am. Acad. Matrimonial Law 391, 391-92 (2009) (describing existing split).

State courts, too, have complained that *Troxel* leaves them without sufficient guidance in deciding grandparent-visitation cases. The Oregon Supreme Court, for instance, remarked that "[t]he absence of a majority opinion in *Troxel* and the array of viewpoints expressed in the six different opinions make it difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the state or a nonparent must make before a court may interfere with a parent's custody or control of a child." *In re Marriage of O'Donnell-Lamont*, 91 P.3d 721, 730 (Or. 2004); *see also Moriarty*, 827 A.2d at 218 (noting state courts' efforts to "decode[] *Troxel*'s elliptical message"); *DeRose v. DeRose*, 666 N.W.2d 636, 643 (Mich. 2003) ("[A]fter *Troxel*, it appears that federal constitutional law in this area is now not as predictable as it was.").

It is incumbent upon this Court to step in and clarify the confusion that the fractured decision in *Troxel* has spawned during the last decade. State courts (and legis-

latures, *see supra* at 17 n.4, 24) desperately need this Court's guidance, as do the children, parents, and grandparents whose interests must be balanced in visitation disputes.

II. The Question Presented Is Important And Requires This Court's Attention.

The question presented has a real-world, practical, systemic significance that radiates well beyond the four corners of this case. Three points are particularly salient.

1. Most obviously, because "[a]ll 50 States have statutes that provide for grandparent visitation in some form," *Troxel*, 530 U.S. at 73 n.*, every State in the country has an interest in the answer to the question presented. As explained in detail above, 37 States have already engaged the constitutional question on the merits—and come to two diametrically opposite conclusions. Even in those States where litigation has not yet materialized, it is nearly certain to unless this Court steps in to clarify the extent to which federal constitutional rules control grandparent-visitation determinations. *See, e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 385 (2000) (granting certiorari to review lower court's invalidation of state campaign-contribution statute "given the large number of States that limit political contributions").

2. Moreover, it is a significant event any time a lower court invalidates a state statute on federal constitutional grounds—particularly where, as here, the court invalidates the statute on its face and "in its entirety." App. 29a. Facial invalidation, which requires a determi-

nation that "no set of circumstances exists under which the [statute] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), exacts an especially high democratic toll, because it has the effect of wiping an entire legislative enactment off the books.

3. Finally, the question presented here can be expected to recur regularly in the lower courts, and its resolution—one way or the other—will therefore significantly affect the lives of countless children, parents, and grandparents.

III. The Alabama Supreme Court's Decision Is Wrong.

The 19-to-18 split among the States concerning an important federal constitutional question is reason enough to grant certiorari. Review is particularly appropriate here, moreover, because the Alabama Supreme Court's decision is wrong. The court's sweeping facial invalidation of the GVA overreads *Troxel*, ignores this Court's repeated warnings about the risks of extending substantive-due-process boundaries, and unduly federalizes an area of traditional state concern.

1. *Troxel* provides no support for the Alabama Supreme Court's facial invalidation of the GVA "in its entirety." App. 29a. As an initial matter, it is worth noting that while in *Troxel* the Washington Supreme Court had invalidated that State's visitation statute on its face, this Court affirmed only on the narrower ground that the statute violated the parents' due process rights "as applied" in their particular case. *Troxel*, 530 U.S. at 65, 67, 68, 73. Indeed, the *Troxel* plurality explicitly urged courts to "be hesitant to hold that specific nonparental

visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73. The Alabama Supreme Court's sweeping facial invalidation of the GVA—which it decreed notwithstanding the fact that the parents had also raised a more modest as-applied challenge—contradicts the caution evident on the face of the various *Troxel* opinions.

The Alabama Supreme Court further erred in concluding that the GVA cannot meet *Troxel*'s requirement that parents' wishes be given some "special weight" in the visitation calculus. 530 U.S. at 69. The record in this very case defies that court's suggestion that the Act forecloses consideration of "the fundamental presumption in favor of the rights of parents." App. 21a-22a. In its decision awarding visitation, the trial court here *expressly* "engaged the presumption in favor of the … parents" and imposed on the grandparents the burden of proving by "clear and convincing evidence" that visitation was in the children's best interest. App. 239a. Although the Alabama Supreme Court noted that fact in recounting the case's procedural history, it made absolutely no effort to square the trial court's application of the "presumption" with its facial invalidation of the GVA. The trial court's balanced visitation order in this case complies precisely with *Troxel*'s directives. The GVA is not unconstitutional, either on its face or as applied here.

2. Not only did the Alabama Supreme Court reach the wrong result, it applied the wrong constitutional methodology. This Court has repeatedly expressed its "'reluctan[ce] to expand the concept of substantive due process'" because "'guideposts for responsible decision-making in this uncharted area are scarce and open-ended.'" *Washington v. Glucksburg*, 521 U.S. 702, 720

(1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Because by conferring substantive-due-process status on an asserted right, courts, "to a great extent, place the matter outside the arena of public debate and legislative action," they must "'exercise the utmost care whenever [they] are asked to break new ground in this field.'" *Id.* (quoting *Collins*, 503 U.S. at 125). It was in view of these sorts of concerns—and what Justice Souter called the "treacherous[ness]" of substantive due process, 530 U.S. at 76 (opinion concurring in the judgment)—that Justice Kennedy urged courts to "use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." *Id.* at 96 (dissenting opinion).

The Alabama Supreme Court's decision here is the *opposite* of "restrain[ed]." Spurning this Court's caution, the court below (1) ignored the record in the case, which clearly demonstrates that the trial court engaged and applied the *Troxel*-prescribed "presumption in favor of the … parents" and required the grandparents to prove that visitation was in the children's best interest (App. 239a-240a); (2) broadly invalidated the GVA on its face and "in its entirety" (App. 29a); and (3) decreed a categorical rule that the Due Process Clause invariably requires a petitioning grandparent to prove that "compelling" circumstances necessitate visitation (App. 23a).

Lost in the Alabama Supreme Court's wooden approach is all of the nuance that visitation cases typically present. Visitation determinations are sensitive, and at times they can be downright messy. Context is critical. Courts considering *grandparent*-visitation petitions, in

particular, are called upon to balance the important interests of the children, parents, and grandparents involved. *See Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) ("Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child."). The trial court's detailed opinion in this case perfectly reflects that delicate balancing; the judge carefully considered all of the affected parties' interests, while paying an extra measure of deference to the parents' wishes. *See* App. 230a-240a.

3. To make matters worse, the rigid compelling-circumstances rule adopted by the Alabama Supreme Court (and 17 other States) unduly federalizes an area of traditional state concern. This Court has historically left the development and application of family law to state and local governments. Indeed, "[l]ong ago [this Court] observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)); *accord, e.g.*, *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."). Of course, there may be "rare instances … in which it is necessary [for this Court] to answer a substantial federal question that transcends or exists apart from the family law issue." *Newdow*, 542 U.S. at 13. But "in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." *Id.*

The Alabama Supreme Court's holding that the Due Process Clause imposes an invariable compelling-circumstances requirement represents a dramatic federal intrusion—well beyond *Troxel*—into an area that has historically been left to the individual States. Whether or not *Troxel* itself "usher[ed] in a new regime of judicially prescribed, and federally prescribed, family law," 530 U.S. at 93 (Scalia, J., dissenting), the compelling-circumstances requirement, by further tying the hands of state legislators and judges, certainly risks doing so. Before countenancing further federalization of an often-messy area of traditional state concern, the Court should "keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise." *Id.* at 101 (Kennedy, J., dissenting).

4. The Alabama Supreme Court's rigid decision is not compelled by this Court's precedent. For all the reasons explained above, *Troxel* leaves ample room for the sort of nuanced visitation determination reached by the trial court in this case. Were it not so—*i.e.*, were it the case that decisions like *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), decreed an unenumerated constitutional right so absolute that it would necessarily require petitioning grandparents to prove some "compelling" basis to see their grandchildren—then those decisions would need to be overruled. *Cf. Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment) (reserving the question whether "our substantive due process cases were wrongly decided" because "neither party ha[d] argued" the issue).

IV. This Case Presents An Ideal Vehicle For Answering The Question Presented.

For at least three reasons, this case presents an ideal vehicle for answering the question presented and resolving the longstanding conflict among the States.

1. This case presents a pure legal issue. Although factual disputes can often complicate the consideration of legal questions arising in family-law cases, there are no such disputes here. The trial court definitively found the facts in its visitation order (App. 226a-230a), and the Alabama Court of Civil Appeals and the Alabama Supreme Court each decided the constitutional question based on a one-paragraph factual recitation. App. 2a; App. 113a-115a.

2. Not only does this case come to the Court on an established factual record, it also arises on a fully developed *legal* record. First, as required by the GVA, the trial court made specific written findings of fact and law, which it embodied in a 49-page order. *See* App. 166a-234a. Then, on direct appeal, the Alabama Court of Civil Appeals published a detailed, 42-page majority opinion and a 7-page dissent. *See* App. 108a-146a. Finally, the Alabama Supreme Court published 134 pages' worth of written opinions—including a lead opinion, four concurrences, and a dissent. *See* App. 1a-107a. Suffice it to say that the constitutional issues underlying the question presented have had the fullest possible airing in the lower courts.

3. Finally, this case is a superior vehicle to earlier cases presenting the same question. For instance, unlike *Hiller v. Fausey*, 904 A.2d 875 (Pa.), *cert. denied*, 539

U.S. 1304 (2006), in which the parent petitioner alleged a pattern of alcohol abuse and domestic violence in the grandparents' household, *see* Pet. for Cert. at 6-7, *Hiller*, No. 06-863, the trial court here found that there was "no evidence whatsoever of domestic violence in this case" and that visitation would not in any way "endanger the physical health … or impair the emotional development" of the children. App. 234a, 237a. And unlike *Moriarty v. Bradt*, 827 A.2d 203, 222 (N.J. 2003), *cert. denied*, 540 U.S. 1177 (2004), in which the parent petitioner had not sought to completely cut off the grandparents' visitation rights but, rather, was "willing to allow [the grandparents] monthly visits with his children," Pet. for Cert. at 3, *Moriarty*, No. 03-708, the parents in this case ultimately "terminated … the grandparents' contact with the grandchildren" entirely, App. 2a, leading to a situation in which the grandchildren "have been isolated from their paternal grandparents" since approximately 2007. App. 235a.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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