No. 11-311

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

REPLY BRIEF FOR PETITIONERS

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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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REPLY BRIEF

Respondents don't deny that in the wake of *Troxel v. Granville*, 530 U.S. 57 (2000), there is genuine—and widespread—confusion over the extent to which the Due Process Clause restricts States' efforts to resolve grandparent-visitation disputes. Nor could they; "'the entire nation is a virtual 'wild west' of wide-ranging trial court interpretations and appellate court decisions'" seeking to decode the various *Troxel* opinions. Pet. 30 (citations omitted). Nor do respondents deny that the *Troxel* issue is an important—and recurring—question that "dramatically affects the lives of countless children, parents, and grandparents." Pet. 18.

Instead, respondents (1) attempt to nibble away at the massive lower-court split over *Troxel*'s meaning and (2) argue that this case doesn't provide the right "vehicle" for answering the *Troxel* question. Respondents' efforts are unavailing. The split is real. This Court will have to answer the question presented eventually. And this case provides a perfectly appropriate vehicle for doing so.

I. The Split Among The Lower Courts Is Real.

Respondents' scattershot attempts to deny the split among the state courts over *Troxel*'s meaning miss the mark.

1. Respondents assert that petitioners' "alleged conflict includes cases decided on state-law grounds." Opp. 9. For instance, respondents contend that the Hawaii Supreme Court's holding in *Doe v. Doe* is based on the premise that "'[p]arents' right to raise their children is

protected under article I, section 6 of the Hawaii Constitution.'" Opp. 10 (quoting 172 P.3d 1067, 1078 (Haw. 2007)). That is incorrect. In fact, the *Doe* court emphasized at the outset of its opinion that the "solitary issue" presented was whether Hawaii's grandparent-visitation statute "is unconstitutional on its face in light of the United States Supreme Court's decision in *Troxel v. Granville*." 172 P.3d at 1069. The court reviewed Hawaii law only as a sidenote, and only after exhaustively analyzing this Court's "fractured" *Troxel* decision, *id.* at 1072, and attempting to discern the federal constitutional principles emanating from it, *see id.* at 1071-78.

In the same way, respondents claim that the New Hampshire Supreme Court's decision in *In re R.A.* turns on the premise that "'[t]he right of parents to raise and care for their children is a fundamental liberty interest protected by Part I, Article 2 of the New Hampshire Constitution.'" Opp. 10 (quoting 891 A.2d 564, 572 (N.H. 2005)). Again, that is incorrect. In the very next sentence, which respondents don't mention, the *R.A.* court stated: "Similarly, the United States Supreme Court has recognized 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.'" 891 A.2d at 572 (quoting *Troxel*, 530 U.S. at 66). The *R.A.* court went on explicitly to address the statute's constitutionality under *both* federal and state law, imposing a "harm" standard but holding that the statute "survive[d] the facial challenge of strict scrutiny under both the State and Federal Constitutions." *Id.* at 580-81, 583.

Citing *In re Parentage of C.A.M.A.*, respondents quote the Washington Supreme Court as having con-

cluded that "'[w]e need not decide the precise effect of an affirmance on narrower grounds of our cases by the United States Supreme Court, because [*In re Custody of Smith*, 969 P.2d 21 (Wash. 1998)] stands as independent, unappealed precedent.'" Opp. 10 (quoting 109 P.3d 405, 409 (Wash. 2005)). The implication, of course, is that the *Smith* decision provided an "independent" *state*-law precedent. Not true. In fact, the *C.A.M.A.* court twice reiterated that "[w]e held in *Smith* that 'parents have a fundamental right to autonomy in child-rearing decisions' and this 'liberty' interest is protected as a matter of substantive due process under the Fourteenth Amendment." 109 P.3d at 408, 410 (quoting *Smith*, 969 P.2d at 27).

2. Respondents similarly assert that the "alleged conflict includes cases that do not address the due process issue that [petitioners] ask this Court to resolve." Opp. 11. But again, respondents' argument rests on inaccurate summaries of lower courts' decisions. For instance, respondents erroneously contend that in *Currey v. Currey*, 650 N.W.2d 273 (S.D. 2002), the South Dakota Supreme Court decided only an overbreadth issue, not the core due-process issue. Opp. 11. But respondents simply ignore the court's statement that the statute did "not unreasonably deprive the custodial parent of the fundamental right to make decisions concerning the care, custody, and control of the children" and "properly place[d] the burden of proof on the grandparents." 650 N.W.2d at 277.

Respondents likewise omit key language from their description of *Brandon L. v. Moats*, 551 S.E.2d 674 (W. Va. 2001). They quote the West Virginia Supreme Court there as having concluded that the case did "'not present

the opportunity for us to determine the amount of weight that should attach to the factor of parental preference ….'" Opp. 12 (quoting 551 S.E.2d at 685). Respondents' ellipsis covers the court's statement that "in light of the *Troxel* decision it is clear that 'the court must accord at least some special weight to the parent's own determination' provided that the parent has not been shown to be unfit." 551 S.E.2d at 685. The court went on to hold that because the statute at issue included "parental preference within a list of other factors for the trial court's consideration on the issue of visitation," it did "not violate the substantive due process right" to direct his or her child's upbringing. *Id.* at 685-86.

Finally, respondents quote a single sentence from *Craven v. McCrillis*, 868 A.2d 740 (Vt. 2005), and then assert that the Vermont Supreme Court "performed no constitutional analysis and did not mention any due process concerns." Opp. 12. To the contrary, the *Craven* court held that "[t]o rebut th[e] presumption" in favor of a parent's wishes, "a grandparent must 'provid[e] evidence of compelling circumstances to justify judicial interference with the parent's visitation decision.'" 868 A.2d at 742-43. Notably, for support, the court cited its earlier decision in *Glidden v. Conley*, in which it had imposed the "compelling circumstances" requirement "to accord with due process." 820 A.2d 197, 204-05 (Vt. 2003).

3. Respondents fault petitioners for referring to the amended grandparent-visitation statutes in Illinois, Michigan, and Texas—which, respondents say, "have not been addressed by any court." Opp. 13. Respondents are missing the point, which is that those States acted out of presumed necessity, to remedy perceived constitu-

tional deficiencies. For instance, in 2005, Texas amended its visitation statute to require grandparents to prove "that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being." Tex. Fam. Code Ann. § 153.433(2). The new statute's legislative history explained that the amendment was designed to incorporate "the holding in *Troxel v. Granville*, 530 US 57 (2000)," H. 79, Tex. B Analysis, H.B. 261, Reg. Sess. (Tex. 2005), and to "avoid an unconstitutional application of the statute," Tex. Att'y Gen. Op. No. GA-0260, 2004 WL 2326558, at *10 (Oct. 13, 2004).

Illinois and Michigan likewise amended their statutes to impose a "harm" standard only after earlier versions of those statutes had been invalidated under the Due Process Clause. *See* 750 Ill. Comp. Stat. Ann. 5/607(a-5)(3) (amended following *Wickham v. Byrne*, 769 N.E.2d 1, 8 (Ill. 2002)); Mich. Comp. Laws Ann. § 722.27b(4)(b) (amended following *DeRose v. DeRose*, 666 N.W.2d 636, 643-44 (Mich. 2003)). Both did so expressly to account for perceived federal constitutional infirmities. *See* Ill. H. Trans., H. 93-110, Reg. Sess., at 28 (2004) (new statute amended after "old standard was found too lenient and was thrown out by the [state] Supreme Court"); Mich. S. Fiscal Agency B. Analysis, S. 92, Reg. Sess. (2005) (new statute codified *Troxel*'s "presumption that fit parents act in the best interests of their children").

These States' legislative experiences—like Alabama's—demonstrate that "[s]tate 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 is*." Pet. 18 n.4.

4. Respondents also complain that the "alleged conflict includes cases interpreting statutes that have since been amended." Opp. 11. That's true, but of no particular moment. Irrespective of whether the statutes construed in those cases have since been altered, the decisions themselves exemplify the confusion in the lower courts about *Troxel*'s import. Moreover, it's not as if the States, by amending their statutes, have taken the grandparent-visitation issue off the table. Rather, they have simply replaced the old visitation statutes with new ones—whose constitutionality remains a live issue. *See, e.g.*, 13 Del. C. § 2412(a)(2)(D) (2010) (allowing visitation where parents object but grandparent has demonstrated "that the objection is unreasonable" and "that the visitation will not substantially interfere with the parent/child relationship").

II. This Case Provides An Appropriate Vehicle For Answering The Question Presented.

Respondents contend that "this case [does] not provide an appropriate vehicle" for "clarify[ing] the constitutional standards applicable to grandparent-visitation statutes." Opp. 14. Notably, however, respondents don't deny that "[t]his case presents a pure legal issue" and, in light of the trial court's explicit factual findings, is "uncomplicated by factual disputes that often plague family-law cases." Pet. 19, 37. Nor do they deny that the case arrives at this Court "on a fully developed *legal* record," having had "the fullest possible airing in the lower courts." Pet. 37.

Instead, respondents focus exclusively on two points—first, that because this case involves "fit, married, natural" parents, it doesn't present a "typical" grandparent-visitation dispute; and second, that Alabama's Grandparent Visitation Act ("GVA") has been amended since the decision below. Neither provides a basis for denying review.

1. Respondents' effort to cordon off visitation cases involving "fit, married, natural" parents from all others is clearly their major play. Indeed, respondents invoke the "fit, married, natural" mantra some 15 times in their opposition. The move fails for at least three reasons.

a. Most obviously, respondents' emphasis on the fact that this case happens to involve "fit, married, natural" parents completely ignores the fact that the Alabama Supreme Court invalidated the GVA "on its face" and "in its entirety." App. 29a, 78a, 91a. Even if the parents' particular characteristics could make a difference in a case involving an as-applied challenge—and as explained below, they shouldn't—they certainly hold no significance here, in light of the facial invalidation of the GVA.

b. In any event, there is no basis for treating "fit, married, natural" parents differently from all others as a *constitutional* matter. Of course, States can choose, as a *policy* matter, to provide special protection to traditional nuclear families. And as respondents have pointed out, some do. Opp. 8-9. But respondents are making a different point—namely, that "fit, married, natural" parents are constitutionally unique, entitled to heightened due-process protection. In particular, respondents assert that because they are "fit, married, [and] natural,"

their right to control their children's upbringing is "at its zenith," and the State's interest in ensuring grandparent visitation is "at its nadir." Opp. 24. The cases they cite for that proposition, however—both of which involved *unmarried* parents—provide them no support. *See Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

c. Finally, respondents' artificially imposed "fit, married, natural" category ignores reality. Families come in all shapes and sizes. As this Court recognized in *Troxel*, "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." 530 U.S. at 63. Ignoring "these changing realities of the American family," *id.* at 64, respondents seem to envision a dividing line with Ward and June Cleaver on one side—and all other parents on the other. It's just not that simple.

For starters, and with all due respect, respondents are not Ward and June. Their opposition provides what can only be called a whitewashed version of the underlying facts—achieved principally by relying on the trial court's summary of individual witnesses' testimony rather than the court's "findings of fact."[1] For instance, while respondents admit that they "suspended contact entirely" between the grandparents and children (Opp. 4), they omit any explanation of *why* they terminated the grandparents' access to the children. The trial court, however, found as a matter of fact that respondents did

[1] That is significant, because the trial court found that, at least in part, respondents' testimony was not truthful. *See* App. 238a.

so *because the grandparents could no longer financially subsidize respondents' lifestyle*. Pet. 11-12. In Justice Bolin's words, "in apparent retaliation for the grandparents' inability to continue to provide financial support and resources to the 'fit parents,' the parents callously pulled the carpet of grandparental love out from under the feet of their own children." App. 84a-85a (concurring opinion).

This case aside, real life defies respondents' simplistic attempt to categorize parents (for constitutional purposes) as either "fit, married, [and] natural" or "other." In fact, parents' home and family situations vary greatly. Respondents' own tally tells the story: Seven of the 35 cases cited in the petition as part of the nationwide split involve what respondents would call "fit, married, natural" parents. Ten involve parents who were divorced. In another 10, one of the parents had deceased. In five, the parents had never married. And another three, respondents say, resist characterization. Opp. 17-18 n.7.

Accordingly, there is no "typical" grandparent-visitation case. Importantly, however—and this is a big "however"—all grandparent-visitation cases share a common core characteristic. *They all ask the same fundamental constitutional question*: Under what circumstances may a court grant grandparents visitation over parental objection? There is no perfect case in which to resolve that question, and this Court's answer—which it will eventually have to give—will necessarily apply to a range of fact patterns. This case is as good a vehicle for answering the question as the next.

2. Respondents also argue that the fact that "[t]he decision below invalidated a statute that is no longer in

force" provides a stand-alone basis for denying certiorari. Opp. 15. That is incorrect.

It is true that the GVA has been amended since the lower courts' decisions; the petition readily acknowledged as much. Pet. 17-18 n.4. But respondents never really explain why the amendment of the GVA should foreclose review. The petition explained (1) that "[b]ecause the amendment's effective date post-dates the decision below by nearly three months, it does not apply to petitioners' case"[2]; (2) that "the amendment does nothing to resolve the massive split among the States"; and (3) that, in fact, the amendment "further underscores the need for this Court's intervention" because it shows that while "[s]tate legislatures are attempting to conform their statutes to constitutional requirements … *they have no idea what the true constitutional target is*." *Id.* Respondents offer no response to any of that.

In fact, the amendment of the GVA doesn't materially affect the certiorari calculus here. First, this Court routinely accepts and decides cases involving statutes and regulations that have been altered or amended since a lower court's decision. *See Schindler Elevator Corp. v. U.S. ex. rel. Daniel Kirk*, 131 S. Ct. 1885, 1889 n.1 (2011); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2574 n.1 (2011); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1986 n.10 (2011).

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[2] *See, e.g.*, *U.S. Steel Mining Co. v. Riddle*, 627 So. 2d 455, 457-58 (Ala. Civ. App. 1993) (statute prescribing new "presumptions" and "burden[s] of proof," which became effective during a case's pendency, was "substantive" rather than "remedial," and thus could not be applied on appeal).

Second, in this instance, the amendment—which adds a "rebuttable presumption … that the parent or parents with whom the child is living know what is in the best interest of the child," Ala. Act 2011-562, § 1—merely mimics the constitutional rule that the trial court applied. In particular, that 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 emphasized, the grandparents had to present "clear and convincing evidence" rebutting that presumption. *Id.* It was only after "engag[ing] the presumption in favor of the … parents" that the trial court held that it was "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. 239a-240a.

Respondents assert that the trial court's recognition of the presumption was only "nominal" and that its visitation order "was based on nothing more than that court's simple belief that the denial of visitation was not in [the] children's best interests." Opp. 15, 23. But that isn't even remotely a fair characterization of the trial court's opinion. As the extensive quotations above make clear, the trial court rigorously applied the presumption in favor of parental prerogatives—which it referenced some 15 times in its opinion and which it acknowledged arose from "the constitution." App. 237a.

For all these reasons, the GVA's recent amendment provides no compelling basis for denying review. Of course, should this Court conclude that the amendment

of the GVA materially changes matters—that the inclusion of the presumption in the GVA's text would matter to the Alabama appellate courts' constitutional assessment[3]—then it should, at the very least, GVR for reconsideration in light of the amendment. *See, e.g.*, *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Trunkline Gas Co. v. Hardin County*, 375 U.S. 8 (1963).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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[3] *Cf.* App. 84a (Bolin, J., concurring in the result) ("It is due only to the statutory omission of language requiring that 'special weight' be given to a *fit* parent's decision regarding grandparent visitation that I concur in the result herein that the Alabama Grandparent Visitation Act as written is unconstitutional."); App. 90a (Shaw, J., joined by Stuart, J., concurring in the result) (similar).