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 Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Alabama Supreme Court held that Alabama's grandparent-visitation statute, as it existed prior to a 2011 amendment, was unconstitutional on its face "[b]ecause [it] authorizes a court to award visitation to a grandparent whenever doing so 'is in the best interests of the minor child,' potentially overriding a parent's decision to deny the grandparent such visitation, without regard for the fundamental right of a fit parent to direct the upbringing of his or her child." Pet. App. 1a.

The question presented is:

Does the Due Process Clause protect the right of fit, married, natural parents to determine whether their children should have visitation with the children's grandparents?

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CONSTITUTIONS AND STATUTES

Petitioners ask this Court to review a state supreme court decision invalidating a state statute that has since been amended and is no longer in force. The present action is also factually atypical of the cases that commonly arise in this area. Indeed, notwithstanding petitioners' claims to the contrary, there is no conflict among state courts on the constitutional question actually presented by this case. This Court should decline the invitation to resolve such a narrow dispute.

STATEMENT

A. Alabama's Grandparent-Visitation Statute

Alabama has sought for several years to find the appropriate balance between parents' constitutional right to direct the upbringing of their children and the state's interest in protecting vulnerable children from harm. One aspect of that balance is manifested in state laws permitting non-parents to seek court-ordered visitation with children. At issue here is the 2003 version of Alabama's grandparent-visitation statute, which has since been amended.

A prior version of Alabama's grandparent-visitation statute was very broad and included a "rebuttable presumption in favor of visitation by any grandparent." Following this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), an Alabama court declared that version of the Alabama statute unconstitutional. *See R.S.C. v. J.B.C.*, 812 So. 2d 361, 372 (Ala. Civ. App. 2001).

In 2003, the Alabama legislature amended its grandparent-visitation statute to delete the previous presumption in favor of grandparent visitation. In addition, the amended statute directed a court deciding a grandparent-visitation petition to consider six

factors relevant to determining the best interests of the child. The sixth listed factor was: "[o]ther relevant factors in the particular circumstances, including the wishes of any parent who is living." 2003 Ala. Acts 1084 (Act 2003-383, § 1) ("Act"); *see also Dodd v. Burleson*, 932 So. 2d 912, 919 (Ala. Civ. App. 2005) (identifying specific changes made by the legislature in response to Alabama court decisions applying *Troxel*).

The 2003 statute is at issue in this case. It provided, in pertinent part:

> (b) Except as otherwise provided in this section, 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 the following conditions exist:
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> * * *
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> (5) When the child is living with both biological parents, who are still married to each other, whether or not there is a broken relationship between either or both parents of the minor and the grandparent and either or both parents have used their parental authority to prohibit a relationship between the child and the grandparent.
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> * * *
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> (d) Upon the filing of an original action . . . , the court shall determine if visitation by the grandparent is in the best interests of the child. Visitation shall not be granted if the visitation would endanger the physical health of the child or impair the emotional development of the child. In determining the best

> interests of the child, the court shall consider the following:
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> > (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.

Ala. Code § 30-3-4.1(b), (d) (Supp. 2003).

The 2003 statute is no longer operative. In 2011, the Alabama legislature amended the statute to provide a rebuttable presumption that parents act in the best interests of their child. In particular, the statute now provides: "[i]f the child is living with one or both biological or adoptive parents, there shall be a rebuttable presumption for purposes of this section that the parent or parents with whom the child is

living know what is in the best interests of the child." Ala. Code § 30-3-4.1(d).

B. Facts and Proceedings Below

Respondents are the fit, married, natural parents of two teenage daughters. Their daughters are "normal, happy, active, intelligent young ladies." Pet. App. 226a. Petitioners are the paternal grandparents of respondents' daughters. In 2005, respondents decided, with the support and advice of a family counselor, to decrease contact between their children and petitioners. *Id.* at 216a. Soon thereafter, they suspended contact entirely.[1]

When respondents decided that it was in their children's best interests to suspend further contact with petitioners, petitioners filed suit seeking visitation under Alabama Code § 30-3-4.1 (Supp. 2003). Pet. App. 166a. After a bench trial, the court considered the six factors listed in the 2003 statute and concluded that visitation with petitioners was in the children's best interests, overriding respondents' judgment on the matter. The court awarded petitioners unsupervised visitation with respondents' children for several hours every Friday afternoon; on

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[1] Respondents' decision to suspend contact between their children and petitioners was met with petitioners' "ever more bizarre efforts" to see the children. Pet. App. 230a. For example, "not aware of any ridicule or harassment to which [their] grandchildren would be submitted," petitioners left signs and stuffed animals expressing their love for the grandchildren along the grandchildren's bus route between home and school. *Id.* at 180a, 197a. At one point, petitioners' persistent efforts to interact with the children led one of their coaches to inform respondents that "if such incidents . . . persist[ed] at the ball field then he would ask [the younger child] to leave the team." *Id.* at 207a, 211a.

the day before each child's birthday; and on Christmas afternoon each year. *Id.* at 240a–241a. In addition, the court granted petitioners daily telephone communication with the children. *Id.* at 241a. The visitation schedule was in addition to any of the children's public events that petitioners attended, and provided for "the minimum visitation allowed." *Id.* The court retained jurisdiction over the parties so that "[t]he full contempt powers of the court may be invoked by either party in the event of violation of the terms of this decree." *Id.* at 242a.

The first court-ordered visitation occurred on June 14, 2008. It did not go well. Respondents moved to stay the visitation order on the grounds that they had a meritorious appeal of the trial court's judgment pending and that the visitation was a "horrific experience." *Id.* at 148a. The children individually wrote letters to their court-appointed guardian *ad litem* expressing their discomfort with the forced visitation. *Id.* at 150a. The "older child ended her letter by stating, 'I really do not want to see my grandparents.'" *Id.* At a hearing on the motion, both children testified that they did not want to continue visitation. *Id.* at 150a–153a. The court nevertheless denied the motion because "[t]he Court [was] not reasonably convinced . . . that performance of the terms of the Court's decree by the parties is detrimental to the health and emotional wellbeing of the said children." *Id.* at 162a. The court ordered unsupervised visitation to continue. *Id.*

On appeal, the Alabama Court of Civil Appeals reversed, *id.* at 139a, declaring the Alabama statute unconstitutional as applied and holding that "the state may overrule the objection of a fit, natural, custodial parent to grandparent visitation only in order

to prevent harm to the child," *id.* at 136a. The court interpreted subsection (d)(6) of the statute, requiring consideration of "other relevant factors in the particular circumstances," to include consideration of harm to the child. *Id.* at 137a. The court further concluded that harm to the child was not to be weighed along with the other subsection (d) factors, but rather that the determination of a child's best interests by fit parents should be presumed correct prior to determining whether the child would be harmed by denial of visitation. *Id.*

The Alabama Supreme Court affirmed the decision of the Court of Civil Appeals on different grounds. *Id.* at 1a. That court held the statute facially unconstitutional, violating the right of fit parents to substantive due process under the Fourteenth Amendment. *Id.* at 24a–25a. The court explained that the "failure of the Act to include a presumption in favor of the parents when deciding questions of visitation infringes on the constitutional right of parents to direct the upbringing of their children, and the Act is therefore fatally flawed and unconstitutional." *Id.*

REASONS FOR DENYING THE PETITION

Petitioners allege a gaping split on an important constitutional issue, but the petition grossly overstates the extent of any conflict that may exist by relying on cases that are distinguishable both factually and legally. In any event, the constitutional issue on which the petition focuses is not well presented in this case. The decision below simply represents a straightforward application of this Court's holding in *Troxel v. Granville*, 530 U.S. 57 (2000). The case presents no issue warranting this Court's review.

I. The Decision Below Is Not Implicated In Any Conflict Warranting This Court's Attention

Petitioners have asked a court to override the considered decision of fit, married, natural parents regarding who should have unsupervised visitation with their minor children. Such requests are rare, and they should be granted even more rarely. In alleging a conflict among state courts, petitioners cite 35 state appellate decisions (at 19–29), but only seven of those cases involved grandparents seeking visitation over the objection of fit, married, natural parents. *See infra* pp. 16–17 & n.7 (categorizing cases). And only *two* of those seven held that visitation could be granted. *See* Pet. 22, 27 (citing *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002), and *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000)). One of those cases arose in a state that has since changed its law to deny grandparent visitation when the children are living with married, natural parents who object. *See* Mo. Ann. Stat. § 452.402.1(1)–(4). In the other case, unlike here, the children and their mother had lived with the grandparents for years. *See Rideout*, 761

A.2d at 295. Thus, petitioners present no current conflict on the due process rights of fit, married, natural parents to determine whether their children should have unsupervised visitation with nonresident grandparents. In the absence of a conflict on an issue resolved below, this Court should deny certiorari.

Moreover, even if this case could conceivably be viewed as implicating the broad constitutional issue suggested by petitioners, any conflict that might exist on that expansive issue is not nearly so extensive as petitioners contend. *See* Pet. 19–29. Petitioners exaggerate the extent of disagreement by including cases that did not involve the decision of fit, married, natural parents; cases decided on state-law grounds; cases involving superseded statutes; cases decided on distinct constitutional grounds; cases decided by intermediate appellate courts; and even statutes that have not yet been reviewed by their state courts. This Court should not devote its scarce resources to resolving an illusory conflict in an atypical case involving a superseded statute.

A. Petitioners' alleged conflict includes 18 states in which the governing statute would not authorize them to seek visitation

In 18 of the states that petitioners allege to be involved in their "gaping" split, Pet. 19–29, the governing statute would not even authorize them to bring an action for visitation.[2] Those states simply do not

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[2] *See* Ariz. Rev. Stat. Ann. § 25-409(A)(1)–(3); Ark. Code Ann. § 9-13-103(b)(1)–(3); Cal. Fam. Code § 3104(b)(1)–(5); Colo. Rev. Stat. Ann. § 19-1-117(1)(a)–(c); Ga. Code Ann. § 19-7-3(b); 750 Ill. Comp. Stat. Ann. 5/607(a-5)(1); Ind. Code Ann. § 31-17-5-1(1)(a)(1)–(3); Iowa Code Ann. § 600C.1(1); La. Rev. Stat. Ann.

permit grandparents to seek court-ordered visitation over the objection of fit, married, natural parents. They instead permit grandparent-visitation actions only when the child's family unit has somehow been disrupted, such as when one parent has died or when the parents are separated or divorced.[3] Cases decided under state statutes that would prohibit these petitioners from seeking visitation cannot be part of any conflict implicated by this case.

B. Petitioners' alleged conflict includes cases decided on state-law grounds

In their attempt to construct a deep conflict on a broad constitutional issue, petitioners also include

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§ 9:344(A)–(D); Mass. Gen. Laws Ann. ch. 119, § 39D; Mich. Comp. Laws Ann. § 722.27b(5); Mo. Ann. Stat. § 452.402.1(1)–(4); Neb. Rev. Stat. Ann. § 43-1802(1)(a)–(c); N.M. Stat. Ann. § 40-9-2; Ohio Rev. Code Ann. § 3109.051(B)(1); 23 Pa. Cons. Stat. Ann. § 5325; S.C. Code Ann. § 63-3-530(33); Tex. Fam. Code Ann. § 153.433(b)(3). For the Court's convenience, the cited statutes are quoted in the Appendix to this brief.

[3] Furthermore, of the 11 states that petitioners do not discuss in the petition, five would similarly not authorize petitioners' visitation action. *See* Fla. Stat. Ann. § 752.01; Minn. Stat. Ann. § 257C.08; Nev. Rev. Stat. Ann. § 125C.050; N.C. Gen. Stat. Ann. § 50-13.2(b1); Okla. Stat. Ann. tit. 43, § 109.4. (For the Court's convenience, the cited statutes are quoted in the Appendix to this brief.) The fact that nearly half of the states would deny petitioners the right even to file suit in these circumstances illustrates two important points: (1) the balance between the interests of the state in safeguarding children and the fundamental rights of parents to determine their children's upbringing depends in significant part on whether the children's family unit is intact or has been disrupted by death, divorce, or some other factor; and (2) a potential opinion from this Court in this case would have limited impact on the general question presented in the petition because it would not be applicable in almost half the states.

four cases decided on independent and adequate state-law grounds. *See Doe v. Doe*, 172 P.3d 1067, 1078 (Haw. 2007) ("Parents' right to raise their children is protected under article I, section 6 of the Hawai'i Constitution, which requires the showing of a compelling state interest prior to infringing on privacy rights."); *Koshko v. Haining*, 921 A.2d 171, 194 & n.22 (Md. 2007) (applying Article 24 of the Maryland Declaration of Rights); *In re R.A.*, 891 A.2d 564, 572 (N.H. 2005) ("The 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."); *In re Parentage of C.A.M.A.*, 109 P.3d 405, 409, 413 (Wash. 2005) (following *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), which *Troxel* affirmed on narrower grounds, and holding 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 *Smith* stands as independent, unappealed precedent").

While those courts generally recognized the rights protected by the federal Constitution, the judgments in those cases rested on the applicable state constitution and case law. Indeed, some courts expressly held that their state constitution provided more robust protection than the federal Constitution. *See Koshko*, 921 A.2d at 194 & n.22 ("The result reached here illustrates the notion that the extent of protection bestowed upon liberty interests recognized as being enshrined within the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution does not dictate necessarily the full complement of safeguards extended to liberty interests available under the Maryland due process analog found in Article 24 of the Maryland Declaration of Rights.").

Those state-law cases cannot support petitioners' claimed conflict under the federal Constitution.

C. Petitioners' alleged conflict includes cases interpreting statutes that have since been amended

Four of the cases cited by petitioners — including the decision below — interpreted statutes that are no longer in force. *See* Pet. App. 21a–23a (applying Ala. Code § 30-3-4.1(d) (Supp. 2003) (subsequently amended by 2011 Ala. Legis. Serv. 562 (West) (Act 2011-562, § 1))); *Thomas v. Nichols-Jones*, 909 A.2d 595 (Del. 2006) (table decision) (applying Del. Code Ann. tit. 10, § 1031(7) (1999) (repealed 2011)); *In re R.A.*, 891 A.2d at 571 ("In discussing the applicability of that chapter, we recognize that the legislature has recently repealed and recodified many of these provisions."); *Blakely*, 83 S.W.3d at 540 n.1 ("Since the briefing and argument of this case, Missouri's legislature passed and the Governor approved and amended section 452.402.1").

Cases addressing the constitutionality of superseded statutes do not evidence a conflict that warrants this Court's attention.

D. Petitioners' alleged conflict includes cases that do not address the due process issue that they ask this Court to resolve

Petitioners' purported split also includes cases that address different constitutional issues, a case decided before *Troxel*, and a case that addresses no constitutional issue. In *Troxel*, this Court struck down Washington's grandparent-visitation statute for, among other things, being overbroad. *See Troxel*, 530 U.S. at 67. Many of the state supreme court cases cited by petitioners address only that aspect of

the state statutes before them and do not consider the due process standard on which petitioners seek certiorari. *See Currey v. Currey*, 650 N.W.2d 273, 277 (S.D. 2002) ("Unlike the Washington statute in *Troxel*, SDCL 25-4-52 is not overbroad.");[4] *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674, 684–85 (W. Va. 2001) ("The West Virginia statutory scheme stands in stark contrast to the simplistic and broadly-worded two-sentence Washington statute scrutinized in *Troxel*. . . . [T]he instant petition . . . does not present the opportunity for us to determine the amount of weight that should attach to the factor of parental preference . . . .").

In addition, the Virginia decision cited by petitioners (at 23–24) was decided before this Court decided *Troxel*. *See Williams v. Williams*, 501 S.E.2d 417 (Va. 1998). It could not possibly be part of any conflict or confusion over the proper scope of a parent's due process rights in light of *Troxel*.

Finally, petitioners' Vermont decision (at 23) simply reviewed a lower court's denial of visitation. *See Craven v. McCrillis*, 868 A.2d 740, 741 (Vt. 2005) ("We affirm the family court's decision because [the grandparent] failed to rebut the presumption of validity attached to father's decision to deny grandparent visitation."). The court performed no constitutional analysis and did not mention any due process concerns. *Id.* at 741–43.

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[4] Contrary to petitioners' characterization (at 28), the South Dakota Supreme Court referred to the applicable due process standard only when quoting the statute. *See Currey*, 650 N.W.2d at 277 ("SDCL 25-4-52 provides for grandparent visitation 'if the visitation is in the best interests of the grandchild'"). The court neither analyzed nor interpreted that provision.

E. Petitioners' alleged conflict includes intermediate state court decisions

In order to increase the apparent magnitude of the alleged "conflict," petitioners include six states solely on the basis of intermediate state-court opinions. *See* Pet. 28–29. The high courts in those jurisdictions have not yet addressed the constitutionality of the statutes.[5] Those cases cannot credibly be counted as part of a "gaping" conflict that requires this Court's attention.

F. Petitioners' alleged conflict includes statutes that have not been addressed by any court

Petitioners include in their alleged conflict three states that merely passed a statute indicating a heightened standard — Illinois, Michigan, and Texas.[6] *See* Pet. 24. They offer no evidence that courts have interpreted those statutes, much less addressed their constitutionality. Petitioners' claim (at 24) that the statutes were amended "in order to alleviate constitutional concerns in light of *Troxel*" is wholly unsubstantiated. In any event, regardless of any decision that this Court might make in this case, a state can always elect to provide more protection than the federal Constitution requires. Thus, those states are not implicated in any conflict on a federal constitutional issue.

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[5] Moreover, four of the states' statutes (Arizona, Indiana, Louisiana, and New Mexico) would not authorize petitioners' claim in any event. *See supra* pp. 8–9 & n.2.

[6] The statutes in those three states also would not authorize petitioners' action in the current factual context. *See supra* pp. 8–9 & n.2.

II. This Case Is Not An Appropriate Vehicle To Address Constitutional Issues That May Be Implicated By The Application Of Grandparent-Visitation Statutes

If this Court were inclined to clarify the constitutional standards applicable to grandparent-visitation statutes, this case would not provide an appropriate vehicle to do so. The trial court applied — and the Alabama Supreme Court invalidated — a state statute that was subsequently amended to change the weight that parents' views receive in a visitation determination. Moreover, the facts of this case are not typical of grandparent-visitation cases. In a typical dispute, grandparents seek visitation over the objection of one parent in a family that has been altered by death, divorce, separation, incarceration, or abandonment. Generally, the grandparents seeking visitation are related to the children through the absent parent and are seeking to maintain contact over the objection of the custodial parent, who has no family connection to the grandparents. In those cases, the state's concern for the children's welfare is heightened by the disruption of the family unit and the decision of one parent to deny the children continuing contact with the other parent's side of the family. No such disruption has occurred here, and both parents have agreed that the children should have no further contact with petitioners. Thus, any decision by this Court about the validity of the former 2003 statute, in a context that is atypical of visitation disputes, would have only a narrow application. If this Court wishes to address the constitutional standard for grandparent-visitation statutes, it should await a case in which its decision would have a broader impact.

A. The decision below invalidated a statute that is no longer in force

This Court need not review the constitutionality of a statute that is no longer in force. The Alabama legislature has amended the state's grandparent-visitation statute in relevant part twice since *Troxel*. *See* 2003 Ala. Acts 1084 (Act 2003-383, § 1); 2011 Ala. Legis. Serv. 562 (West) (Act 2011-562, § 1) (H.B. 348). Those amendments were not trivial; both of them significantly altered the burden of proof required of grandparents seeking visitation with their grandchildren.

The latest amendment took effect three months after the decision below. *See* Act 2011-562, § 2. That amendment inserted a rebuttable presumption "that the parent or parents with whom the child is living know what is in the best interests of the child." Ala. Code § 30-3-4.1(d). The lack of that presumption was one of the primary reasons that the Alabama Supreme Court held the statute facially unconstitutional. *See* Pet. App. 21a–22a ("In order for a grandparent-visitation statute to pass constitutional muster, it must recognize the fundamental presumption in favor of the rights of the parents. The [2003] Act, however, and particularly § 30-3-4.1(d), makes no mention of the fundamental right of parents.").

Petitioners' contention (at 33) that the trial court applied the presumption properly, anticipating the legislature's amendment, is unavailing. Although the trial court purported to include a presumption in favor of the parents' wishes, it did so while applying the statutory factors for determining the best interests of the children. *See* Pet. App. 235a–237a. The presumption was nominal; it was the last of six equal

factors considered to determine the best interests of the children, not a separate presumption given special weight apart from that determination. *See id.* at 90a–91a (Shaw, J., concurring in the result) ("[A] fit parent's decision, though acknowledged, was, by the plain language, simply relegated to one of many factors the trial court is allowed to consider. . . . I cannot agree that the [2003] Act can be further construed so as to give a parent's decision the weight the legislature did not provide."). Conversely, the 2011 amendments require that the presumption be considered prior to, and separate from, the court's determination of the best interests of the children.

In sum, the trial court awarded grandparent visitation on the basis of a statute that is no longer in force. This Court should decline petitioners' invitation to review the constitutionality of an out-of-date statute.

B. This case, involving the considered choice of two fit, married, natural parents, is not typical of grandparent-visitation disputes

This case is atypical of grandparent-visitation disputes. Respondents are fit, married, natural parents, with daughters who are "perfectly normal, happy, active, intelligent young ladies." Pet. App. 226a. Additionally, respondents were in full agreement with each other when suspending the visits between their daughters and petitioners.

Visitation disputes between grandparents and fit, married, natural parents are rare. As noted above (at 8–9 & nn.2–3), 23 states do not even authorize grandparent-visitation petitions over the objection of fit, married, natural parents. Of the 35 cases petitioners cite (at 19–29) as somehow in conflict, only

seven involve disputes between grandparents and fit, married, natural parents.[7] Two of those cases are

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[7] *See Koshko v. Haining*, 921 A.2d 171 (Md. 2007); *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. Ct. App. 2004); *Camburn v. Smith*, 586 S.E.2d 565 (S.C. 2003); *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002); *Stacy v. Ross*, 798 So. 2d 1275 (Miss. 2001); *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000); *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998). Ten cases involved grandparents seeking visitation either from the divorced parent who was not their child, or within the divorce proceeding itself. *See Doe v. Doe*, 172 P.3d 1067 (Haw. 2007); *Polasek v. Omura*, 136 P.3d 519 (Mont. 2006); *In re Marriage of Harris*, 96 P.3d 141 (Cal. 2004); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Moriarty v. Bradt*, 827 A.2d 203 (N.J. 2003); *McCune v. Frey*, 783 N.E.2d 752 (Ind. Ct. App. 2003); *Currey v. Currey*, 650 N.W.2d 273 (S.D. 2002); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001); *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674 (W. Va. 2001); *Ridenour v. Ridenour*, 901 P.2d 770 (N.M. Ct. App. 1995). Ten cases involved grandparents seeking visitation from the other parent after their child, through whom they were related to the grandchild, died. *See Matter of E.S. v. P.D.*, 863 N.E.2d 100 (N.Y. 2007); *Hamit v. Hamit*, 715 N.W.2d 512 (Neb. 2006); *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006); *In re Estate of S.T.T.*, 144 P.3d 1083 (Utah 2006); *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005); *Craven v. McCrillis*, 868 A.2d 740 (Vt. 2005); *Linder v. Linder*, 72 S.W.3d 841 (Ark. 2002); *Roth v. Weston*, 789 A.2d 431 (Conn. 2002); *Department of Soc. & Rehab. Servs. v. Paillet*, 16 P.3d 962 (Kan. 2001); *Galjour v. Harris*, 795 So. 2d 350 (La. Ct. App. 2001). Five cases involved situations in which the parents never married. *See Thomas v. Nichols-Jones*, 909 A.2d 595 (Del. 2006) (table decision); *In re R.A.*, 891 A.2d 564 (N.H. 2005); *Evans v. McTaggart*, 88 P.3d 1078 (Alaska 2004); *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002); *In re Paternity of Roger D.H.*, 641 N.W.2d 440 (Wis. Ct. App. 2002). Finally, there were three cases that did not fit cleanly into any of those categories. *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006) (paternal grandparents seeking visitation from maternal aunt and uncle, who adopted the child after both parents died); *In re Parentage of C.A.M.A.*, 109 P.3d 405 (Wash. 2005) (paternal grandparents seeking visitation from the father, whose relationship with the mother ended shortly after the birth of the grandson, but who

distinguishable because the grandchild lived with the grandparents for an extended period.[8] The present case is accordingly within a small minority of grandparent-visitation cases, and it therefore is a poor vehicle for this Court to offer guidance on the constitutional requirements for future visitation cases.

C. If this Court does wish to address grandparent-visitation statutes again, a more suitable vehicle is likely to arise in the near future

Grandparent-visitation disputes arise regularly, and the parties often seek certiorari. Since *Troxel*, this Court has denied 10 petitions raising grandparent-visitation issues. Seven involved grandparents seeking visitation with their grandchildren after their child (the parent of their grandchildren) had died.[9]

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had, along with the grandchild, lived with the grandparents for two years); *McGovern v. McGovern*, 33 P.3d 506 (Ariz. Ct. App. 2001) (maternal grandparents seeking visitation from the mother, who never married the father).

[8] *See Koshko*, 921 A.2d at 173 (oldest child raised in the grandparents' home for the first three years of her life); *Rideout*, 761 A.2d at 295 ("During the first seven years of [the oldest child's] life, four years of [the middle child's] life, and several months of [the youngest child's] life, the Rideouts were the children's 'primary caregivers and custodians.'").

[9] Seven petitions arose in cases in which maternal grandparents sought visitation after the death of the grandchild's mother. *See Harris v. Galjour*, 534 U.S. 1020 (2001) (*denying cert. to* 795 So. 2d 350 (La. Ct. App. 2001)) (No. 01-411); *Thurgood v. Burton*, 540 U.S. 817 (2003) (*denying cert. to* 56 F. App'x 460 (10th Cir. 2003)) (No. 02-1712); *Moriarty v. Bradt*, 540 U.S. 1177 (2004) (*denying cert. to* 827 A.2d 203 (N.J. 2003)) (No. 03-708); *Babin v. Darce*, 540 U.S. 1182 (2004) (*denying cert. to* 854 So. 2d 403 (La. Ct. App. 2003)) (No. 03-902); *Collier v. Harrold*,

Two more involved grandparents seeking visitation with grandchildren after their child's divorce, when the other parent was awarded primary custody of the grandchildren.[10] The tenth case involved visitation challenges over the objection of parents who were unmarried and lived apart.[11] The *Blixt c*ourt emphasized the relevance of the parents' marital status in resolving grandparent-visitation disputes:

> The Legislature has long recognized, as it may, consistent with our Federal and State Constitutions, that children whose parents are unmarried and live apart may be at heightened risk for certain kinds of harm when compared with children of so-called intact families. . . . That children whose unmarried parents live apart may be especially vulnerable to real harm from the loss or absence of a grandparent's significant presence is a permissible legislative conclusion, drawn from social experience and consistent with the State's compelling interest in protecting minors from harm. . . . Moreover, the Legislature may . . .

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547 U.S. 1004 (2006) (*denying cert. to* 836 N.E.2d 1165 (Ohio 2005)) (No. 05-871); *Fausey v. Hiller*, 549 U.S. 1304 (2007) (*denying cert. to* 904 A.2d 875 (Pa. 2006)) (No. 06-863); *Harris-Brunson v. Jenkins*, 129 S. Ct. 2871 (2009) (*denying cert. to* No. 06-A-06158-2 (Ga. Super. Ct., Gwinnett County 2008)) (No. 08-1327).

[10] Two petitions arose in cases in which paternal grandparents sought visitation after the father and mother divorced. *See Dorwart v. Sicking*, 531 U.S. 876 (2000) (*denying cert. to* 996 P.2d 471 (Okla. Civ. App. 1999)) (No. 00-103); *Wegelin v. Schmehl*, 552 U.S. 1022 (2007) (*denying cert. to* 927 A.2d 183 (Pa. 2007)) (No. 07-322).

[11] *See Blixt v. Blixt*, 537 U.S. 1189 (2003) (*denying cert. to* 774 N.E.2d 1052 (Mass. 2002)) (No. 02-847).

> presume that the burden of the traumatic loss of a grandparent's significant presence may fall most heavily on the child whose unmarried parents live apart and who may not have or be able to draw on the resources of two parents in coping with his or her loss.

774 N.E.2d at 1064–65.

As discussed below, *infra* pp. 24–25, the implications of the parents' marital status and co-habitation for grandparent-visitation disputes pose important constitutional questions that cannot be addressed in this case.

This Court receives an average of one grandparent-visitation petition per term. Until this case, no petition since *Troxel* has involved a dispute in which the parents were fit, married, and living together. This Court can expect that future petitions will arise in factual circumstances that are more typical of the disputes in this field.

III. The Court Below Correctly Held That Compelled Grandparent Visitation Violated Respondents' Due Process Rights

A. Parents have a fundamental right to direct the upbringing of their children, including the right to decide with whom their children spend unsupervised time

This Court has held that the Due Process Clause guarantees the fundamental right of parents to determine the upbringing of their minor children. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that . . . the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education

and upbringing of one's children."); *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) ("[T]he Due Process Clause demands [that] [b]efore a State may sever completely and irrevocably the rights of parents in their natural child . . . the State [must] support its allegations by at least clear and convincing evidence."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (reaffirming "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing the right of parents "to control the education of their [children]").

In *Troxel*, this Court recognized that the fundamental right of parents to direct the upbringing of their children limits the state's power to compel visitation by third parties, including grandparents. *See* 530 U.S. at 72 (plurality opinion) ("[T]he visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."); *id.* at 78 (Souter, J., concurring in the judgment) ("*Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation"); *id.* at 80 (Thomas, J., concurring in the judgment) ("[T]his Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."); *id.* at 94 (Kennedy, J., dissenting) (recognizing "the parent's constitutional right to raise the child without undue intervention by the State").

B. Under *Troxel*, a court must give "special weight" to a fit parent's decision to deny visitation

Troxel held that the Due Process Clause mandates a "presumption that fit parents act in the best interests of their children" under which a trial court "must accord *at least some special weight* to the parent's own determination." 530 U.S. at 68, 70 (plurality opinion) (emphasis added). Five Justices made clear that the presumption is *not* rebutted when there is no special justification for compelling visitation other than the trial court's disagreement with the parents over whether visitation would be in the children's best interests. *See id.* at 72–73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."); *id.* at 78 (Souter, J., concurring in the judgment) (finding it insufficient that "a judge believed he 'could make a better decision' than the objecting parent had done"). In sum, compelled visitation is not constitutionally permissible when there was "nothing more than a simple disagreement between the [trial court] and [fit parents] concerning [the] children's best interests." *Id.* at 72 (plurality opinion).

C. The trial court below simply disagreed with respondents' decision to deny visitation, thus ignoring *Troxel*'s admonition that parents' decisions be given "special weight"

The visitation order in this case cannot stand under *Troxel*. The trial court's order compelling unsupervised visitation over respondents' objection

was based on nothing more than that court's simple belief that the denial of visitation was not in respondents' children's best interests. *See*, *e.g.*, Pet. App. 230a, 235a–240a.

This reasoning is very similar to the Washington Superior Court's reasoning that this Court rejected in *Troxel*. In *Troxel*, the trial court rested its judgment to compel visitation on findings that the *Troxel* grandparents were "part of a large, central, loving family . . . and can provide opportunities for the children in the areas of cousins and music" and that "[t]he children would be benefited from spending quality time with the [*Troxel* grandparents]." 530 U.S. at 72 (plurality opinion) (quoting trial court). This Court affirmed the Washington Supreme Court judgment reversing the order of compelled visitation in *Troxel* in part because it rested on "nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests." *Id.*; *see also id.* at 78 (Souter, J., concurring in the judgment) ("*Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision' than the objecting parent had done."). This case presents the same sort of "simple disagreement" that a majority of this Court held in *Troxel* to be an impermissible basis for compelling visitation.

D. Because respondents are fit, married, natural parents, their right to determine the best interests of their children is at its zenith, and the state has only a *de minimis* interest in interfering with their choices

There is an additional reason that respondents should prevail: they are the fit, married, custodial birth parents of the children in question. As such, respondents' fundamental right to control the upbringing of their children is at its zenith, while the state's interest in compelling visitation is at its nadir. *See Quilloin v. Walcott*, 434 U.S. 246, 247–48 (1978) ("[A] father's interest in the 'companionship, care, custody, and management' of his children is 'cognizable and substantial,' . . . and, on the other hand, . . . the State's interest in caring for the children is '*de minimis*' if the father is in fact a fit parent.") (quoting *Stanley v. Illinois*, 405 U.S. 645, 651–52, 657–58 (1972)); *see also Lehr v. Robertson*, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent–child relationship and make uniquely valuable contributions to the child's development."). Indeed, respondents are a paradigmatic example of the family unit that this Court has sought to protect from uninvited, unwarranted state intervention. *See Quilloin*, 434 U.S. at 255 ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some show-

ing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' . . . But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child.") (quoting *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in the judgment)).

A holding for petitioners would gut the fundamental right of parents in visitation cases. That right, if it is not to be a "sham," requires that respondents prevail. *Troxel*, 530 U.S. at 78 (Souter, J., concurring in the judgment). No plausible interpretation of *Troxel* justifies ruling for petitioners, and the petition for a writ of certiorari should accordingly be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

ARIZONA

Ariz. Rev. Stat. Ann. § 25-409(A) provides in relevant part:

> A. The superior court may grant the grandparents of the child reasonable visitation rights to the child during the child's minority on a finding that the visitation rights would be in the best interests of the child and any of the following is true:
>
> 1. The marriage of the parents of the child has been dissolved for at least three months.
>
> 2. A parent of the child has been deceased or has been missing for at least three months. . . .
>
> 3. The child was born out of wedlock.

ARKANSAS

Ark. Code Ann. § 9-13-103(b) provides:

> (b) A grandparent or great-grandparent may petition a circuit court of this state for reasonable visitation rights with respect to his or her grandchild or grandchildren or great-grandchild or great-grandchildren under this section if:
>
> (1) The marital relationship between the parents of the child has been severed by death, divorce, or legal separation;
>
> (2) The child is illegitimate and the petitioner is a maternal grandparent of the illegitimate child; or

(3) The child is illegitimate, the petitioner is a paternal grandparent of the illegitimate child, and paternity has been established by a court of competent jurisdiction.

CALIFORNIA

Cal. Fam. Code § 3104(b) provides:

(b) A petition for visitation under this section may not be filed while the natural or adoptive parents are married, unless one or more of the following circumstances exist:

(1) The parents are currently living separately and apart on a permanent or indefinite basis.

(2) One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse.

(3) One of the parents joins in the petition with the grandparents.

(4) The child is not residing with either parent.

(5) The child has been adopted by a stepparent.

At any time that a change of circumstances occurs such that none of these circumstances exist, the parent or parents may move the court to terminate grandparental visitation and the court shall grant the termination.

COLORADO

Colo. Rev. Stat. Ann. § 19-1-117(1) provides in relevant part:

> (1) Any grandparent of a child may, in the manner set forth in this section, seek a court order granting the grandparent reasonable grandchild visitation rights when there is or has been a child custody case or a case concerning the allocation of parental responsibilities relating to that child. . . . [F]or the purposes of this section, a "case concerning the allocation of parental responsibilities with respect to a child" includes any of the following . . . :
>
> > (a) That the marriage of the child's parents has been declared invalid or has been dissolved by a court or that a court has entered a decree of legal separation with regard to such marriage;
> >
> > (b) That legal custody of or parental responsibilities with respect to the child have been given or allocated to a party other than the child's parent or that the child has been placed outside of and does not reside in the home of the child's parent, excluding any child who has been placed for adoption or whose adoption has been legally finalized; or
> >
> > (c) That the child's parent, who is the child of the grandparent, has died.

FLORIDA

Fla. Stat. Ann. § 752.01(1) provides:

> (1) The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
>
> (a) The marriage of the parents of the child has been dissolved;
>
> (b) A parent of the child has deserted the child; or
>
> (c) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091.

GEORGIA

Ga. Code Ann. § 19-7-3(b) provides:

> (b) Except as otherwise provided in this subsection, any grandparent shall have the right to file an original action for visitation rights to a minor child or to intervene in and seek to obtain visitation rights in any action in which any court in this state shall have before it any question concerning the custody of a minor child, a divorce of the parents or a parent of such minor child, a termination of the parental rights of either parent of such minor child, or visitation rights concerning such minor child or whenever there has been an adoption in which the adopted child has been adopted by the child's blood relative or by a stepparent, notwithstanding the provisions of Code Section

> 19-8-19. This subsection shall not authorize an original action where the parents of the minor child are not separated and the child is living with both of the parents.

ILLINOIS

750 Ill. Comp. Stat. Ann. 5/607(a-5)(1) provides in relevant part:

> (a-5)(1) Except as otherwise provided in this subsection (a-5), any grandparent, great-grandparent, or sibling may file a petition for visitation rights to a minor child if there is an unreasonable denial of visitation by a parent and at least one of the following conditions exists:
>
> (A) (Blank);
>
> (A-5) the child's other parent is deceased or has been missing for at least 3 months. . . . ;
>
> (A-10) a parent of the child is incompetent as a matter of law;
>
> (A-15) a parent has been incarcerated in jail or prison during the 3 month period preceding the filing of the petition;
>
> (B) the child's mother and father are divorced or have been legally separated from each other or there is pending a dissolution proceeding involving a parent of the child or another court proceeding involving custody or visitation of the child (other than any adoption proceeding of an unrelated child) and at least one parent does

not object to the grandparent, great-grandparent, or sibling having visitation with the child. The visitation of the grandparent, great-grandparent, or sibling must not diminish the visitation of the parent who is not related to the grandparent, great-grandparent, or sibling seeking visitation;

(C) (Blank);

(D) the child is born out of wedlock, the parents are not living together, and the petitioner is a maternal grandparent, great-grandparent, or sibling of the child born out of wedlock; or

(E) the child is born out of wedlock, the parents are not living together, the petitioner is a paternal grandparent, great-grandparent, or sibling, and the paternity has been established by a court of competent jurisdiction.

INDIANA

Ind. Code Ann. § 31-17-5-1(1)(a) provides:

Sec. 1. (a) A child's grandparent may seek visitation rights if:

(1) the child's parent is deceased;

(2) the marriage of the child's parents has been dissolved in Indiana; or

(3) subject to subsection (b), the child was born out of wedlock.

IOWA

Iowa Code Ann. § 600C.1(1) provides:

> 1. The grandparent or great-grandparent of a minor child may petition the court for grandchild or great-grandchild visitation when the parent of the minor child, who is the child of the grandparent or the grandchild of the great-grandparent, is deceased.

LOUISIANA

La. Rev. Stat. Ann. § 9:344 provides:

> A. If one of the parties to a marriage dies, is interdicted, or incarcerated, and there is a minor child or children of such marriage, the parents of the deceased, interdicted, or incarcerated party without custody of such minor child or children may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.
>
> B. When the parents of a minor child or children live in concubinage and one of the parents dies, or is incarcerated, the parents of the deceased or incarcerated party may have reasonable visitation rights to the child or children during their minority, if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.
>
> C. If one of the parties to a marriage dies or is incarcerated, the siblings of a minor child or

> children of the marriage may have reasonable visitation rights to such child or children during their minority if the court in its discretion finds that such visitation rights would be in the best interest of the child or children.
>
> D. If the parents of a minor child or children of the marriage are legally separated or living apart for a period of six months, the grandparents or siblings of the child or children may have reasonable visitation rights to the child or children during their minority, if the court in its discretion find that such visitation rights would be in the best interest of the child or children.

MASSACHUSETTS

Mass. Gen. Laws Ann. ch. 119, § 39D, provides in relevant part:

> If the parents of an unmarried minor child are divorced, married but living apart, under a temporary order or judgment of separate support, or if either or both parents are deceased, or if said unmarried minor child was born out of wedlock whose paternity has been adjudicated by a court of competent jurisdiction or whose father has signed an acknowledgement of paternity, and the parents do not reside together, the grandparents of such minor child may be granted reasonable visitation rights to the minor child during his minority by the probate and family court department of the trial court upon a written finding that such visitation rights would be in the best interest of the said minor child; provided, however,

> that such adjudication of paternity or acknowledgment of paternity shall not be required in order to proceed under this section where maternal grandparents are seeking such visitation rights. No such visitation rights shall be granted if said minor child has been adopted by a person other than a stepparent of such child and any visitation rights granted pursuant to this section prior to such adoption of the said minor child shall be terminated upon such adoption without any further action of the court.

* * *

MICHIGAN

Mich. Comp. Laws Ann. § 722.27b(5) provides:

> (5) If 2 fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3). This subsection does not apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code . . . and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated.

MINNESOTA

Minn. Stat. Ann. § 257C.08 provides in relevant part:

> **Subdivision 1. If parent is deceased.** If a parent of an unmarried minor child is deceased, the parents and grandparents of the deceased parent may be granted reasonable visitation rights to the unmarried minor child during minority by the district court upon finding that visitation rights would be in the best interests of the child and would not interfere with the parent child relationship. . . .
>
> **Subd. 2. Family court proceedings.** (a) In all proceedings for dissolution, custody, legal separation, annulment, or parentage, after the commencement of the proceeding, or at any time after completion of the proceedings, and continuing during the minority of the child, the court may, upon the request of the parent or grandparent of a party, grant reasonable visitation rights to the unmarried minor child, after dissolution of marriage, legal separation, annulment, or determination of parentage during minority if it finds that: (1) visitation rights would be in the best interests of the child; and (2) such visitation would not interfere with the parent-child relationship. . . .
>
> * * *
>
> **Subd. 3. If child has resided with grandparents.** If an unmarried minor has resided with grandparents or great-grandparents for a period of 12 months or more, and is subsequently removed from the home by the minor's parents, the grandparents or great-grandparents may petition the district court

for an order granting them reasonable visitation rights to the child during minority. The court shall grant the petition if it finds that visitation rights would be in the best interests of the child and would not interfere with the parent and child relationship.

Subd. 4. If child has resided with other person. If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority. The court shall grant the petition if it finds that:

(1) visitation rights would be in the best interests of the child;

(2) the petitioner and child had established emotional ties creating a parent and child relationship; and

(3) visitation rights would not interfere with the relationship between the custodial parent and the child.

* * *

Subd. 5. Exception for adopted children. This section shall not apply if the child has been adopted by a person other than a stepparent or grandparent. Any visitation rights granted pursuant to this section prior to the adoption of the child shall be automatically terminated upon such adoption.

Subd. 6. Grandparent visitation with an adopted child. (a) A grandparent of a child adopted by a stepparent may petition and a court may grant an order setting visitation with the child if:

(1) the grandparent is the parent of:

(i) a deceased parent of the child; or

(ii) a parent of the child whose parental relationship was terminated by a decree of adoption according to section 259.57, subdivision 1; and

(2) the court determines that the requested visitation:

(i) is in the best interests of the child; and

(ii) would not interfere with the parent and child relationship.

(b) Failure to comply with the terms of an order for visitation granted under this subdivision is not a basis for revoking, setting aside, or otherwise challenging the validity of a consent, relinquishment, or adoption of a child.

* * *

MISSOURI

Mo. Ann. Stat. § 452.402.1 provides in relevant part:

> 1. The court may grant reasonable visitation rights to the grandparents of the child and issue any necessary orders to enforce the decree. The court may grant grandparent visitation when:
>
> (1) The parents of the child have filed for a dissolution of their marriage. . . . ; or
>
> (2) One parent of the child is deceased and the surviving parent denies reasonable visitation to a parent of the deceased parent of the child; or
>
> (3) The child has resided in the grandparent's home for at least six months within the twenty-four month period immediately preceding the filing of the petition; and
>
> (4) A grandparent is unreasonably denied visitation with the child for a period exceeding ninety days. However, if the natural parents are legally married to each other and are living together with the child, a grandparent may not file for visitation pursuant to this subdivision.

NEBRASKA

Neb. Rev. Stat. Ann. § 43-1802(1) provides:

> (1) A grandparent may seek visitation with his or her minor grandchild if:
>
> (a) The child's parent or parents are deceased;
>
> (b) The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
>
> (c) The parents of the minor child have never been married but paternity has been legally established.

NEVADA

Nev. Rev. Stat. Ann. § 125C.050(1)–(2) provide:

> 1. Except as otherwise provided in this section, if a parent of an unmarried minor child:
>
> (a) Is deceased;
>
> (b) Is divorced or separated from the parent who has custody of the child;
>
> (c) Has never been legally married to the other parent of the child, but cohabitated with the other parent and is deceased or is separated from the other parent; or
>
> (d) Has relinquished his or her parental rights or his or her parental rights have been terminated,
>
> the district court in the county in which the child resides may grant to the great-

> grandparents and grandparents of the child and to other children of either parent of the child a reasonable right to visit the child during the child's minority.
>
> 2. If the child has resided with a person with whom the child has established a meaningful relationship, the district court in the county in which the child resides also may grant to that person a reasonable right to visit the child during the child's minority, regardless of whether the person is related to the child.

NEW MEXICO

N.M. Stat. Ann. § 40-9-2(A)–(E) provide in relevant part:

> A. In rendering a judgment of dissolution of marriage, legal separation or the existence of the parent and child relationship pursuant to the provisions of the Uniform Parentage Act, or at any time after the entry of the judgment, the district court may grant reasonable visitation privileges to a grandparent of a minor child, not in conflict with the child's education or prior established visitation or time-sharing privileges.
>
> B. If one or both parents of a minor child are deceased, any grandparent of the minor child may petition the district court for visitation privileges with respect to the minor. . . .
>
> C. If a minor child resided with a grandparent for a period of at least three months and the child was less than six years of age at the beginning of the three-month period and the

child was subsequently removed from the grandparent's home by the child's parent or any other person, the grandparent may petition the district court for visitation privileges with respect to the child . . . .

D. If a minor child resided with a grandparent for a period of at least six months and the child was six years of age or older at the beginning of the six-month period and the child was subsequently removed from the grandparent's home by the child's parent or any other person, the grandparent may petition the district court for visitation privileges with respect to the child . . . .

E. A biological grandparent may petition the district court for visitation privileges with respect to a grandchild when the grandchild has been adopted or adoption is sought, pursuant to the provisions of the Adoption Act, by:

(1) a stepparent;

(2) a relative of the grandchild;

(3) a person designated to care for the grandchild in the provisions of a deceased parent's will; or

(4) a person who sponsored the grandchild at a baptism or confirmation conducted by a recognized religious organization.

NORTH CAROLINA

N.C. Gen. Stat. Ann. § 50-13.2(b1) provides:

> (b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

OHIO

Ohio Rev. Code Ann. § 3109.051(B)(1) provides:

> (B)(1) In a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child, the court may grant reasonable companionship or visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent, if all of the following apply:
>
> > (a) The grandparent, relative, or other person files a motion with the court seeking companionship or visitation rights.

(b) The court determines that the grandparent, relative, or other person has an interest in the welfare of the child.

(c) The court determines that the granting of the companionship or visitation rights is in the best interest of the child.

OKLAHOMA

Okla. Stat. Ann. tit. 43, § 109.4(A)(1), provides:

A. 1. Pursuant to the provisions of this section, any grandparent of an unmarried minor child may seek and be granted reasonable visitation rights to the child which visitation rights may be independent of either parent of the child if:

a. the district court deems it to be in the best interest of the child pursuant to subsection E of this section, and

b. there is a showing of parental unfitness, or the grandparent has rebutted, by clear and convincing evidence, the presumption that the fit parent is acting in the best interests of the child by showing that the child would suffer harm or potential harm without the granting of visitation rights to the grandparent of the child, and

c. the intact nuclear family has been disrupted in that one or more of the following conditions has occurred:

(1) an action for divorce, separate maintenance or annulment involving the grandchild's parents is pending before the court, and the grandparent had a

preexisting relationship with the child that predates the filing of the action for divorce, separate maintenance or annulment,

(2) the grandchild's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled,

(3) the grandchild's parent who is a child of the grandparent is deceased, and the grandparent had a preexisting relationship with the child that predates the death of the deceased parent unless the death of the mother was due to complications related to the birth of the child,

(4) except as otherwise provided in subsection C or D of this section, legal custody of the grandchild has been given to a person other than the grandchild's parent, or the grandchild does not reside in the home of a parent of the child,

(5) one of the grandchild's parents has had a felony conviction and been incarcerated in the Department of Corrections and the grandparent had a preexisting relationship with the child that predates the incarceration,

(6) grandparent had custody of the grandchild pursuant to Section 21.3 of this title, whether or not the grandparent had custody under a court order, and there exists a strong, continuous grandparental relationship between the grandparent and the child,

> (7) the grandchild's parent has deserted the other parent for more than one (1) year and there exists a strong, continuous grandparental relationship between the grandparent and the child,
>
> (8) except as otherwise provided in subsection D of this section, the grandchild's parents have never been married, are not residing in the same household and there exists a strong, continuous grandparental relationship between the grandparent and the child, or
>
> (9) except as otherwise provided by subsection D of this section, the parental rights of one or both parents of the child have been terminated, and the court determines that there is a strong, continuous relationship between the child and the parent of the person whose parental rights have been terminated.

PENNSYLVANIA

23 Pa. Cons. Stat. Ann. § 5325 provides:

> In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:
>
> > (1) where the parent of the child is deceased, a parent or grandparent of the

deceased parent may file an action under this section;

(2) where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage; or

(3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home.

SOUTH CAROLINA

S.C. Code Ann. § 63-3-530(A)(33) provides in relevant part:

(A) The family court has exclusive jurisdiction:

* * *

(33) to order visitation for the grandparent of a minor child where either or both parents of the minor child is or are deceased, or are divorced, or are living separate and apart in different habitats, if the court finds that:

(1) the child's parents or guardians are unreasonably depriving the grandparent of the opportunity to visit with the child, including denying visitation of the minor child to the grandparent for a period exceeding ninety days; and

> (2) the grandparent maintained a relationship similar to a parent-child relationship with the minor child; and
>
> (3) that awarding grandparent visitation would not interfere with the parent-child relationship; and:
>
> > (a) the court finds by clear and convincing evidence that the child's parents or guardians are unfit; or
> >
> > (b) the court finds by clear and convincing evidence that there are compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.
>
> * * *

TEXAS

Tex. Fam. Code Ann. § 153.433(a) provides:

> (a) The court may order reasonable possession of or access to a grandchild by a grandparent if:
>
> > (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;
> >
> > (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would

significantly impair the child's physical health or emotional well-being; and

(3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:

(A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;

(B) has been found by a court to be incompetent;

(C) is dead; or

(D) does not have actual or court-ordered possession of or access to the child.