WISCONSIN SUPREME COURT

In the matter of the grandparental visitation of A.A.L.:
In re the Paternity of A.A.L.:

CACIE M. MICHELS,

Petitioner-Appellant,

v.

Appeal No.: 17-AP-1142
Circuit Court Case No.: 10-FA-206

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

Appeal from the Circuit Court for Chippewa County
the Honorable James M. Isaacson, Presiding

BRIEF OF APPELLANTS, CACIE M. MICHELS AND KEATON L. LYONS

WELD RILEY, S.C.
Ryan J. Steffes, State Bar No. 1049698
3624 Oakwood Hills Parkway
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786; (715) 839-8609 Fax

Attorneys for Appellants, Cacie M. Michels and
Keaton L. Lyons

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STATEMENT OF THE ISSUE

I. Did the visitation order entered by the circuit court pursuant to Wis. Stat. § 767.43(3) violate the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution?[1]

[1]Pursuant to Kurtz v. City of Waukesha, 91 Wis. 2d 103, 117, 280 N.W.2d 757 (1979), the Attorney General has been provided notice that the constitutionality of Wis. Stat. § 767.43(3) is being challenged in this action. (A-Ap 39-41).

STATEMENT OF THE FACTS AND OF THE CASE

The material facts are mostly undisputed. Ann is an 8 year-old girl.[2] (R. 87, p. 58). Petitioner-Appellant Cacie M. Michels is Ann's mother. (R. 87, p. 58). Respondent-Appellant Keaton L. Lyons is her father. (R. 87, p. 58). All parties agree they are fit parents, and the circuit court found them to be "good parents." (R. 88, p. 26) (A-Ap 35).

Michels and Lyons were never married but lived together with Ann until 2011, when they broke up. (R. 87, p. 58). Since that time, Michels has had primary custody of Ann. (R. 87, pp. 59-60). By informal agreement, Lyons has custody approximately every other weekend and on other occasions. (R. 87, p. 94). The circuit court commended Michels and Lyons for their ability to amicably share custody of Ann. (R. 87, pp. 125-26) (A-Ap 1-2).

Ann has a close relationship with her maternal grandparents because she and Michels lived with them for over two years. (R. 87, p. 59). Petitioner-Respondent Jill R. Kelsey

[2]As the court of appeals did in its certification, Appellants will refer to A.A.L. as Ann for ease of reading.

is Ann's paternal grandmother. (R. 87, pp. 5-6). Ann never lived with Kelsey. (R. 87, pp. 58-60).

The precise extent of Kelsey's contact with Ann was disputed, but all parties agree the most significant contacts were on Wednesday nights during the summers of 2013, 2014 and 2015. (R. 87, pp. 6-8, 31). On many such Wednesday nights, Michels took Ann to a rodeo event where Kelsey and Ann rode horses together. (R. 87, pp. 6-8, 31). Ann would then often spend the night at Kelsey's house. (R. 87, pp. 53-54). Kelsey had less regular contact with Ann the remainder of the year. (R. 87, pp. 8-9); (R. 35).

In September 2015, Ann started kindergarten. (R. 87, p. 60). Shortly thereafter, "her life started filling up with other things, friends, she has a lot of family, school, extracurricular activities." (R. 87, p. 61). Michels initially tried to maintain the same level of visitation with her parents and Kelsey, but she observed that doing so was exhausting Ann and having a negative effect on Ann's relationship with Lyons, who was sacrificing some of his time with her. (R. 87, pp. 61, 64-65, 95-96).

Ultimately, in or around November 2015, Michels and Lyons began decreasing, but did not eliminate, Ann's visitation with Kelsey. (R. 87, pp. 21, 39); (R. 35). Shortly thereafter, Michels informed Kelsey she was no longer interested in going to Disney World with her and Ann, a trip Kelsey had previously proposed and had been planning. (R. 87, pp. 20-21, 65-66). Kelsey had asked Michels to lie to Lyons regarding how the trip would be funded. (R. 87, pp. 18, 78); (R. 65, p. 20). That request strained Michels' relationship with Lyons. (R. 87, pp. 19, 21, 76, 78); (R. 65, p. 20).

On December 15, 2015, Kelsey proposed taking Ann to Disney World with one of her male friends. (R. 87, p. 65). Michels said "absolutely not." (R. 87, p. 65). In response, Kelsey left Michels a nasty voicemail in which she called her "selfish," purported to possess unflattering information about her, Lyons and their significant others and threatened to sue to get custody of Ann. (R. 87, p. 66); (R. 62). A recording of the voicemail is in the record as a non-electronic record item.

Kelsey followed through with her threat to sue on January 23, 2016 when she intervened in this 2010 paternity

action. (R. 18). She petitioned for visitation rights under Wis. Stat. § 767.43(3). (R. 18). That provision provides a court may grant visitation rights to a grandparent in a case like this if:

> 1. The grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented from doing so by a parent who has legal custody of the child;
>
> 2. The grandparent is not likely to act in a manner that is contrary to decisions that are made by a parent who has legal custody of the child and that are related to the child's physical, emotional, educational or spiritual welfare; and
>
> 3. The visitation is in the best interests of the child.
>
> Wis. Stat. § 767.43(3).

A court trial was held on January 27, 2017. (R. 87). Kelsey sought extensive visitation, including a 7-day period each summer, something she had never previously had and something Michels and Lyons strongly opposed. (R. 38); (R. 87, pp. 67, 95-96).

Michels and Lyons testified that any court-ordered visitation with Kelsey, much less any extended visitation, was ***not*** in Ann's best interests. (R. 87, pp. 67, 95-96). They noted that the strain on Ann's schedule was what caused them to decrease grandparent visitation in the first place.

(R. 87, pp. 61, 64-65, 95-96). A court order requiring regular visits would only reimpose and likely increase that strain. (R. 87, pp. 61, 64-65, 95-96).

Michels and Lyons also expressed concerns regarding Kelsey's judgment. Kelsey concedes she gave Ann "a sip" of alcohol when Ann was only 4 years old. (R. 87, p. 54). She concedes she allowed Ann to go horseback riding without a helmet, even after Michels and Lyons insisted Ann wear a helmet. (R. 65, p. 20). She concedes she asked Michels to lie to Lyons regarding the proposed Disney World trip. (R. 65, p. 20).

Over Michels' and Lyons' objections, the circuit court granted Kelsey's petition. (R. 65, pp. 125-30) (A-Ap 1-6); (R. 44) (A-Ap 9). It ordered Michels and Lyons to cede custody of Ann to Kelsey one Sunday each month for a 5-hour visit and for a 7-day period each summer, with no restriction on where Kelsey could take Ann during that 7-day period. (R. 65, pp. 125-30) (A-Ap 1-6); (R. 44) (A-Ap 9). Michels and Lyons sought reconsideration. (R. 64). They argued the court order

violated their constitutional right to make decisions regarding the care, custody and upbringing of their daughter. (R. 63).

The court denied the motion. (R. 88, pp. 14-16) (A-Ap 23-25); (R. 73) (A-Ap 37-38). Relying on In re the Paternity of Roger D.H., 2002 WI App 35, ¶ 19, 250 Wis. 2d 747, 641 N.W.2d 440, the court concluded it could constitutionally overrule Michels' and Lyons' visitation decisions so long as: 1) it applied a "presumption" in their favor; and 2) it nevertheless found greater visitation was in Ann's best interests. (R. 88, pp. 15-16) (A-Ap 23-25).

Michels and Lyons appealed. They noted that fit parents have a fundamental liberty interest in the care, custody and upbringing of their children and argued that Wis. Stat. § 767.43(3) must be subject to strict scrutiny review because it infringes on that liberty interest. They argued that, as interpreted and applied by the circuit court and by the court of appeals in In the Interest of Nicholas L., 2007 WI App. 37, ¶¶ 11-12, 299 Wis.2d 768, 731 N.W.2d 288, Wis. Stat. § 767.43(3) cannot withstand strict scrutiny review.

The court of appeals certified the appeal to this court. It noted Roger D.H. does not make clear the standard grandparents seeking visitation under Wis. Stat. § 767.43(3) must meet "to overcome the presumption in favor of the parent's decision." (Certification, p. 6). It also expressed doubt that the standard applied in this case is constitutional:

> "Michels and Lyons persuasively argue that the *Roger D.H.* presumption, if understood as the circuit court did in this case and as this court did in *Nicholas L.*, is meaningless. This is so, they contend, because the burden of production is not shifted – as it always was with the grandparent under Wis. Stat. § 767.43(3) – and the burden of persuasion is not truly heightened. Rather, the presumption operates merely as 'a clunky restatement of the best-interests-of-the-child standard,' which is unconstitutional under *Troxel*." (Certification, p. 7).

For the reasons set forth below, Michels and Lyons now respectfully request this court find that the visitation order entered by the circuit court violates the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution.

STANDARD OF REVIEW

Whether a statute, as applied, violates the constitutional right to substantive due process is a question of law this court reviews de novo. In re the Termination of Parental Rights to Zachary B., 2004 WI 48, ¶ 16, 271 Wis.2d 51, 678 N.W.2d 831. In an as-applied challenge, the court presumes the statute is constitutional but does ***not*** presume the state applied the statute in a constitutional manner. In re the Termination of Parental Rights to Gwenevere T., 2011 WI 30, ¶ 48, 333 Wis.2d 273,797 N.W.2d 854.

A statute that infringes on a fundamental liberty interest is subject to strict scrutiny review. In re the Termination of Parental Rights to Max G.W., 2006 WI 93, ¶ 41, 293 Wis.2d 530, 716 N.W.2d 845. Under strict scrutiny review, the statute, as applied, must be narrowly tailored to advance a compelling state interest. Zachary B., 271 Wis.2d 51 at ¶ 24.

ARGUMENT

I. The Visitation Order Entered by the Circuit Court Pursuant to Wis. Stat. § 767.43(3) Violated the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution.

Understanding why the visitation order is unconstitutional requires understanding the nature of the liberty interest at issue, the United States Supreme Court's decision in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000), and the aftermath of that decision. This brief will first address those topics. It will then explain why Wis. Stat. § 767.43(3), as applied in this case, must be subject to strict scrutiny review and why it does not survive that review. Finally, the brief will show that when Wis. Stat. § 767.43(3) is interpreted and applied in a constitutional manner, Kelsey's petition fails.

A. Michels and Lyons have a fundamental liberty interest in the care, custody and upbringing of their daughter and that interest was infringed when the circuit court overruled their grandparent visitation decisions.

Substantive due process rights are rooted in the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution. State v.

Wood, 2010 WI 17, ¶ 17, 323 Wis.2d 321, 780 N.W.2d 63. Substantive due process addresses "what government may do to people under the guise of the law." Id. It is afforded only to fundamental liberty interests such as child-rearing, procreation and bodily integrity. Zachary B., 271 Wis.2d 51 at ¶ 19. Fit parents have a fundamental liberty interest in parenting their children. Id. at ¶ 23.

An analysis of how that fundamental liberty interest is implicated by grandparent visitation statutes should begin with Troxel. The case involved the children of unmarried parents. 530 U.S. at 60. The paternal grandparents had regular contact with the children until their son died. Id. at 60-61. Thereafter, the children's mother informed the grandparents their visitation would be reduced to "one short visit per month." Id.

The grandparents filed suit under Washington's visitation statute. The trial court found it would be in the children's best interests to spend more time with the grandparents. Id. at 61. It ordered visitation one weekend per month and for one week each summer. Id. After the Washington Supreme Court found the visitation order to be a violation of the parents' substantive

due process rights, the grandparents sought review in the United States Supreme Court.

The court accepted review. In a plurality decision, it noted: "(T)he interest of parents in the care, custody, and control of their children is perhaps the oldest fundamental liberty interest recognized by this Court." Id. at 65. And:

> "(I)t cannot now be doubted 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." Id. at 66.
>
> "(S)o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Id. at 68-69 (parenthetical in original).

The court ultimately concluded:

> "(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 72-73.

Yet, that is ***exactly*** what happened in this case. It is worth noting the factual similarities and differences between this case and Troxel. As in Troxel, this case involves unmarried parents. As in Troxel, Kelsey complained her visitation opportunities had been reduced but not eliminated all together. As in Troxel, the circuit court granted Kelsey's petition and

ordered monthly visitation and visitation for one week each summer. (R. 44) (A-Ap 9). Unlike Troxel, both of Ann's parents are alive and both objected to Kelsey's petition. (R. 87, pp. 67, 95-96). Unlike Troxel, the parents expressed well-founded concerns regarding Kelsey's judgment. (R. 87, p. 54); (R. 65, p. 20).

So how did the circuit court believe it had the power to second-guess the decision of two fit parents regarding the care, custody and upbringing of their child? It relied on Roger D.H.. (R. 88, p. 15) (A-Ap 24). That reliance is misplaced. Understanding why it is misplaced requires understanding the aftermath of Troxel.

At the time Troxel was decided, all fifty states had some form of visitation statute. 530 U.S. at 99 (J. Kennedy, dissenting). Forty-nine of the fifty statutes imposed some variation of a best-interests-of-the-child standard. Id. Troxel held that applying that minimal standard violates parents' substantive due process rights. Id. at 72-73. Unfortunately, the court did not say what more is required to protect those rights. In fact, it explicitly dodged that all-important question:

> "(W)e do not consider the primary constitutional question passed on by the Washington Supreme Court – 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.

As a result, state courts were left to figure out how to apply their visitation statutes in a constitutional manner. It has been a slow process in which nearly every state to have considered the issue has chosen one of two approaches: 1) imposing a "harm" standard on visitation statutes; or 2) imposing a "clear and convincing evidence" standard on visitation statutes.

The Washington Supreme Court, in a case decided along with Troxel, concluded a visitation statute is constitutional only if it is limited to cases where the court finds that not granting visitation would cause harm to a child. In re the Custody of Smith, 137 Wash. 2d 1, 969 P.2d 21, 30-31 (1998). In doing so, the court noted there are two recognized sources of state power to intrude on family life. First, the state may, using its police powers, protect the interests of society as a whole and children generally by doing things such as requiring children be vaccinated and regulating child labor. Id. at 28. Second, the

state may exercise its *parens patriae* power to protect individual children "where a child has been harmed or where there is a threat of harm to a child." Id.

The court then concluded:

> "Both *parens patriae* power and police power provide the state with the authority to act to protect children lacking the guidance and protection of fit parents of their own, and although they may represent different perspectives, both contemplate harm to the child and, in practical terms, have been used nearly interchangeably in the fashioning of a threshold requirement of parental unfitness, harm or threatened harm...(T)he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process." Id. at 28, 30.

Under the harm standard, court-ordered visitation is constitutional only where a grandparent or other third party has had a relationship with the child and where "arbitrarily depriving" the child of the relationship would cause harm to the child. Id. In other words, it is the case where a parent dies, and the surviving parent arbitrarily cuts out in-laws, or the case where a third party raises a child but is later arbitrarily cut off from contact when a parent returns. Only in those sorts of cases does the state have a sufficiently compelling interest to second-guess a fit parent's decision regarding the care, custody and upbringing of his or her child. Id.

The majority of state supreme courts to have considered the issue have come to the same conclusion as Washington and have either read the harm standard into their grandparent visitation statutes or have struck down the statutes as unconstitutional. In doing so, they have noted:

> "We believe the (harm standard) is sounder because of the ease with which a petitioning party could otherwise intrude upon parental prerogative....(T)here is no real barrier to prevent a party, who has more time and money than the child's parents, from petitioning the court for visitation rights. A parent who does not have the up-front out-of-pocket expense to defend against the petition may have to bow under the pressure even if the parent honestly believes it is not in the best interest of the child. (citation omitted). The prospect of competent parents potentially getting caught up in the crossfire of lawsuits by relatives and other interested parties demanding visitation is too real a threat to be tolerated in the absence of protection afforded through a stricter burden of proof. Therefore pursuant to this court's inherent supervisory powers...we determine that a nonparent petitioning for visitation pursuant to § 46b-59 must prove the requisite relationship and harm, as we have previously articulated, by clear and convincing evidence." Roth v. Weston, 259 Conn. 202, 789 A.2d 431, 448-49 (2002).

> "Because the Grandparent Visitation Statute is an incursion on a fundamental right...it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. Our prior jurisprudence establishes clearly that the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. When no harm threatens a child's welfare, the State lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit...Although *Troxel* avoided confronting that issue directly, we are satisfied that prior United States Supreme Court decisions fully support our conclusion that

interference with parental autonomy will be tolerated only to avoid harm to the health or welfare of a child. *Compare Yoder*, 406 *U.S.* at 230, 92 *S.Ct.* at 1540-41, 32 *L.Ed.*2d at 33-34 (noting that interference with childrearing was not justified because Amish children would not be physically or mentally *harmed* from receiving an Amish education as opposed to public education (emphasis added)); *Stanley, supra*, 405 *U.S.* at 649, 92 *S.Ct.* at 1211, 31 *L.Ed.*2d at 557 (requiring showing of parental *unfitness* with concomitant harm to child before terminating unwed father's parental rights (emphasis added)); *Pierce, supra*, 268 *U.S.* at 534, 45 *S.Ct.* at 573, 69 *L.Ed.* at 1078 (holding that state's interest was inadequate to justify interference in family life because children were not *harmed* by parents' decision to send their children to private schools as those schools fulfilled their obligations (emphasis added)); *Meyer*, 262 *U.S.* at 403, 43 *S.Ct.* at 628, 67 *L.Ed.* at 1046-47 (striking down state law that forbade children from learning foreign language because, among other things, such knowledge was not "so clearly *harmful* as to justify its inhibition with the consequent infringement of rights long freely enjoyed" (emphasis added)), *with Prince, supra*, 321 *U.S.* at 169-70, 64 *S.Ct.* at 444, 88 *L.Ed.* at 654 (upholding parent's conviction for violating state child labor laws because selling religious magazines to public could lead to emotional, psychological, or physical *injury* to child (emphasis added))." Moriarty v. Bradt, 177 N.J. 84, 827 A.2d 203, 222-23 (2003).

"(S)ome form of harm to a child has traditionally been necessary under the Due Process Clause to support interference by the state in this sensitive area. (citing Yoder and Pierce). Harm not only has been the prevailing standard of intervention, but is most suitable in analyzing a grandparent visitation statute. It is consistent with the essential presumption of fitness accorded a parent and is stringent enough to prevent states from meddling into a parental decision by simply making what it believes is a better decision. It also recognizes the challenges inherent in ordering grandparent visitation, including the tremendous burdens and strain placed on the parent-child relationship...There is no doubt, in a broad sense, that grandparent-grandchild relationships are beneficial and should be promoted. (citations omitted). Children deprived of the influence of a grandparent may lose important opportunities for positive growth and development. However, such a generalization falls short

> of establishing the type of harm that would justify state intervention into a parental decision denying contact. (citations omitted). If grandparent visitation is to be compelled by the state, there must be a showing of harm to the child beyond that derived from the loss of the helpful, beneficial influence of grandparents." In re the Marriage of Howard, 661 N.W.2d 183, 189-91 (Iowa 2003).

This is the majority view. Other cases that follow it include: Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996); In re Herbst, 1998 OK 100, ¶ 16, 971 P.2d 395; Doe v. Doe, 116 Hawaii 323, 172 P.3d 1067, 1079-80 (2007); Brooks v. Parkerson, 265 Ga. 189, 454 S.E.2d 769, 772-74 (1995); Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993); Koshko v. Haining, 398 Md. 404, 921 A.2d 171, 192-93 (2007); Glidden v. Conley, 175 Vt. 111, 820 A.2d 197, 204-05 (2003); Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565, 568 (2003); Blixt v. Blixt, 437 Mass. 649, 774 N.E.2d 1052, 1060-61 (2002); Ex parte E.R.G., 73 So.3d 634, 650 (Ala. 2011).

A minority of courts to have considered the issue have taken a different approach. They still recognize that the best-interests-of-the-child standard is constitutionally insufficient but hold the state can constitutionally second-guess a fit parent's visitation decision if the grandparent shows *by clear and convincing evidence* that visitation is in the child's best interests.

In their view, the higher burden of persuasion is sufficient to protect parents' liberty interests. Cases that adopt some variation of the clear-and-convincing-evidence standard include In the Matter of the Petition for Adoption of C.A., 137 P.3d 318, 327-28 (Colo. 2006); Polasek v. Omura, 2006 MT 103, ¶ 15, 332 Mont. 157, 136 P.3d 519; and Soohoo v. Johnson, 731 N.W.2d 815, 823 (Minn. 2007); Walker v. Blair, 382 S.W.3d 862, 871 (Kent. 2012); Hamit v. Hamit, 271 Neb. 659, 715 N.W.2d 512, 527-28 (2006); In re A.L., 2010 S.D. 33, 781 N.W.2d 482, 488 (2010); Hiller v. Fausey, 588 Pa. 342, 904 A.2d 875, 887-88 (2006).

Some of the cases that adopt the minority view involve visitation statutes that are much more narrowly tailored than Wis. Stat. § 767.43(3). For instance, the Pennsylvania statute limited visitation to grandparents whose child had died. Hiller, 904 A.2d at 886. Some courts have upheld visitation statutes, without reading in a presumption in favor of the parent, where the statute was narrowly tailored and already required giving special preference to the parent's decision. State ex rel. Brandon L. v. Moats, 209 W.Va. 752, 551 S.E.2d 674, 685

(2001); Harold v. Collier, 107 Ohio St.3d 44, 836 N.E.2d 1165, ¶¶ 41-44 (2005).

That brings us to Wisconsin, Roger D.H. and Nicholas L. Roger D.H. was 15 years old. 250 Wis.2d 747 at ¶ 3. His mother had always been his primary guardian. Id. His father had no custody or visitation rights. Id. His paternal grandmother petitioned for visitation under Wis. Stat. § 767.245(3), which was later renumbered Wis. Stat. § 767.43(3). Id. at ¶ 5. The circuit court denied the petition because it mistakenly interpreted Troxel as requiring a showing that the custodial parent is unfit. Id. at ¶ 7.

In an attempt to sustain the circuit court's order at the court of appeals, Roger's mother argued Troxel rendered Wis. Stat. § 767.245(3) "facially unconstitutional." Id. at ¶ 1. The court rejected the argument and held:

> "(W)e hold that when applying Wis. Stat. § 767.243(3), circuit courts must apply the presumption that a fit parent's decision regarding grandparent visitation is in the best interest of the child. At the same time, we observe that this is only a presumption and the circuit court is still obligated to make its own assessment of the best interest of the child. *See* § 767.245(3)(f). What the Due Process Clause does not tolerate is a court giving no 'special weight' to a fit parent's determination, but instead basing its decision on 'mere disagreement' with the parent." Id. at ¶ 19.

The court did not say what is required *to overcome* the presumption that the fit parent's decision is in the best interests of the child. Id. Is it: 1) showing that not granting visitation would harm the child?; 2) showing by clear and convincing evidence that visitation is in the child's best interests?; or 3) merely showing by a preponderance of the evidence that visitation is in the child's best interests?

The circuit court in this case plainly thought it was the third option. (R. 88, p. 15) (A-Ap 24). So did the court of appeals in Nicholas L., where it held:

> "The due process clause, therefore, prevents a court from starting with a clean slate when assessing whether grandparent visitation is in the best interests of the child. Rather, within the best interests decisional framework, the court must afford a parent's decision 'special weight.' (citing Troxel and Roger D.H.). This 'special weight' given to a parent's decision is not a separate element in the court's assessment as Julie argues. Pursuant to *Troxel* and *Roger D.H.*, the court accords special weight by applying a rebuttable presumption that the fit parents' decision regarding grandparent visitation is in the best interest of the child. (citing Troxel and Roger D.H.). In other words, as the grandparents aptly write, 'the rebuttable presumption is the legal means of giving the parent's decision 'special weight." Thus, the court is to tip the scales in the parent's favor by making that parent's offer of visitation the starting point for the analysis and presuming it is in the child's best interests. It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. The court is then to make its own assessment of the best interests of the child. (citing Roger D.H.)." 299 Wis.2d 768 at ¶¶ 11-12.

That cannot be. If the presumption in favor of the parent can be overcome by showing by a preponderance of the evidence that visitation is in the child's best interests, then the presumption is meaningless. A presumption is only meaningful if it shifts or otherwise alters the burden of production or the burden of persuasion.[3] That is the entire point of a presumption. *Black's Law Dictionary* instructs:

> "A presumption *shifts the burden of production or persuasion to the opposing party*, who can then attempt to overcome the presumption." *Black's Law Dictionary* (9th ed.), p. 1304 (Emphasis Added).

The Roger D.H. presumption, as understood by the circuit court and by the court of appeals in Nicholas L., does not shift the burden of production. Even in the absence of the presumption, the grandparent, as the petitioner, would bear the burden. Only a presumption *favoring the grandparent* would shift the burden of production. For instance, if there was a

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[3]The burden of persuasion is sometimes "loosely" referred to as the "burden of proof." *Black's Law Dictionary* (9th ed.), p. 223. As used in this brief, "burden of persuasion" refers to a party's "duty to convince the fact-finder to view the facts in a way that favors that party." *Black's Law Dictionary* (9th ed.), p. 223. The burden of persuasion in civil cases is typically by the preponderance of the evidence. In criminal cases, it is beyond a reasonable doubt. The "middle" burden of persuasion is by clear and convincing evidence. As used in this brief, "burden of proof" includes both the burden of production and the burden of persuasion. *Black's Law Dictionary* (9th ed.), p. 223.

presumption that spending time with a grandparent was in the best interests of a child, *that* would shift the burden of production and be meaningful. As it is, however, the Roger D.H. presumption does not shift or otherwise alter the burden of production.

The presumption could still be meaningful if it heightened the burden of persuasion. If, in order to overcome the presumption, the petitioning grandparent was required to show harm to the child or to show by clear and convincing evidence that visitation was in the child's best interests, the presumption would be meaningful because it would heighten the grandparent's burden of persuasion. But that is not how the presumption has been interpreted or applied. Instead, the court of appeals in Nicholas L. held:

> "'(T)he rebuttable presumption is the legal means of giving the parent's decision 'special weight." Thus, the court is to tip the scales in the parent's favor by making that parent's offer of visitation the starting point for the analysis and presuming it is in the child's best interests. *It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. The court is then to make its own assessment of the best interests of the child*." 299 Wis.2d 768 at ¶¶ 11-12 (Emphasis Added).

The first italicized sentence confirms the grandparent bears the burden of production. As noted above, that would be

the case even in the absence of the presumption. The second italicized sentence instructs that the burden of persuasion is the standard civil burden – preponderance of the evidence. The court simply decides what it thinks is best for the child. Id. That is the same burden of persuasion the grandparent would have to meet in the absence of the presumption.

Since the presumption, as applied by the circuit court and by the court of appeals in Nicholas L., does not shift or otherwise alter the burden of production or the burden of persuasion, it is meaningless. It is just a clunky restatement of the best-interests-of-the-child standard. With or without the presumption, a grandparent, to prevail, has to put forth evidence that convinces the court, by a preponderance of the evidence, that visitation is in the best interests of the child. The intent of the presumption was to accord "special weight" to parents' decisions. In practice, however, it has been applied in a way that does not do that.

The best-interests-of-the-child standard, whether in its original or restated form, violates parents' substantive due process rights and is unconstitutional. Troxel makes that clear:

> "(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." 530 U.S. at 72-73.

Yet, that is ***exactly*** what happened in this case and is exactly what Roger D.H. authorizes when it is interpreted as the circuit court did in this case and as the court of appeals did in Nicholas L.

This court considered and approvingly cited Roger D.H. in In re the Marriage of Meister, 2016 WI 22, ¶ 40-45, 367 Wis. 2d 447, 876 N.W.2d 746. However, the case was decided under unusual circumstances, and the court's analysis of the constitutional question was quite limited.

The case involved a grandparent petitioning for visitation under Wis. Stat. § 767.43(1).[4] A family court commissioner granted the petition. 367 Wis.2d 447 at ¶ 3. The circuit court reversed because it concluded Wis. Stat. § 767.43(1) required the petitioning grandparent to show a parent-like relationship with the child. Id. at ¶ 15. The children, by a guardian ad litem, appealed. Id. at ¶ 16. On appeal, the parent who opposed the

[4]Section 767.43(1) is closely related to Wis. Stat. § 767.43(3). Subsection (1) is the general visitation provision. Subsection (3) is a "special" provision that applies when the requirements set forth in subsections (3)(a) to (3)(c) are satisfied. Wis. Stat. § 767.43(2).

petition argued: 1) the circuit court correctly concluded Wis. Stat. § 767.43(1) requires showing a parent-like relationship; and 2) in any event, substantive due process requires showing a parent-like relationship. Id. at ¶ 5.

The court of appeals affirmed. It agreed the petitioning grandparent had to show a parent-like relationship with the child. Id. at ¶ 17. Shortly after the court of appeals issued its decision, the petitioning grandparent died. Id. at ¶ 18. Even though the case was moot, the children, by the guardian ad litem, petitioned for review. Id. This court granted the petition. It concluded the case should be heard, despite being moot, because it "present(ed) a question of great public importance that will occur frequently in the future." Id. at ¶ 18, n. 10.

The court then concluded Wis. Stat. § 767.43(1) does not require the petitioning grandparent to show a parent-like relationship with the child. Id. at ¶ 38. It also concluded that substantive due process does not require reading such a requirement into Wis. Stat. § 767.43(1). Id. at ¶ 46. In doing so, the court approvingly cited Roger D.H.:

> "Although *Roger D.H.* involved the statute now codified at Wis. Stat. § 767.43(3), we conclude that the court of

> appeals' reasoning is equally appropriate with regard Wis. Stat. § 767.43(1). As under subsection (3), a court may grant visitation under subsection (1) only if the court determines that doing so would be in the child's best interest. The Supreme court indicated in *Troxel* that any examination of a child's best interest must give special weight to a fit parent's own best interest determination. *Troxel*, 530 U.S. at 69-70, 120 S.Ct. 2054. ... *Troxel's* presumption in favor of a fit parent's determination would apply to a court's evaluation of a § 767.43(1) visitation petition as a part of the best interest analysis–and the presumption would apply regardless of whether the petitioner proved a parent-child relationship with the child...Whenever someone brings a visitation petition under § 767.43(1)–whether the petitioner is a grandparent, greatgrandparent, stepparent, or other person–*Troxel* requires that the deciding court give special weight to a fit parent's opinions regarding the child's best interest as part of any best interest determination." Id. at ¶ 45.

The constitutional argument put forth by the parent objecting to the petition in Meister was two paragraphs long. (Respondent's Supreme Court Brief, Appeal No. 2014AP1283, pp. 6-7). The term "strict scrutiny" did not appear in the brief. There was no mention of the fact that other jurisdictions have overwhelmingly held the constitution requires more than Nicholas L.'s restated best-interests-of-the-child standard. It is thus hardly surprising that this court's analysis of the constitutional issue was limited and that the court failed to recognize the constitutional problem created if the Roger D.H. presumption is interpreted and applied as it was in Nicholas L.

Michels and Lyons have a fundamental liberty interest in the care, custody and upbringing of their daughter. Troxel, 530 U.S. at 66, 68-69; Zachary B., 271 Wis.2d 51 at ¶ 23. Their substantive due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution preclude a court from overruling their grandparent visitation decisions simply because the court believes better decisions could be made. Troxel, 530 U.S. at 72-73. Yet, that is ***exactly*** what the circuit court did in this case. It did so by applying the Roger D.H. presumption in a way that renders the presumption meaningless and equivalent to the best-interests-of-the-child standard, a standard found unconstitutional in Troxel.

Unfortunately, the court in Troxel did not decide what more is required to protect parents' substantive due process rights. Many state supreme courts have considered the question. They are not in lockstep agreement, but a majority have concluded that only a showing of harm to the child can overcome a fit parent's fundamental liberty interest in raising her children as she deems best. A minority have concluded that

imposing the middle burden of proof on the petitioning grandparent is enough to protect the parent's liberty interest. None have concluded that a restated best-interests-of-the-child standard is enough.

The court of appeals, in certifying this case, recognized that Roger D.H. did not make clear "the standard for what is required to overcome the presumption in favor of the parent's decision." (Certification, p. 6). Nor did this court in Meister. 367 Wis.2d 447 at ¶ 45. The court of appeals did make the standard clear in Nicholas L. 299 Wis.2d 768 at ¶¶ 11-12, where it held that a petitioning grandparent could overcome the presumption by showing, by a preponderance of the evidence, that visitation is in the best interests of the child. That holding, however, is directly contrary to the United States Supreme Court's holding in Troxel.

The question is now finally before this court. For the reasons set forth in this brief, the court should hold that substantive due process requires a petitioning grandparent to show that not granting visitation would cause harm to the child. Anything less is insufficient to protect one of the oldest and

most fundamental liberty interests – a fit parent's right to raise her child as she deems best.

B. Section 767.43(3), as applied in this case, must be subject to strict scrutiny review and does not survive that review.

A parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child. Zachary B., 271 Wis.2d 51 at ¶ 23. Any statute that infringes on a fundamental liberty interest is subject to strict scrutiny review. Max G.W., 293 Wis.2d 530 at ¶ 41. Under strict scrutiny review, a statute must be narrowly tailored to advance a compelling state interest that justifies interference with the fundamental liberty interest. Zachary B., 271 Wis.2d 51 at ¶ 25.

Section 767.43(3) infringes on parents' fundamental liberty interest in the care, custody and upbringing of their children. By its plain terms, it empowers circuit courts to overrule parents' decisions on who their children should spend time with and to order parents to cede custody and control of their children to petitioning grandparents. Wis. Stat. § 767.43(3).

Because Wis. Stat. § 767.43(3) infringes on a fundamental liberty interest, it must be narrowly tailored to advance a compelling state interest that justifies interference with the liberty interest. Max G.W., 293 Wis.2d 530 at ¶ 41. This court has previously held that preventing harm to a child is a sufficiently compelling state interest to justify overruling parental decisions. Max G.W., 293 Wis.2d 530 at ¶ 41; Zachary B., 271 Wis.2d 51 at ¶ 25. As far as the undersigned can tell, the court has never found that *anything less* than the prevention of harm is sufficiently compelling.

That is not surprising. Courts in other jurisdictions, once they have determined their grandparent visitation statutes are subject to strict scrutiny review, have overwhelmingly concluded that only the prevention of harm to the child justifies state interference. The Hawaii Supreme Court collected relevant cases and held:

> "Other jurisdictions have held that the strict scrutiny inquiry is satisfied only where denial of visitation to the nonparent third party would result in significant harm to the child ... *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203, 222 (2003) ("Because the Grandparent Visitation Statute is an incursion on a fundamental right (the right to parental autonomy), ... it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. Our prior jurisprudence establishes clearly that the only state interest warranting the invocation of the State's

parens patriae jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child."); *Roth v. Weston*, 259 Conn. 202, 789 A.2d 431, 445 (2002) ("Without having established substantial, emotional ties to the child, a petitioning party could never prove that serious harm would result to the child should visitation be denied. This is as opposed to the situation in which visitation with a third party would be in the best interests of the child or would be very beneficial. The level of harm that would result from denial of visitation in such a situation is not of the magnitude that constitutionally could justify overruling a fit parent's visitation decision."); *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417, 418 (1998) (agreeing with the intermediate appellate court's conclusion that "[f]or the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find actual harm to the child's health or welfare without such visitation"); *In re Parentage of C.A.M.A.*, 154 Wash.2d 52, 109 P.3d 405, 413 (2005) (concluding that "RCW 26.09.240's presumption in favor of grandparent visitation is unconstitutional under *Troxel* and the application of the 'best interests of the child' standard rather than a 'harm to the child' standard is unconstitutional under [*Smith*, 969 P.2d 21, *aff'd sub nom., Troxel*, 530 U.S. 57, 120 S.Ct. 2054]"); *In re Herbst*, 971 P.2d 395, 399 (Okla.1998) ("[A] vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with this parental decision regarding who may see the child."); *Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla.1996) (concluding under the privacy clause of the Florida Constitution, that the state has a compelling interest in ordering grandparent visitation over the wishes of a fit parent only "when it acts to prevent demonstrable harm to the child"); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, 773 (1995) ("[W]e find that implicit in Georgia cases, statutory and constitutional law is that state interference with parental rights to custody and control of children is permissible only where the health or welfare of the child is threatened."); *Hawk*, 855 S.W.2d at 582 ("We hold that Article I, Section 8 of the Tennessee Constitution protects the privacy interest of these parents in their child-rearing decisions, so long as their decisions do not substantially endanger the welfare of their children. Absent some harm

> to the child, we find that the state lacks a sufficiently compelling justification for interfering with this fundamental right."). We agree with these jurisdictions that proper recognition of parental autonomy in child-rearing decisions requires that the party petitioning for visitation demonstrate that the child will suffer significant harm in the absence of visitation before the family court may consider what degree of visitation is in the child's best interests." Doe, 172 P.3d at 1079-80.

This court should do the same. The state cannot prevent fit parents from teaching a child a foreign language, even if it believes doing so is not in the best interests of the child. Meyer v. Nebraska, 262 U.S. 390, 403, 43 S.Ct.625 (1923). The state cannot prevent fit parents from sending a child to private school, even if it believes doing so is not in the best interests of the child. Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571 (1925). The state cannot prevent parents from ceasing a child's formal education after eighth grade, even if it believes additional education would be in the child's best interests.[5] Wisconsin v. Yoder, 406 U.S. 205, 234-35, 92 S.Ct. 1526 (1972).

[5]Yoder admittedly involves the intersection of parental rights with the right to free exercise of religion. However, the United States Supreme Court has noted it would not have ruled in the parents' favor in Yoder if not for their substantive due process rights in the care, custody and upbringing of their children. Employment Division, DHR of Oregon v. Smith, 494 U.S. 872, 881, 110 S.Ct. 1595 (1990).

How then can the state overrule a visitation decision made by two fit parents without a showing that the decision would result in harm to the child? A majority of courts to have considered the question have concluded the state cannot do so. This court should now join them. Anything less is insufficient to protect Wisconsin parents' fundamental liberty interest in parenting their children in the manner they deem best.

C. When Wis. Stat. § 767.43(3) is interpreted and applied in a constitutional manner, Kelsey's petition fails.

If this court adopts and applies the harm standard, Kelsey's petition fails.[6] The Iowa Supreme Court has noted:

> "Children deprived of the influence of a grandparent may lose important opportunities for positive growth and development. However, such a generalization falls short of establishing the type of harm that would justify state intervention into a parental decision denying contact. (citations omitted). If grandparent visitation is to be compelled by the state, there must be a showing of harm to the child beyond that derived from the loss of the helpful, beneficial influence of grandparents." Howard, 661 N.W.2d at 191.

The harm standard properly limits court-ordered visitation to cases where a grandparent has had a relationship

[6]Michels and Lyons strongly urge this court to adopt the harm standard. However, for the reasons noted in this section, Kelsey's petition would also fail under a clear-and-convincing-evidence standard or any standard that truly gives parents' decisions special weight.

with the child and where arbitrarily depriving the child of the relationship would cause harm, e.g., cases where a parent dies, and the surviving parent arbitrarily cuts off in-laws from having contact with their grandchildren, cases where a grandparent raises a child but is later arbitrarily cut off from contact when a parent returns, etc. Smith, 969 P.2d at 28, 30. This is plainly ***not*** that sort of case.

Michels and Lyons are fit parents. The circuit court even found them to be "good parents." (R. 88, p. 26) (A-Ap 35). There was nothing arbitrary about their decision to decrease Ann's visitation with Kelsey. They believed that trying to maintain the same level of visitation once Ann's life "started filling up with other things," such as school, friends and extracurricular activities, was exhausting Ann and negatively affecting her relationship with Lyons. (R. 87, pp. 61, 64-65, 95-96).

Michels and Lyons expressed concern regarding Kelsey's judgment and the advisability of her having custody of Ann for any extended period of time. The concerns were based on undisputed facts: 1) Kelsey allowing Ann to drink "a sip" of

alcohol when she was 4 years old; 2) Kelsey allowing Ann to go horseback riding without a helmet after Michels and Lyons explicitly told her not to do so; 3) Kelsey asking Michels to lie to Lyons regarding the proposed Disney World trip; and 4) Kelsey berating and threatening Michels when Michels resisted her demand to take Ann to Disney World. (R. 87, pp. 54, 66); (R. 65, p. 20); (R. 62). Kelsey also concedes that Lyons, her own son, wants nothing to do with her and believes she had a negative influence on his life. (Kelsey Court of Appeals Brief, p. 3).

This is not a case where Michels and Lyons totally cut off contact with Kelsey. Kelsey concedes as much. (R. 87, p. 39) (complaining "I was turned down more than I was allowed when I would ask (to spend time with Ann)"); (R. 87, p. 36) (admitting it is "very possible" Ann stayed at her house on January 21, 2016 and was scheduled to do the same on February 11, 2016); (R. 87, pp. 87-97) (Michels and Lyons provided her with schedules of extracurricular activities she could attend to see Ann); (R. 65, p. 21) (admitting she was never

"shut down" from seeing Ann). Kelsey simply wanted *more* visitation and wanted it to be *on her terms*.

Kelsey contended in her court of appeals brief that the real reason Michels and Lyons reduced her contact with Ann was the voicemail she left Michels. (Kelsey Court of Appeals Brief, p. 2). That creates a factual dispute but not a material one. In the voicemail, Kelsey calls Michels "selfish." She purports to possess and threatens to publicize unflattering information regarding Michels, Lyons and their significant others. She threatens to sue and implies that because she has resources, she will win.

What reasonable parent would want their child to spend extended time with a grandparent who behaves that way, especially given the concerns Michels and Lyons already had regarding Kelsey's judgment and given Lyons' view that Kelsey was a negative influence on his life? Even if the voicemail really was the impetus for the reduced visitation, Michels' and Lyons' decision would still be reasonable.

Kelsey presented no evidence that the reduced visitation would harm Ann. It may well be that Ann benefits from

spending time with Kelsey, but that does not prove those benefits outweigh the negative effects of being spread "between three different places." (R.87, p. 65). Nor does it prove the benefits of spending time with Kelsey outweigh the benefits Ann would realize by instead spending the time with her friends, with her father, playing baseball, reading a book, visiting a museum, or doing a thousand other things that can enrich a child's life. Ann's parents, not the state, should be deciding how she spends that time.

Finally, this is the rare case where ***both*** parents oppose a visitation petition. In most cases, there is at least an inference that the deceased, absent or non-custodial parent would want the child to have the visitation sought. There is no such inference in this case. There are two fit parents who both believe the visitation sought was contrary to the best interests of their child.

In light of the above undisputed facts, it is clear Kelsey cannot show that denying her petition would cause harm to Ann. This court should so find and order that the petition be dismissed.

CONCLUSION

The Tennessee Supreme Court has noted:

> "For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. 'You may do whatever you choose, so long as it is what I would choose also' does not constitute a delegation of authority." Hawk, 855 S.W.2d at 580.

The federal and state constitutions prevent the state from engaging in that sort of second-guessing of a fit parent's decisions regarding how to raise his or her child, including decisions regarding grandparent visitation. Unfortunately, the circuit court in this case engaged in exactly that sort of second-guessing.

In Roger D.H., the court of appeals correctly recognized that for Wis. Stat. § 767.43(3) to be applied in a constitutional manner, the court had to presume the parent's decision was in the child's best interests. 250 Wis.2d 747 at ¶ 19. The court failed, however, to explain what a grandparent had to do to overcome the presumption. Did the grandparent have to show that not granting visitation would cause harm to the child? To show by clear and convincing evidence that visitation is in the child's best interests? To meet some other standard?

The court of appeals answered the question in Nicholas L. but did so in a way that cannot be squared with parents' substantive due process rights or with Troxel. 299 Wis.2d 768 at ¶¶ 11-12. It held that a petitioning grandparent can overcome the Roger D.H. presumption by showing, by a preponderance of the evidence, that visitation is in the child's best interests. Id. That holding renders the presumption meaningless and just a clunky restatement of the best-interests-of-the-child standard.

This court should therefore overrule Nicholas L. and consider de novo what standard is required to protect parents' substantive due process rights. When the court does so, it should take note of what other jurisdictions have done. Many sister courts have considered the question. A majority have found that only the harm standard is sufficient to protect parents' rights. That conclusion is consistent with this court's own jurisprudence. It has found that preventing harm to a child is a sufficiently compelling state interest to justify overruling parental decisions. Max G.W., 293 Wis.2d 530 at ¶ 41; Zachary B., 271 Wis.2d 51 at ¶ 25. It has never found that *anything less* is sufficiently compelling.

The question that was not raised in Roger D.H., Nicholas L. or Meister is whether Wis. Stat. § 767.43 must be subject to strict scrutiny review. The question has been raised in this case, and the answer is clearly "yes." A fit parent's interest in raising her child as she deems best is one of the oldest and most fundamental liberty interests ever recognized by the United States Supreme Court. Troxel, 530 U.S. at 65-66. A court order overruling a parent's decision as to whether a child should spend time with a grandparent, or as to how much time the child should spend with the grandparent, indisputably infringes on that liberty interest.

To survive strict scrutiny, Wis. Stat. § 767.43(3) must be narrowly tailored to advance a compelling state interest. Zachary B., 271 Wis.2d 51 at ¶ 24. The only way Wis. Stat. § 767.43(3) can meet that standard is if the petitioning grandparent must show that not granting visitation would cause harm to the child. This court should so find and hold that when applying Wis. Stat. § 767.43(3), courts can grant visitation only

if the petitioning grandparent shows that not granting visitation would cause harm to the child.[7]

Once the court adopts the harm standard, it should apply it to this case. Michels and Lyons are fit parents. Their concerns regarding Kelsey's judgment and the advisability of her having extended custody of Ann were reasonable and based on undisputed facts. They did not totally cut off Kelsey's contact with Ann. They made reasonable decisions as to how Ann's time should be apportioned. Kelsey therefore cannot show that denying her petition would cause harm to Ann, and her petition must be dismissed.

For all of the above reasons, Michels and Lyons respectfully request this court: 1) find the visitation order entered in this case to be an unconstitutional violation of their substantive due process rights under the Fourteenth Amendment

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[7]Michels and Lyons have made an as-applied challenge, rather than a facial challenge, because Wis. Stat. § 767.43(3) can be applied in a constitutional manner by requiring the petitioning grandparent to meet the harm standard. If this court were to determine *sua sponte* that it lacks the power to read the harm standard into Wis. Stat. § 767.43(3), then the court must strike down the statute and leave it to the legislature to enact a new, constitutional version. See State v. Zarnke, 224 Wis. 2d 116, 139-40, 589 N.W.2d 370 (1999) (discussing whether an unconstitutional statute should be "construed to serve a constitutional purpose" or whether it should be struck down).

to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution; and 2) remand the case with instructions to dismiss Kelsey's petition.

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

ADDRESS
3624 Oakwood Hills Pkwy
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786
(715) 839-8609 Fax

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font:

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this brief is 9,341 words.

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the Supreme Court Brief of Appellants Cacie M. Michels and Keaton L. Lyons, was sent by U.S. mail on July 11, 2018, to the Clerk of the Wisconsin Supreme Court, with three (3) copies served on the parties as follows:

Daniel M. Smetana
Smetana Law Office
2211 E. Clairemont Ave., #4
Eau Claire WI 54701

Kari S. Hoel, Attorney at Law
Hoel Law Office, LLC
103 N. Bridge Street, Ste. 240
Chippewa Falls WI 54729

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

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SUPREME COURT OF WISCONSIN

In the matter of the grandparental visitation of A.A.L.:
In re the Paternity of A.A.L.:

CACIE M. MICHELS,

Appeal No.: 17-AP-1142

Petitioner-Appellant,

v.

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

Appeal from the Circuit Court for Chippewa County
The Honorable James M. Isaacson, Presiding

BRIEF OF PETITIONER-RESPONDENT JILL R. KELSEY

STAFFORD ROSENBAUM LLP
Jeffrey A. Mandell
State Bar No. 1100406
Eileen M. Kelley
State Bar No. 1085017
Anthony J. Menting
State Bar No. 1020915

222 West Washington Avenue,
Suite 900
P.O. Box 1784
Madison, Wisconsin 53701-1784
Telephone: (608) 256-0226
Facsimile: (608) 259-2600

Attorneys for Petitioner-Respondent Jill R. Kelsey

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COUNTER-STATEMENT OF THE ISSUE

The Court of Appeals certified one question, distinct from both of those in Appellants' docketing statement. (R.75) It asked this Court "to clarify the standard of proof required for a grandparent to overcome the presumption that parents' decisions regarding the scope and extent of their child's visitation with the grandparent is in the child's best interest." (Certification at 1-2) This Court also has jurisdiction to decide, should it wish, the issues contained in the docketing statement.

COUNTER-STATEMENT OF THE CASE

A. The parties to this case

Ann[1] was born in 2009 and will turn nine years old this October. (R.29; R.87 at 6:9-10)[2] Cacie Michels is Ann's mother. (R.87 at 6:11-12) Ann lives with Cacie. (R.87 at 59:21-60:6)

Keaton Lyons is Ann's father. (R.87 at 5:25-6:4) Not long after Ann was born, Keaton and Cacie, who never married, split up. (R.87 at 58:25-59:4) In a 2010 action initiated

[1] This brief continues the practice of referring to A.A.L. as Ann. It refers to adult parties by their first names for simplicity.

[2] Record citations use R.__ to indicate document numbers on the record index transmitted to the court of appeals on August 14, 2017.

by Chippewa County, Keaton stipulated to paternity and child support. (R.3-R.6; R.16)

Though the parents have joint custody (R.3), Keaton was "not … very involved" in the first six years of Ann's life. (R.87 at 18:10-12) However, since the latter part of 2015, when Ann turned six, she has spent every other weekend with Keaton, his girlfriend, and their son Mason under an informal agreement. (R.87 at 62:5-14, 69:14-20)

Jill Kelsey—who Ann calls Grandma Gigi—is Ann's paternal grandmother (Keaton's mother). (R.87 at 5:25-6:4, 44:19-20) Jill works for Chippewa County Public Health as a registered nurse. (R.87 at 5:1-10) In 2014, Jill received an honorable discharge from the U.S. Army Reserves as a Captain after nearly 27 years of service. (R.87 at 5:11-24)

B. Jill and Ann's relationship

The depth and breadth of the relationship Jill and Ann share is uncontested. Cacie testified that Ann "loves Jill." (R.87 at 65:13) Keaton "absolutely" agreed that Ann "really loves spending time with her grandmother." (R.87 at 92:25-93:2) Jill, who owns horses and is an avid rider, keeps a pony for Ann, and the two rode regularly, both at weekly summer rodeo events in Mondovi and around Jill's neighborhood.

(R.87 at 6:24-8:7) Ann has a bedroom at Jill's house, furnished and decorated for her. (R.87 at 14:2-24) For years, Ann regularly spent the night at Jill's home without her parents, both after weekly summer rodeo events and on other occasions. (R.87 at 6:21-23, 7:4-6, 53:15-22, 56:12-20) Ann often celebrated holidays, including Christmas and Easter, with Jill. (R.35; R.87 at 11:14-12:10, 15:11-21)

In December 2015, Cacie and Keaton "drastically" and "abruptly" reduced Jill's contact with Ann. (R.87 at 22:7-24, 39:15-23; *see also* R.87 at 27:8-28:16) There is a dispute about how much Ann and Jill saw one another early in 2016. (R.87 at 22:7-24, 35:19-36:17, 74:11-16) Once Jill petitioned for a visitation order under Wis. Stat. § 767.43(3), Cacie and Keaton cut off Ann's visits to Jill's house. (R.18; R.87 at 78:22-80:23) The circuit court appointed a Guardian ad Litem and held an extensive evidentiary hearing. (R.24; R.87)

Jill introduced into evidence a calendar (R.35) that documents significant, sustained contact with Ann from birth until the end of 2015. It was undisputed that the calendar under-estimated the time Jill and Ann spent together, because, as Jill explained, it included "only [visits] that I can actually prove through pictures and dates," even though "not every time that

I had [Ann] did I take pictures." (R.87 at 9:6-22) The calendar especially under-counted winter visits, when Jill did not take pictures because "we were just in the house watching Disney movies or coloring." (R.87 at 9:16-20)

The calendar also reflected that Jill had "about as much time" with Ann in all of 2016 as "she had probably in any given month all of the years prior to that." (R.87 at 118:17-20) Jill testified that her requested visitation schedule—which was more extensive than what the circuit court ultimately ordered—"is basically what I had the first six years of [Ann's] life." (R.87 at 28:24-25)

C. Clarifying what the record shows

The record shows that Ann is safe with Jill. Neither Cacie nor Keaton expressed any concerns about safety prior to this litigation. (R.87 at 16:1-10, 29:17-20) Indeed, Cacie testified that Ann "has always been safe when she was with Jill," and Keaton called Jill "a good grandmother to [Ann]." (R.87 at 90:18-23, 102:5-7) The Guardian ad Litem recommended visitation. (R.29; R.87 at 123:11-20) And the circuit court found, based on the evidence, that Jill "has maintained a relationship with" Ann and "is not likely to act in

a manner inconsistent" with the parents' rules, such that visitation is in Ann's best interest. (R.88 at 16:3-15)

Cacie and Keaton distort the record and resort to insinuation in an effort to call Jill's judgment into question. The record includes Jill's unrebutted testimony that "I don't smoke in the house when [Ann] is around. I don't smoke with [Ann] in the car." (R.87 at 37:5-7) The record contains Jill's uncontested explanation of the circumstances in which she once allowed Ann a small sip of an alcoholic beverage and reflects that she immediately told Cacie, who laughed about and expressed no concerns over the incident for years, until this visitation dispute. (R.87 at 54:6-55:10) The record also indicates that Jill complied with Cacie and Keaton's request that Ann wear a helmet while horseback riding, after that request was made in December 2015. (R.87 at 30:15-21, 37:12-16, 44:24-45:16)[3] In sum, the record does not support Cacie and Keaton's attacks on Jill's judgment when it comes to Ann.

[3] Cacie and Keaton cite Jill's deposition transcript—which was neither offered nor admitted into evidence—for the proposition that she subsequently allowed Ann to ride without a helmet once, because the weather was too cold for a helmet that left Ann's ears uncovered. (R.65, Exh. 2 at 29:7-17) The deposition transcript is not part of the trial record. *See Commerce Ins. Co. v. Merrill Gas Co.*, 271 Wis. 159, 168, 72 N.W.2d 771 (1955). But, to the extent this Court wishes to consider it, the transcript also indicates that Jill went to great lengths to honor Cacie and Keaton's

Nor does the record support Cacie and Keaton's characterizations of Jill as a liar. Jill and Cacie discussed and subsequently planned to take Ann to Disney World and to swim with dolphins. (R.87 at 16:17-17:8) They discussed this trip for nearly two years, waiting for Ann to reach the minimum age for swimming with the dolphins. (R.87 at 16:11-17:12) As Ann's sixth birthday approached, Jill and Cacie cemented their plans and Jill purchased plane tickets while Cacie was on the phone, confirming every step of the plan. (R.87 at 17:9-18:4) This coincided with Keaton getting more involved in Ann's life. (R.87 at 18:10-12) Because she had recently stopped providing Keaton direct financial support, Jill was hesitant to tell him that she was paying to take Ann and Cacie to Florida. (R.87 at 18:5-21:4, 20:3-5, 52:7-11) But the record does not support Cacie and Keaton's assertion that Jill lied.[4] Similarly,

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request, borrowing from a neighbor a child-sized helmet when Keaton forgot to pack Ann's. (R.65, Exh. 2 at 18:24-19:23)

The trial record is unequivocal that, since Cacie and Keaton expressed a preference that Ann wear a helmet, Jill has ensured she does so. (R.87 at 37:12-16, 44:24-45:16)

[4] Again, Cacie and Keaton go outside the record to cite Jill's deposition transcript. But there Jill testified that she had *not* lied to Keaton. (R.65, Exh. 2 at 31:24-32:17) Jill acknowledged that she had not been fully forthcoming with Keaton, but the only references to lying are injected by Cacie and Keaton's counsel and resisted by Jill. (R.65, Exh. 2 at 32:2-15)

the voicemail message they reference is not part of the trial record,[5] and to the extent it is referenced in the trial record, those mentions do not support Cacie and Keaton's incendiary characterizations. (R.87 at 35:4-18, 66:3-9)

D. The visitation order and subsequent proceedings

After considering the entire record and the relevant legal standard, the circuit court ordered visitation, albeit on a less-frequent schedule than Jill had requested or the Guardian ad Litem had recommended.[6] (R.87 at 125:9-16, 127:19-20) The order ensures that Ann and Jill will have at least some visitation—one afternoon per month and one-week during the summer. (R.45; R.87 at 128:20-25, 129:14-17)

Once Jill sought to enforce the order (R.51), Keaton, through new counsel, requested the circuit court reopen the judgment and reconsider the visitation order, arguing both that the court "misunderstood its role and the standards it was

[5] Like Jill's deposition transcript, this recording was neither offered nor accepted into evidence. (R.62 at ¶1)

[6] Cacie and Keaton assert that the order requires the parents "to cede custody." (Br. at 6, 30; *see also id.* at 35, 42) This is inaccurate. "Custody" is defined at Wis. Stat. § 767.001(2). On distinctions among the terms "custody," "placement," and "visitation," see *In re Opichka*, 2010 WI App 23, ¶13, 323 Wis. 2d 510, 780 N.W.2d 159; *Lubinski v. Lubinski*, 2008 WI App 151, ¶¶8-9, 314 Wis. 2d 395, 761 N.W.2d 676.

required to apply" and that Jill's "judgment with regard to [Ann] has, at least at times, been quite poor."[7] (R.63 at 2, 6) After briefing and a hearing on the merits, the circuit court denied the motion. (R.73; R.88 at 14:8-18:12) With regard to the facts, the circuit court reiterated that Ann "has had a significant and ongoing relationship with her grandma [Jill]," such that it was not in her best interest "then or now to just cut off cold turkey her contact with grandma." (R.88 at 8:24-9:1, 16:13-15; *accord* R.88 at 16:22-23, 18:3-6) After Keaton's new counsel acknowledged not reviewing the trial record (R.88 at 5:21-22), the circuit court explained:

> Now, if you had been here for the hearing, you would have heard that for years, I am talking not just a couple of months, I am talking years, grandma had this child -- I can be corrected, I'm sure, by [the Guardian ad Litem] -- but two days a week was almost the norm for several years before this. There was a calendar introduced into evidence that had dates circled, and she was there a lot, particularly in the summertime when there was these horse events. … [G]randma had a role, a significant role, I think, significant contact with [Ann].

(R.88 at 15:11-24) With regard to the law, the circuit court allowed that it "was not very articulate in my decision perhaps"

[7] The motion paperwork reflects that Keaton alone filed the motion. (R.63-64) At the reconsideration hearing, new counsel represented both Cacie and Keaton. (R.88 at 1:16-2:11)

but affirmed that it reviewed and applied relevant precedent. (R.88 at 14:22-15:10, 17:25-18:3)

Throughout the proceedings below, the circuit court was mindful of and faithfully applied the governing legal standard. (R.86 at 3:16-18; R.87 at 25:13-24, 26:19-22; R.88 at 15:13-16:10, 19:8-11) The circuit court "applied the presumption a fit parent's decision on placement is in the child's best interest." (R.88 at 15:4-6) But, as Jill's trial counsel noted, "[t]here was overwhelming evidence in the record to overcome the parental presumption." (R.70 at 4) The Guardian ad Litem echoed this, noting that the visitation order accorded with her recommendation and the evidence. (R.88 at 12:10-12)

Cacie and Keaton appealed from the visitation order (but not the reconsideration order). (R.74) They identified two issues: whether Wisconsin precedent, as applied by the circuit court, is unconstitutional and, if not, whether the circuit court exceeded its discretion. (R.75) The court of appeals certified a specific threshold question, seeking clarification about the applicable standard of proof. (Certification at 1-2)

STANDARD OF REVIEW

The Court has been asked to clarify the standard of proof required to overcome the presumption in favor of a parental decision regarding grandparent visitation. This requires interpretation of Wis. Stat. § 767.43(3). The meaning and application of the statute are questions of law that the Court addresses de novo. *See In re Marriage of Meister*, 2016 WI 22, ¶19, 367 Wis. 2d 447, 876 N.W.2d 746.

To the extent the Court also takes up Cacie and Keaton's constitutional challenge, that "likewise presents a question of law requiring [this Court's] independent review." *State v. McKellips*, 2016 WI 51, ¶29, 369 Wis. 2d 437, 881 N.W.2d 258. To prevail on an as-applied constitutional challenge, "the challenger must show that his or her constitutional rights were actually violated," *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶13, 357 Wis. 2d 360, 851 N.W.2d 302 (quoting *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63), and "must prove beyond a reasonable doubt that as applied to him or her the statute is unconstitutional," *Mayo v. Wis. Injured Patients & Families Fund*, 2018 WI 78, ¶58, --- Wis. 2d ---, 914 N.W.2d 678.

Should the Court opt to reach the merits of the visitation order, the standard of review differs. The decision below was an exercise of the circuit court's discretion. *Meister*, 2016 WI 22, ¶47. This Court affirms discretionary determinations as long as the circuit court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶13, 312 Wis. 2d 1, 754 N.W.2d 439. In reviewing "a circuit court's discretionary determination," this Court "look[s] for reasons to sustain" the action below. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493 (citing *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610). This Court "will not reverse a discretionary determination by the circuit court if the record shows that discretion was in fact exercised and [it] can perceive a reasonable basis for the court's decision." *Id.* (quoting *Sukala*, 2005 WI 83, ¶8).

ARGUMENT

The Court should confirm the well-settled law that the presumption a parent's decision regarding grandparent visitation is in the best interests of the child can be rebutted by a preponderance of the evidence. That should end this matter, as the visitation order meets that standard and was a lawful, proper exercise of the circuit court's discretion. However, in the event this Court overturns precedent and changes the applicable legal standard, it should remand for further circuit court proceedings under that new standard.

Cacie and Keaton argue that the circuit court's actions—which followed Wisconsin law governing presumptions—violated their constitutional rights. As a threshold matter, this argument was forfeited below, when Cacie and Keaton failed to object to the circuit court's application of the legal standard they now challenge. If the Court reaches the merits, it should rule that the question certified by the court of appeals regarding the appropriate standard of review has been definitively answered and that the standard is neither unclear nor unconstitutional. Disagreements with that standard are policy questions properly answered by the legislature. To the extent that this Court wishes to address

Cacie and Keaton's further constitutional arguments, those arguments too, are unavailing and should be rejected.

I. Cacie And Keaton Forfeited TheirRight To Object To The Legal Standard Applied By The Circuit Court.

As a threshold matter, the Court should dismiss this appeal because Cacie and Keaton failed to lodge a timely objection to the legal standard used by the circuit court. "[T]he rule requiring issues to be raised first in the circuit court is 'a bedrock principle of appellate practice.'" Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 3.4 (7th ed. 2016) (quoting *In re Ambac Assur. Corp.*, 2012 WI 22, ¶35, 339 Wis. 2d 48, 810 N.W.2d 450).

At trial, the circuit court clearly articulated the legal standard it understood to apply, and asked the parties to speak up if they disagreed:

> THE COURT: … I believe the standard is still best interest, and I still believe that the Supreme Court believes that the fit parents' decisions about placement is *[sic]* to be presumptively in the child's best interest. Am I wrong about that, anybody?
>
> [CACIE AND KEATON'S COUNSEL]: No, Your Honor. That is spot on.
>
> THE COURT: Mr. Smetana.
>
> [JILL'S COUNSEL]: There is an initial presumption, Your Honor, but it's only a presumption. It is a rebuttable presumption. …

(R.87 at 25:13-24) If Cacie and Keaton believed that the quantum of proof needed to overcome the presumption here differed from other presumptions under Wisconsin law, they needed to say so. They did not. Accordingly, they forfeited the argument that the circuit court applied the wrong standard.[8] *See, e.g.*, *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177; *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.[9]

This Court has enforced forfeiture, even where the court of appeals has not. In *Bostco LLC v. Milwaukee Metropolitan Sewerage District*, the plaintiff alleged inverse condemnation of timber pilings supporting its building. 2013 WI 78, ¶82, 350 Wis. 2d 554, 835 N.W.2d 160. On appeal, Bostco alleged for the first time that its inverse-condemnation theory included the

[8] Nor can Cacie and Keaton argue the circuit court was unaware of the constitutional dimension of this case. At the hearing to appoint the Guardian ad Litem, the circuit court summarized the case as one that involved Cacie and Keaton's "right to parent and raise their own child." (R.86 at 3:16-18). And in her closing argument at trial, Cacie and Keaton's counsel argued that Jill's visitation petition was "interfering with [Cacie and Keaton's] rights to take care of this child and to be the parent of this child." (R.87 at 122:6-8)

[9] The constitutional dimension of this case does not require an exception to the forfeiture rule. The so-called constitutional exception involves only those rights—"including the right to the assistance of counsel, the right to refrain from self-incrimination, and the right to have a trial by jury"—"that the Framers thought indispensable to a fair trial." *Ndina*, 2009 WI 21, ¶¶31-32 (internal quotation marks omitted).

groundwater under the building. *Id.*, ¶83. This Court held that Bostco's appeal raised "a fundamentally different argument than that which it raised and tried before the circuit court" and, on that basis, "decline[d] to address the inverse condemnation/ takings claim, notwithstanding the court of appeals' decision to reach this issue." *Id*. The same logic applies here, where Cacie and Keaton—like Bostco—attempt to obtain reversal by raising a fundamentally different argument on appeal than they made at trial. That is not permitted. *Id.*

Indeed, there is even greater reason to dismiss this appeal, because Cacie and Keaton invited the ruling they now point to as error. By endorsing the circuit court's articulation of the controlling legal standard as "spot on" (R.87 at 25:20), Cacie and Keaton "affirmatively contributed to what [they] now claim[] was trial court error." *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989) (declining to consider merits of Gove's appeal in the interests of justice).

II. Wisconsin Law Clearly Establishes The Standard Of Proof Required To Overcome The Presumption That A Parental Visitation Decision Reflects The Child's Best Interest.

Should the Court choose not to dismiss this case based on forfeiture, it should hold that Wisconsin law already clearly

establishes the applicable standard of proof. Cacie and Keaton correctly assert that, when a grandparent seeks to rebut the presumption in favor of a parental visitation decision, Wisconsin precedent applies a preponderance-of-the-evidence standard, in full accord with the Wisconsin Rules of Evidence. But Cacie and Keaton err when they attack that precedent on constitutional grounds. The presumption that has been imposed by both the court of appeals and this Court in prior cases provides greater protection to parents than anticipated by the Supreme Court of the United States or required by due process. The applicable principles of Wisconsin law are neither unclear nor unconstitutional.

A. This Court has affirmed that *Roger D.H.* "appropriately addressed and resolved" the presumption prescribed in *Troxel*.

In 2002, the court of appeals rejected a constitutional challenge to Wisconsin's grandparent-visitation statute. *See In re the Paternity of Roger D.H.*, 2002 WI App 35, ¶¶13-20, 250 Wis. 2d 747, 641 N.W.2d 440.[10] The court held that, in

[10] *Roger D.H.* addresses Wis. Stat. § 767.245(3), subsequently renumbered without substantive alteration as section 767.43(3). *See Meister*, 2016 WI 22, ¶17 n.9.

In addition to actions under chapter 767, grandparents and other parties may also petition for visitation subsequent to the adoption of a minor child (Wis. Stat. § 48.925), following the death of a parent (Wis.

considering petitions under the grandparent-visitation statute, "circuit courts must apply the presumption that a fit parent's decision regarding grandparent visitation is in the best interests of the child." *Id.*, ¶19. "At the same time," the court held, "this is only a presumption and the circuit court is still obligated to make its own assessment of the best interest of the child." *Id.*

The *Roger D.H.* court read this presumption into the grandparent-visitation statute to satisfy due-process concerns articulated by the Supreme Court of the United States in *Troxel v. Granville*, 530 U.S. 57 (2000). That case, challenging the State of Washington's grandparent-visitation statute, was largely inconclusive and yielded an array of separate opinions. While six Justices affirmed the judgment reversing the visitation order in that case, the Court was unable to assemble a majority in support of any rule. For the plurality opinion, the "problem" was "not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the parent's] determination of her daughters' best interests." *Id.* at 69. Essentially, the Washington statute, as

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Stat. § 54.56), and pursuant to a court's general equitable authority to protect a child's best interest. *See In re Custody of H.S.H.-K.,* 193 Wis. 2d 649, 691, 533 N.W.2d 419 (1995).

applied by the trial court, eliminated the parents from the decision-making process with regard to visitation. In the plurality's view, "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." *Id.* at 70.

Roger D.H. applied the *Troxel* plurality's teachings. It explained that "[w]hat the Due Process Clause does not tolerate is a court giving no 'special weight' to a fit parent's determination, but instead basing its decision on 'mere disagreement' with the parent." 2002 WI App 35, ¶19 (quoting *Troxel*, 530 U.S. at 68-69). By imposing a presumption in favor of the parental decision, *Roger D.H.* constrained how circuit courts apply the grandparent-visitation statute. *See id.* The case's guidance ensured that Wisconsin law avoids the pitfalls identified in *Troxel*. Indeed, in light of *Roger D.H.*, Wisconsin law is the opposite of the Washington law rejected in *Troxel*, which imposed upon "the fit custodial parent[] the burden of *disproving* that visitation would be in the best interest of her daughters." 530 U.S. at 69 (emphasis in original).

Roger D.H.'s guidance has worked in practice. As one case explains:

> Pursuant to *Troxel* and *Roger D.H.*, the court accords special weight by applying a rebuttable presumption that the fit parent's decision regarding grandparent visitation is in the best interest of the child. *In other words, ... the rebuttable presumption is the legal means of giving the parent's decision special weight.* Thus, the court is to tip the scales in the parent's favor by making that parent's offer of visitation the starting point for the analysis and presuming it is in the child's best interests. It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. The court is then to make its own assessment of the best interests of the child.

In re Nicholas L., 2007 WI App 37, ¶12, 299 Wis. 2d 768, 731 N.W.2d 288 (emphasis added; internal quotation marks and citations omitted). Subsequent decisions indicate no confusion over this guidance. *See, e.g.*, *In re A.M.K.*, 2013 WI App 128, ¶¶17-18, 351 Wis. 2d 223, 838 N.W.2d 865 (unpublished) (citing *Troxel*, *Roger D.H.*, and *Nicholas L.* (which it refers to as *Martin L.*)).

Wisconsin's application of *Troxel* reached this Court in 2016. Though the issue arose under a broader visitation provision, Wis. Stat. § 767.43(1), this Court expressly affirmed the *Roger D.H.* decision. *Meister*, 2016 WI 22, ¶40 ("We conclude that the court of appeals appropriately addressed and resolved this contention [that *Troxel* renders the visitation statute unconstitutional] in *Roger D.H.*"); *see also id.*, ¶6

("[W]e conclude that the legislature's decision to allow courts to grant visitation rights to grandparents … when visitation is in the best interest of the child does not unconstitutionally infringe on parents' constitutional rights because any best interest determination must give special weight to a fit parent's decisions regarding the child's best interest.").[11]

Cacie and Keaton dismiss *Meister*'s constitutional analysis as "quite limited" (Br. at 25), but they fail to substantiate that characterization. The parties to that case addressed this issue in briefing and oral argument, *see Meister*, 2016 WI 22, ¶40, and this Court explored constitutionality in a full section of the opinion—four pages of the Wis. 2d reporter, *see id.*, ¶¶39-47. There is no basis to suggest that this Court's decision was ill-considered or ill-informed.

B. Settled Wisconsin law provides for uniform treatment of presumptions, including the one imposed by *Roger D.H.* and *Meister*.

Contrary to Cacie and Keaton's argument, the presumption imposed by *Roger D.H.* and *Meister* is in accord

[11] The lead opinion, written by Justice Prosser, was joined by Chief Justice Roggensack and Justice A.W. Bradley. Justice Ziegler, joined by Justice Gableman, also endorsed *Roger D.H.* 2016 WI 22, ¶80 (Zieger, J., concurring) (joining all but ¶23 of the lead opinion). Justice R.W. Bradley did not participate. *Id.*, ¶49. Justice Abrahamson wrote separately without addressing the *Roger D.H.* decision. *Id.*, ¶¶50-79.

with well-settled Wisconsin law on presumptions, as set forth in the Wisconsin Rules of Evidence. The absence from the decisions in *Roger D.H.* and *Meister* of any discussion about the quantum of proof required to rebut the presumption (adopted in *Roger D.H.* and affirmed in *Meister*) neither constitutes an oversight nor creates any ambiguity.

Rule of Evidence 903.01 governs presumptions. It provides:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Wis. Stat. § 903.01. It establishes a default principle applicable in any instance where a civil statute does not expressly establish a different standard. *See id.*; *accord Judicial Council Committee's Note*—1973, 59 Wis. 2d R41, R46-R47. Because the grandparent-visitation statute "is silent with respect to the effect of the presumption on the opposing party … and because [visitation] is civil in nature, the presumption is governed by sec. 903.01, Stats." *In re Interest of Kyle S.-G.*, 194 Wis. 2d 365, 373, 533 N.W.2d 794 (1995) (internal citation omitted).

By its plain text, section 903.01 provides that a presumption allows proof of a basic fact to suffice for the establishment of a presumed fact, unless the opposing party proves, by a preponderance of the evidence, that the presumed fact is more likely than not untrue. *See Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 365-66, 387 N.W.2d 64 (1986); *see also Judicial Council Committee's Note*—1973, 59 Wis. 2d at R50; Wis. JI-Civil 352; Daniel D. Blinka, *Wisconsin Evidence* (Wisconsin Practice Series vol. 7) § 301.2 (4th ed. 2017). This Court has noted that section 903.01 implicitly imposes "a uniform quantum of proof for every presumption." *Kruse*, 130 Wis. 2d at 366 (citing *Judicial Council Committee's Note*—1973, 59 Wis. 2d at R46).[12] That uniform standard "is equivalent to 'the greater weight of the credible evidence' required by the ordinary burden of proof." *Id.*[13]

[12] *Accord Judicial Council Committee's Note*—1973, 59 Wis. 2d at R44 ("There seems to be no basis for the *[sic]* perpetuating a distinction between presumptions. Elimination of the distinction may serve to eliminate confusion in the applicable law.").

[13] To be sure, the uniform burden of proof is not without exception. Section 903.01's opening clause excepts those presumptions to which statutes expressly apply a higher burden of proof. Wis. Stat. § 903.01. This Court has echoed section 903.01, applying the uniform standard to "[a]ll presumptions at common law and all statutory presumptions which do not express a quantum of proof." *Kruse*, 130 Wis. 2d at 366 (citing *Judicial Council Committee's Note*—1973, 59 Wis. 2d at R46). Here, the exception does not apply.

That is how the circuit court proceeded in this case. The basic fact is that Cacie and Keaton oppose Jill's request for visitation. The presumed fact is that visitation is not in Ann's best interest. Jill produced evidence that visitation serves Ann's best interest—evidence rebutting the presumption. Under section 903.01, the circuit court properly engaged in "its own assessment of the best interest of [Ann]." *Roger D.H.*, 2002 WI App 35, ¶19; *Nicholas L.*, 2007 WI App 37, ¶12. Applying the standard of proof required by settled law, it concluded that the evidence rebutted the presumed fact. (R.87 at 123:17-20; R.88 at 16:3-17:25)

C. The application of settled Wisconsin law on presumptions in the grandparent-visitation context meets constitutional requirements.

Cacie and Keaton argue that the circuit court's actions —which followed Wisconsin law governing presumptions— violated their constitutional rights. Their arguments fail.

1. The *Roger D.H./Meister* presumption is not rendered "meaningless" by section 903.01's preponderance standard.

Cacie and Keaton's brief distorts how presumptions work. They argue that "[i]f the presumption in favor of the parent can be overcome by a preponderance of the evidence

that visitation is in the child's best interests, then the presumption is meaningless." (Br. at 22) This is not a constitutional argument, but one about the way presumptions function. And it is incorrect.

In offering a dictionary definition of "presumption," Cacie and Keaton invite confusion by quoting only the last of three sentences in the Black's Law Dictionary definition. (Br. at 22) Cacie and Keaton misconstrue that sentence's reference to "opposing party," reading it as the party opposing the ultimate relief sought in the trial court, rather than (as the previous sentence in the definition establishes) the party adversely affected by, and thus opposing, the presumption itself. *See Presumption*, Black's Law Dictionary (10th ed. 2014).[14] Essentially, Cacie and Keaton contend that anytime a presumption benefits a party not bearing the overall burden of proof, the presumption is "meaningless." That is just plain wrong, as shown in this Court's *Kruse* decision.

[14] The full definition reads: "A legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption."

The *Kruse* case considered the presumption that "the person establishing a legal title to the premises is presumed to have been in possession of the premises within the time required by law." *Kruse*, 130 Wis. 2d at 365 n.5 (quoting Wis. Stat. § 893.30). This Court held that a presumption is *not* rendered meaningless by the application of a preponderance standard for rebuttal. *Id.* at 365. This holding follows from the fact that, "even where rebutting evidence has been produced, the inference from the presumption survived and is sufficient to support a jury verdict until the presumption is met by evidence of equal weight." *Id.* at 365-66 (citing *Judicial Council Committee's Note*—1973, 59 Wis. 2d at R42). The Court then went further, expressly rejecting the notion that rebuttal of a presumption should require a heightened standard of proof and holding instead that the existence of the presumption "tends to justify a *lower* burden of proof." *Id.* at 366 (emphasis added).

The *Kruse* analysis presages *Nicholas L.*'s holding in the grandparent-visitation context that "the rebuttable presumption *is* the legal means of giving the parent's decision special weight." 2007 WI App 37, ¶12 (emphasis added; internal quotation marks omitted). Notably, *Nicholas L.* itself

belies Cacie and Keaton's argument that Wisconsin law renders the parental presumption "meaningless." While the grandparents in that case rebutted the parental presumption with respect to two grandchildren, the supposedly "meaningless" presumption held with respect to the third. *See id.*, ¶1 n.1.

Cacie and Keaton's argument is not novel and has already been rejected by this Court. A dissenting opinion in *Kruse* considered Cacie and Keaton's approach to presumptions:

> The majority's analysis of the presumption makes it a legal theory with no value to the beneficiary. … Under this standard, the opponent of a presumption only has a burden to come forth with equal evidence. It does not give any value to a presumption that cannot be overcome by merely evidence of equal weight. The opponent of the presumption does not have a burden of proof. It is not really a presumption under that test, but merely an advantage to not have to initially produce evidence [contrary to the presumed fact].

130 Wis. 2d at 374-75 (Steinmetz, J., dissenting). No other Justice joined the dissent, and, in the 30 years since, this Court has neither proposed an amendment to section 903.01 nor reversed *Kruse's* analysis, even as Wisconsin courts routinely face the need to apply presumptions.

2. The *Roger D.H./Meister* presumption exceeds the protections prescribed by the *Troxel* plurality for parental preferences.

Although Cacie and Keaton characterize the presumption imposed in *Roger D.H.* (and affirmed in *Meister*) as feeble, it is stronger than *Troxel* anticipates. This is true because presumptions operate more robustly under Wisconsin law than under Federal Rule of Evidence 301.

In adopting section 903.01, Wisconsin followed the then-proposed federal rule, based upon the Uniform Rules of Evidence and work by Edmund M. Morgan. *See Judicial Council Committee's Note*—1973, 59 Wis. 2d at R41-R45. But Congress rejected the proposed federal rule, adopting instead Federal Rule of Evidence 301, which mirrors the Model Rules, based upon work by James Bradley Thayer. *See* Blinka, *supra*, § 301.2 ("Thayer's ideas are captured in Fed. R. Evid. 301. Morgan's theory is embraced by Wis. Stat. § 903.01 (and the original draft of the federal rules)."); Fed. R. Evid. 301.[15]

[15] The full text of Federal Rule of Evidence 301 provides: "In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."

This historical divergence is both significant and instructive. A "Morgan presumption" shifts both the burden of production and the burden of persuasion to the party seeking to rebut it. *See Morgan presumption*, Black's Law Dictionary (10th ed. 2014); Blinka, *supra*, § 301.4. By contrast, a "Thayer presumption" operates as a "bursting bubble"; it shifts only the burden of production and, once a party seeking to rebut the presumption produces any evidence, the presumption bursts and the parties equally bear the burden of persuasion. *See Thayer presumption*, Black's Law Dictionary (10th ed. 2014); Blinka, *supra*, § 301.3. As a result, "[t]he Morgan approach confers much greater power on the presumption." Blinka, *supra*, § 301.2. And, because Wisconsin adopted Morgan's views while the federal rules embraced Thayer's, it follows that Wisconsin law grants "much greater power" to presumptions than federal law does. *Id.*; *see also, e.g.*, *id.* at § 301.3 (Congress rejected the proposal on which Wisconsin Rule 903.01 is based "in favor of a Thayerian rule that gives only a modest force to presumptions in civil cases.").

Thus, the "special weight" in favor of the parental decision applies more forcefully in Wisconsin than *Troxel* plurality anticipated, simply by virtue of the weight Wisconsin

law gives to presumptions.[16] Nothing in *Troxel* suggests that affording the parental presumption the treatment provided under the Federal Rules of Evidence (and the similar rules in most states, including Washington, where *Troxel* originated) would violate due process. Given that, affording that same presumption the benefit of the "much greater power" that Wisconsin's section 903.01 confers easily clears the due-process bar.

3. *Troxel* does not require a heightened burden of proof for rebutting the presumption that a fit parent's decision is in the best interests of their child.

Applying section 903.01's preponderance standard to evidence rebutting the parental presumption comports with the teachings of *Troxel*. Cacie and Keaton argue that, post-*Troxel*, there are only two ways for states to maintain grandparent-visitation statutes: by requiring a showing of harm in the absence of visitation or by imposing a heightened clear-and-convincing-evidence standard to evaluate arguments contrary to the parental preference. (Br. at 14) Not so. Wisconsin's

[16] Indeed, Wisconsin is in the minority of states to apply Morgan presumptions. *See* Lynn McLain, 5 *Maryland Evidence*, § 301:2 (2018) (noting the "majority American common law approach" is to follow Thayer's theory, while "at least eleven states," including Wisconsin, have adopted Morgan's approach).

presumption standard is consistent with *Troxel*. As this Court has already concluded, Wisconsin's grandparent-visitation statute "does not unconstitutionally infringe on parents' constitutional rights." *Meister*, 2016 WI 22, ¶6.

Notably, the *Troxel* plurality declined to define "the precise scope of the parental due process right in the visitation context." 530 U.S. at 73. Although the Washington Supreme Court had adopted a harm requirement in its decision below, the *Troxel* plurality declined to follow suit. *See id.* ("[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—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.").

Instead, the plurality proceeded mostly through indirect comments, cataloguing the shortcomings of the Washington court proceedings rather than offering a normative statement of what the law should be. The only concrete guidance the opinion provided is the prescription that, "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least *some special weight* to the parent's own determination." *Id.* at 70 (emphasis added).

Cacie and Keaton labor in vain to weave an elaborate tapestry from these few threads.

Cacie and Keaton's assertion that, post-*Troxel*, states have followed one of two paths—adopting either a harm requirement or a clear-and-convincing-evidence standard—over-simplifies matters considerably. The reality is that, both before and after *Troxel*, different states have approached this issue in a variety of ways. Cacie and Keaton's argument draws a false dichotomy between two distinct concepts and in doing so fails to distinguish between the substantive showing a state requires (harm, best interest of the child, or a variety of other options) and the standard of proof applied (clear-and-convincing evidence, preponderance, or something else) to determine whether the substantive showing has been met. A survey of state laws reveals they are a hodgepodge, mixing and matching different substantive requirements with various standards of proof. The resulting laws defy neat categorization.

Counting Wisconsin, a dozen states—also Indiana, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Dakota, Ohio, and Wyoming—have statutes that look to the best interest of the child (rather than a showing of harm) and do not require a heightened

evidentiary standard (like clear and convincing evidence) to visitation petitions where additional criteria are satisfied.[17] In most of these states, the grandparent-visitation statute has survived constitutional scrutiny.[18] Other states have taken different approaches. Some apply a clear-and-convincing-evidence standard. Some require a showing of harm. A few

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[17] *See, e.g.*, Ind. Code § 31-17-5-2; Kan. Stat. Ann. § 23-3301; La. Civ. Code Ann. art. 136; Miss. Code Ann. § 93-16-3; Mo. Rev. Stat. § 452.402; N.H. Rev. Stat. Ann. § 461-A:13; N.M. Stat. Ann. § 40-9-2; N.Y. Dom. Rel. Law § 72; N.D. Cent. Code § 14-09-05.1; Ohio Rev. Code Ann. § 3109.12; Wyo. Stat. Ann. § 20-7-101.

[18] *See Kulbacki v. Michael*, 845 N.W.2d 625, 629-30 (N.D. 2014) ("North Dakota's provision for consideration of the best interests of the child … passes constitutional muster under both the Federal and North Dakota Constitutions."); *Smith v. Wilson*, 90 So. 3d 51, 60 (Miss. 2012) (holding Mississippi statute constitutional after noting it is narrower than the one in *Troxel*); *In re Rupa*, 13 A.3d 307, 313 (N.H. 2010) (affirming constitutionality of grandparent-visitation statute where statutory factors regarding best interest of the child and interference with parental relationship are given extra weight); *In re K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 462 (Ind. 2009) (where courts apply presumption in favor of parental decision, grandparent-visitation statute "does not substantially infringe on a parent's fundamental right to control the upbringing, education, and religious training of their children" (internal quotation marks omitted)); *Matter of E.S. v. P.D.*, 863 N.E.2d 100, 101 (N.Y. 2007) (holding grandparent-visitation provision "is constitutional, both on its face and as applied"); *Harrold v. Collier*, 836 N.E.2d 1165, 1172, ¶44 (Ohio 2005) ("Ohio's nonparental-visitation statutes are narrowly tailored to serve [a child's best interest and] are not, therefore, unconstitutional under *Troxel*."); *Blakely v. Blakely*, 83 S.W.3d 537, 538 (Mo. 2002) (en banc) (holding grandparent-visitation statute as interpreted in court "constitutional under the standards set out in *Troxel*"); *State Dep't of Social & Recreation Servs. v. Paillet*, 16 P.3d 962, 971 (Kan. 2001) (holding that Kansas statute is not "called into question by the Supreme Court's decision in *Troxel*").

Louisiana, New Mexico, and Wyoming have not decided constitutional challenges to their grandparent-visitation laws.

have adopted both.[19] Importantly, in most states, these judgments are legislative policy decisions, disturbed by courts only if the statute is unconstitutional. Cacie and Keaton insist that a showing of harm is constitutionally mandated, but *Troxel* does not require as much and many states—including Arizona, California, Colorado, Kentucky, Montana, Nebraska, New York, Ohio, Oregon, Pennsylvania, and West Virginia—have rejected that same argument.[20]

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[19] *See, e.g.*, Fla. Stat. Ann. § 752.011(3); Ga. Code Ann. § 19-7-3(c)(1); Okla. Stat. Ann. tit. 43, § 109.4(A)(1)(b). Notably, Florida, Georgia, and Oklahoma's state constitutions provide greater protection to parental prerogatives than the federal Due Process Clause does. *See Patten v. Ardis*, No. S18A0412, --- S.E.2d ---, 2018 WL 3193970, at *1 (Ga. June 29, 2018); *Neal v. Lee*, 14 P.3d 547, 550-51 (Okla. 2000); *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996). These states' decisions to adopt grandparent-visitation statutes more stringent than most, therefore, reflects unique local circumstances, not a divergent view of what *Troxel* teaches. With respect to substantive due process, this Court's decisions "find no substantial difference between the due process protections provided" by "the Fourteenth Amendment to the United States Constitution and [] art. I, § 1 of the Wisconsin Constitution." *Dowhower ex rel. Rosenberg v. W. Bend Mut. Ins. Co.*, 2000 WI 73, ¶12, 236 Wis. 2d 113, 613 N.W.2d 557.

[20] *See, e.g.*, *In re Marriage of Friedman & Roels*, 418 P.3d 884, 889, ¶19 (Ariz. 2018) (overturning decision that, under *Troxel*, "nonparent who seeks visitation … must prove that the child's best interests will be substantially harmed absent judicial intervention" (internal quotation marks omitted)); *Walker v. Blair*, 382 S.W.3d 862, 872 (Ky. 2012) (best-interest standard is consistent with *Troxel* and "showing harm to the child is not the only way that a grandparent can rebut the presumption in favor of the child's parents"); *Matter of E.S.*, 863 N.E.2d at 105 ("Reasoning from *Troxel,* we conclude that [grandparent-visitation statute that does not include harm requirement] is facially constitutional."); *Hiller v. Fausey*, 904 A.2d 875, 888-90 (Pa. 2006) (rejecting argument that, under *Troxel*, "grandparents must demonstrate that a child will suffer harm as a result of the denial of visitation"); *In re Adoption of C.A.*, 137 P.3d 318, 319 (Colo. 2006) (en banc) (*Troxel* "did not require the standard of harm or potential harm to the child that the court of appeals adopted in this case" but "left to

The disparity in how states have approached this issue underscores that a variety of approaches satisfy due process. If due process mandated one specific approach, *Troxel* would have said so and there would be uniformity among the states. The flexibility of the constitutional standard explains the *Troxel* plurality's preference to allow "state-court adjudication in this context [to] occur[] on a case-by-case basis." 530 U.S. at 73. In Wisconsin and several other states, that adjudication has yielded a best-interest inquiry, with a presumption in favor of the parental decision. Though Cacie and Keaton dislike that result, it is neither an outlier nor unconstitutional.

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each state the responsibility for enunciating how its statutes and court decisions give 'special weight' to parental determinations in the context of grandparent visitation orders."); *Hamit v. Hamit*, 715 N.W.2d 512, 527-28 (Neb. 2006) (rejecting argument that Nebraska statute failed to satisfy *Troxel* because, "under Nebraska's grandparent visitation statutes as a whole, the best interests of the child consideration does not deprive the parent of sufficient protection"); *Polasek v. Omura*, 136 P.3d 519, 522-23, ¶15 (Mont. 2006) (setting out three inquiries in light of *Troxel*, with harm not being one of them); *Harrold*, 836 N.E.2d at 1172, ¶44 (nonparental-visitation statute that does not require a showing of harm is constitutional in light of *Troxel*); *In re Marriage of Harris*, 96 P.3d 141, 151 (Cal. 2004) (statute, which does not include harm standard, "does not suffer from the constitutional infirmities that plagued the Washington statute considered in *Troxel*"); *In re Marriage of O'Donnell-Lamont*, 91 P.3d 721, 740 (Or. 2004) (rejecting argument that harm standard is required by federal constitution; holding that *Troxel* requires presumption in favor of fit parent's visitation decision but "goes no further"); *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (concluding grandparent-visitation statute, which does not require showing of harm, is "well within the constitutional concerns addressed in *Troxel*").

D. Public policy counsels caution in upsetting settled law in the way Cacie and Keaton propose.

Because Wisconsin's grandparent-visitation statute, as interpreted in *Roger D.H.* and affirmed in *Meister*, is within constitutional bounds, this Court should not overrule the legislative policy decisions it reflects. Public policy militates in favor of recognizing that *Meister* already answered the question certified by the court of appeals and declining Cacie and Keaton's invitation to adjudicate the issue anew.

1. This court should not disturb the legislature's policy decisions absent constitutional necessity.

Where "the legislature has acted, 'the judiciary is limited to applying the policy the legislature has chosen to enact, and may not impose its own policy choices.'" *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶60, 281 Wis. 2d 300, 697 N.W.2d 417 (quoting *Fandrey v. Am. Family Mut. Ins. Co.,* 2004 WI 62, ¶16, 272 Wis. 2d 46, 680 N.W.2d 345); *accord Meyers v. Bayer AG*, 2007 WI 99, ¶53, 303 Wis. 2d 295, 735 N.W.2d 448 ("We decline to substitute our judgment for that of the legislature."); *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, ¶24, 576 N.W.2d 245, 252 (1998)

("This court has long held that it is the province of the legislature, not the courts, to determine public policy.").

This Court already applied this principle to section 767.43: "We conclude that *the legislature's decision* to allow courts to grant visitation rights to grandparents … when visitation is in the best interest of the child does not unconstitutionally infringe on parents' constitutional rights." *Meister*, 2016 WI 22, ¶6 (emphasis added). The Court should continue upholding that policy decision out of respect for the legislature as a co-equal branch of government.

2. Adopting the rule Cacie and Keaton advocate would undermine fundamental principles of Wisconsin family law.

It is axiomatic that "each unhappy family is unhappy in its own way." Leo Tolstoy, *Anna Karenina* 1 (Richard Pevar & Larissa Volokhonsky, trans., Penguin 2000) (1878). Family law deals almost exclusively with families that are unhappy in some respect. (Hence their presence in family court.) For this reason, family law as a discipline eschews broad rules in favor of fact-intensive, case-by-case adjudication. *See Wendland v. Wendland*, 29 Wis. 2d 145, 149, 138 N.W.2d 185, 187 (1965) ("Each custody case must turn on its own facts and circumstances."). The *Troxel* plurality recognized as much,

explaining its reticence to adopt a broad constitutional rule "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis." 530 U.S. at 73.

Moreover, "[t]he best interest of the child is an organizing principle of Wisconsin family law." *In re F.T.R.*, 2013 WI 66, ¶120, 349 Wis. 2d 84, 833 N.W.2d 634 (Abrahamson, J., concurring). In adjudicating the interests of families, this Court has repeatedly held that "the polestar is the best interests of the children." *E.g.*, *Johnson v. Johnson*, 78 Wis. 2d 137, 148, 254 N.W.2d 198 (1977). Whether in considering custody and placement, guardianship, adoption, child support, or a CHIPS petition, Wisconsin law takes seriously the effects various potential outcomes will have on the children. "The legislature has clearly and repeatedly expressed the policy that courts are to act in the best interest of children." *In re Custody of H.S.H.-K.*, 193 Wis. 2d at 682. So important is ensuring that the courts have a clear-eyed assessment of children's interests that Wisconsin law requires, in family law disputes involving minor children, the appointment of a Guardian ad Litem, whose sole obligation is to investigate and represent before the court the children's best

interests.[21] Wis. Stat. § 767.407(1), (4); *see also In re C.L.F.*, 2007 WI App 6, ¶8, 298 Wis. 2d 333, 727 N.W.2d 334; *Guardians ad Litem in Family Court: Answering Your Legal Questions*, State Bar of Wisconsin (2012), available at https://www.wisbar.org/forPublic/INeedInformation/Pages/Guardians-Ad-Litem.aspx (last visited Aug. 2, 2018).

Cacie and Keaton urge this Court to adopt a broad rule that will apply to all cases and substantially favor—if not guarantee vindication of—parental preferences in visitation disputes. (*See* Br. at 41-42) Such an approach would undermine both of the fundamental principles above. It would give a sweeping new rule precedence over careful, fact-focused, case-by-case adjudication; indeed, that is precisely why the *Troxel* plurality declined to proceed as Cacie and Keaton propose. And it would read the constitutional rights of parents so broadly that in many cases the children's interests, as represented by the Guardian ad Litem, would be irrelevant. This contravenes the very nature of family law, and it is inconsistent not only with the policy choices embodied in the

[21] Notably, there is no reference in *Troxel* to a Guardian ad Litem or children's advocate. This underscores the plurality's concern that the visitation decision there elevated the trial judge's personal preference over legal principle. *See* 530 U.S. at 72.

grandparent-visitation statute, but also with the policy choices underlying the requirement that courts appoint Guardians ad Litem to represent children's interests.

This Court should regard proposed sea changes in the law warily. *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶59, 319 Wis. 2d 91, 768 N.W.2d 674 (A.W. Bradley, J., concurring). That is especially true where, as here, the proposed change would overturn precedent. *See, e.g.*, *State v. Luedtke*, 2015 WI 42, ¶40, 362 Wis. 2d 1, 863 N.W.2d 592 ("This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law. … [The doctrine] promotes evenhanded, predictable, and consistent development of legal principles ... and contributes to the actual and perceived integrity of the judicial process." (internal quotation marks and citations omitted)). Even where "a large majority of other jurisdictions" agree on a question—and here that is *not* the case—their decisions are "not a sufficient reason for this court to overrule its precedent." *State v. Suriano*, 2017 WI 42, ¶29, 374 Wis. 2d 683, 893 N.W.2d 543 (quoting *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶100, 264 Wis. 2d 60, 665 N.W.2d 257).

III. Strict Scrutiny Does Not Apply, But The Grandparent-Visitation Statute Nevertheless Meets That Test.

Though the issue was not certified, Cacie and Keaton devote much of their brief to facially challenging the constitutionality of section 767.43(3). The Court should reject that challenge.

"Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). "It falls to the party challenging the constitutionality of a statute to prove that the statute is unconstitutional beyond a reasonable doubt." *State v. Grandberry*, 2018 WI 29, ¶12, 380 Wis. 2d 541, 910 N.W.2d 214 (quoting *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328). Cacie and Keaton cannot clear these hurdles.

The first problem is that Cacie and Keaton incorrectly assume strict scrutiny applies. (*See* Br. at 30) Notably, in *Troxel*, "Justice Thomas was alone in calling for application of the strict scrutiny standard." David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 Rutgers L.J.

711, 713 (2001) (citing *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment). "Instead of strict scrutiny," most of the Court "embraced an essentially pragmatic approach to the constitutional problem of parents' rights," seeking "a more flexible, less outcome-determinative standard." *Id.* at 711, 722. The plurality studiously avoided defining either "the precise scope of the parental due process right in the visitation context" or the applicable legal standard. *Troxel*, 530 U.S. at 73. Consequently, "missing from *Troxel* is any real effort to decide the case by reference to something that might pass as a constitutional theory or bedrock principle." Meyer, *supra*, at 712.

By insisting that strict scrutiny applies here, Cacie and Keaton ignore *Troxel*'s reliance on "an undefined but less exacting standard" and the fact that the plurality "stressed the nuanced, case-specific nature of the inquiry." *O'Donnell-Lamont*, 91 P.3d at 729-30. Indeed, several state courts have held, post-*Troxel*, that grandparent-visitation statutes are not subject to strict scrutiny. *See, e.g.*, *id.*; *Blakely*, 83 S.W.3d at 545-48; *Crafton v. Gibson*, 752 N.E.2d 78, 91-92 (Ind. Ct. App. 2001). These decisions are "consistent with the fact that parental rights, although of prime importance, must be

balanced with other rights." *Blakely*, 83 S.W.3d at 546. And they recognize that "it should matter to any constitutional assessment of visitation whether the court's order contemplates brief, infrequent contact or something closer to shared physical custody." Meyer, *supra*, at 726. Wisconsin courts have come to a similar conclusion. *See, e.g.*, *Lubinski*, 2008 WI App 151, ¶9 ("Visitation" as used in Wis. Stat. § 767.43 "does not incorporate the rights associated with legal custody or physical placement."). And so have other courts. *See, e.g.*, *Blakely*, 83 S.W.3d at 541 (recognizing that grandparent "visitation rights … *are less than substantial encroachment* on a family," as they entail "*occasional, temporary visitation*, which may only be allowed if a trial court finds visitation to be in the best interest of the child" (emphases in original; internal quotation marks omitted)).

Against *Troxel* and these reasoned opinions, Cacie and Keaton have little to offer in support of strict scrutiny. The cases they cite (as well as the cases those rely upon in turn) involve permanent termination of parental rights. (*See* Br. at 31 (citing *In re Max G.W.*, 2006 WI 93, ¶¶40-41, 293 Wis. 2d 530, 716 N.W.2d 845, and *In re Zachary B.*, 2004 WI 48, ¶¶17, 23, 271 Wis. 2d 51, 678 N.W.2d 831)) Termination cases differ in

kind from this one: they require courts "to balance the interests between a lonely individual and an overbearing state." Meyer, *supra*, at 722. For that reason, "common sense" dictates "that the Constitution should demand extra justification from the state when it seeks to *terminate* parental rights than when" visitation is at issue. *Id.* at 725 (emphasis in original). By contrast, strict scrutiny is inappropriate in reviewing the visitation order at issue here—a minor intrusion on Cacie and Keaton's rights to "the custody, care, and control" of Ann.

Applying less than strict scrutiny fully accords with Wisconsin law, which holds that the applicable level of scrutiny "depends on the degree to which the law burdens a fundamental right." *In re Commitment of Alger*, 2015 WI 3, ¶39 n.16, 360 Wis. 2d 193, 858 N.W.2d 346 ("A law that implicates a fundamental right is not necessarily subject to strict scrutiny."); *Zablocki v. Redhail*, 434 U.S. 374, 386-88 (1978) (rational basis review applies to "reasonable regulations that do not significantly interfere with" the fundamental right to marry; strict scrutiny applies to a law that "significantly interferes" with that right). Where, as here, the burden is not substantial, strict-scrutiny is inapposite. *See* Meyer, *supra*, at 722 ("When the state is asked to 'referee' such an internal

family squabble, stacking the deck heavily in favor of a particular combatant [by applying strict scrutiny] does not seem calculated to *avoid* state interference so much as mandate its particular *substance*." (emphases in original)).

The second problem Cacie and Keaton face is that section 767.43(3) survives even a strict-scrutiny analysis. "Strict scrutiny requires a showing that the statute, as applied, is narrowly tailored to advance a compelling state interest." *In re Gwenevere T.*, 2011 WI 30, ¶52, 333 Wis. 2d 273, 797 N.W.2d 854. Wisconsin courts have concluded that the state has a compelling interest in using visitation "to contribute to the child's well-being by providing a sense of continuity" within a non-intact family and that the "rebuttable presumption in favor of the parent's decision regarding visitation ensures that the visitation orders are closely tailored to achieve th[at] purpose." *In re Opichka*, 2010 WI App 23, ¶22. That analysis is sound, fits with *Meister*'s holding that section 767.43 passes constitutional muster, and should be adopted here.

IV. If This Court Reviews The Circuit Court's Discretionary Visitation Decision, It Should Affirm.

There is no need for this Court to review the circuit court's discretionary grant of visitation to Jill. However, if it does so, it should affirm the visitation order. The record confirms that the circuit court knew the legal standard set forth in *Roger D.H.* and applied that standard appropriately. *See Sands*, 2008 WI 89, ¶13 (court "will sustain discretionary acts" where the trial judge "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach").

In particular, the circuit court knew that a presumption was to be applied in favor of the parental decision. (R.86 at 3:16-18; R.87 at 25:13-24, 26:19-22) The circuit court also knew that, once Jill presented evidence contesting the assertion that denying her visitation petition would serve Ann's best interests, it had an obligation "to make its own assessment of the best interest of the child." *Roger D.H.*, 2002 WI App 35, ¶19; *Nicholas L.*, 2007 WI App 37, ¶12. As the circuit court explained at the reconsideration hearing, it applied the presumption in favor of Cacie and Keaton's decision and

considered the evidence offered to rebut that presumption. (R.88 at 15:3-6) And the circuit court looked specifically to the requirements set forth in Wis. Stat. § 767.43(3) to determine whether a visitation order was appropriate. (R.88 at 15:24-16:6)

The record contains ample facts supporting the circuit court's determination that Jill successfully rebutted the presumption:

- The record contains extensive evidence establishing Ann's "significant and ongoing relationship with her grandma." (R.88 at 8:24-9:1)

- The circuit court accepted a calendar into evidence, showing times Ann visited her and frequent sleepovers; Jill provided unrebutted testimony that the calendar necessarily understated the time Ann spent at her house. (R.35; R.87 at 6:21-8:7, 9:6-22, 11:14-12:10, 15:11-21, 53:15-22, 56:12-20) The circuit court found the calendar significant. (R.88 at 15:11-24)

- The record shows that Jill and Ann particularly share a love of horseback riding, which was an activity that they engaged in frequently together. (R.87 at 6:24-8:7; R.88 at 8:24-9:3)

- The testimony made clear that all parties agree Ann loves Jill and treasures spending time with her. (R.87 at 65:13, 92:25-93:2)

- Cacie and Keaton testified that Ann is safe with Jill and that Jill is "a good grandmother to [Ann]." (R.87 at 16:1-10, 29:17-20, 90:18-23, 102:5-7)

- The record establishes that Cacie and Keaton "drastically" and "abruptly" reduced Jill's contact with Ann beginning in December 2015. (R.87 at 22:7-24, 39:15-23; *see also* R.87 at 27:8-28:16)

- The record reflects that the Guardian ad Litem conducted an investigation and recommended, in her role speaking for Ann's best interests, that visitation be granted. (R.29; R.87 at 123:11-20)

- Notwithstanding Cacie and Keaton's attempts to call Jill's judgment into question, the record shows that the circuit court, like the Guardian ad Litem, concluded that Jill "is not likely to act in a manner inconsistent" with Cacie and Keaton's rules for Ann. (R.88 at 16:3-15)

Taking those factors into account, the circuit court granted Jill's petition but provided for less-frequent visitation than either Jill had requested or the Guardian ad Litem had recommended. (R.45; R.87 at 125:9-16, 127:19-20) The visitation order ensures that Ann and Jill will be able to see each other one afternoon per month and one-week during the summer. (R.45; R.87 at 128:20-25, 129:14-17)

The circuit court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sands*, 2008 WI 89, ¶13. There is no basis for finding that the circuit court erroneously exercised its discretion.

V. If The Court Adopts A New Legal Standard, It Should Remand For Further Proceedings.

Cacie and Keaton urge this Court to adopt a new legal standard and dismiss Jill's visitation petition. (Br. at 34, 38) As discussed above, this Court should not establish a new standard of proof for rebutting the presumption that favors parental decisions in grandparent-visitation actions. However, if this Court does overturn precedent and adopt a new legal standard, it should remand to allow circuit court proceedings under that standard. The circuit court, having heard the testimony at trial, is in the best position to apply any new legal standard to the evidence.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal or, alternatively, reaffirm the well-settled standard of proof under Wisconsin law and, on that basis, affirm the circuit court's visitation order.

Dated: August 10, 2018

STAFFORD ROSENBAUM LLP

By _____
Jeffrey A. Mandell
State Bar No. 1100406
Eileen M. Kelley
State Bar No. 1085017
Anthony J. Menting
State Bar No. 1020915

Attorneys for Petitioner-Respondent
Jill R. Kelsey

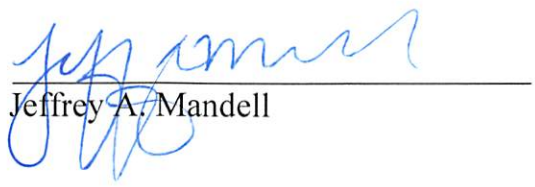
222 West Washington Avenue,
Suite 900
P.O. Box 1784
Madison, Wisconsin 53701-1784
Email: jmandell@staffordlaw.com
ekelley@staffordlaw.com
amenting@staffordlaw.com
Telephone: (608) 256-0226
Facsimile: (608) 259-2600

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 10,504 words.

Dated: August 10, 2018.



Jeffrey A. Mandell

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the text of the electronic copy of the brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: August 10, 2018.

Jeffrey A. Mandell

CERTIFICATION OF FILING AND SERVICE

I certify that the brief was hand delivered to the Clerk of the Supreme Court on August 10, 2018.

I further certify that, on August 10, 2018, three copies of the brief were mailed via U.S. Mail to:

Mr. Ryan J. Steffes
WELD RILEY, S.C.
3624 Oakwood Hills Parkway
P.O. Box 1030
Eau Claire, WI 54702-1030

Kari S. Hoel
103 N. Bridge St., Suite 240
Chippewa Falls, WI 54729

I further certify that the brief was correctly addressed and postage was prepaid.

Dated: August 10, 2018.

Jeffrey A. Mandell

WISCONSIN SUPREME COURT

In the matter of the grandparental visitation of A.A.L.:
In re the Paternity of A.A.L.:

CACIE M. MICHELS,

Petitioner-Appellant,

v.

Appeal No.: 17-AP-1142
Circuit Court Case No.: 10-FA-206

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

Appeal from the Circuit Court for Chippewa County
the Honorable James M. Isaacson, Presiding

REPLY BRIEF OF APPELLANTS, CACIE M. MICHELS AND KEATON L. LYONS

WELD RILEY, S.C.
Ryan J. Steffes, State Bar No. 1049698
3624 Oakwood Hills Parkway
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786; (715) 839-8609 Fax

Attorneys for Appellants, Cacie M. Michels and
Keaton L. Lyons

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ARGUMENT

I. Kelsey Overstates Several Facts and Takes Others out of Context.

Kelsey asserts that she had "about as much time with Ann in all of 2016 as she had probably in any given month all of the years prior to that." (Kelsey Brief, p. 4). In fact, Ann had an overnight visit with Kelsey on January 21, 2016 and was scheduled to have another on February 11, 2016. (R. 87, p. 36). That was not a dramatic change from previous Januaries and Februaries. (R. 35). Had this lawsuit not been filed, Kelsey would have continued to have visitation, including overnight visits, in 2016 and beyond. (R. 87, pp. 66, 74, 78). The frequency of the visits would simply have been reduced to accommodate Ann's busier schedule. (R. 87, pp. 61, 64-65, 95-96).

Michels and Lyons only stopped sending Ann to Kelsey's house *after they became aware Kelsey had sued them*. (R. 87, pp. 78-80). Even then, they invited Kelsey to attend Ann's tee-ball games and a grandparent event at school. (R. 87, p. 87). Further, in or around October 2016, Michels and Lyons, despite no obligation to do so, agreed to a "gentlemen's agreement"

under which Ann visited Kelsey twice a month, which was more often than she was visiting her maternal grandparents. (R. 87, pp. 43, 48).

Kelsey contends the visitation the court ordered was "basically what (she) had the first six years of Ann's life." (Kelsey Brief, p. 4). In fact, she conceded she had never had Ann for a week-long visit. (R. 87. p. 50). Her own calendar evidences the longest visit was two nights (and that was only on one occasion). (R. 35).

Kelsey contends Michels and Lyons never expressed concerns regarding Ann's safety prior to this litigation. (Kelsey Brief, p. 3). In fact, Michels gave Kelsey a list of rules that addressed her and Lyons' concerns more than a month before Kelsey filed her lawsuit. (R. 87, p. 67).

Kelsey contends the record does not support the assertion that she lied to Michels and/or Lyons regarding the proposed Disney trip. (Kelsey Brief, p. 6). Michels and Lyons actually asserted that Kelsey had asked Michels to lie to Lyons regarding the funding of the trip. (Michels Brief, p. 6). Kelsey does not dispute that assertion. As for whether she lied, she testified:

Q …At the end of the day, were you honest with Keaton (regarding the proposed Disney trip)?

A No.

(R. 65, p. 32).

Kelsey contends the visitation ordered by the court was less than that recommended by the guardian ad litem. (Kelsey Brief, p. 7). In fact, the guardian ad litem did **not** recommend Kelsey have a week-long visit every summer. (R. 29). She also recommended that Kelsey not be permitted to take Ann more than 60 miles from home without written consent from a parent. (R. 29).

Kelsey criticizes the undersigned attorney for not having reviewed the trial transcript prior to asking the court to reconsider its decision. (Kelsey Brief, p. 9). What she fails to note is that there was no trial transcript because Michels and Lyons could not afford to have one prepared after spending

thousands of dollars defending Kelsey's lawsuit.[1] (R. 67, p. 4, n.1); (R. 88, p. 5); (R. 87, p. 103).

Finally, Kelsey criticizes Michels and Lyons for citing her deposition transcript and the recording of the voicemail. (Kelsey Brief, pp. 6-7). She argues the transcript and voicemail should not be cited because they were not part of the *trial* record. They are, however, part of the *circuit court record*. (R. 65); (R. 62); (Non-Electronic Record Item). They were considered by the circuit court when it decided whether the standard it applied was constitutional. (R. 62); (R. 65). Kelsey did not argue it was improper for the court to consider them. (R. 70). Nor did she argue it was improper for the court of appeals

[1]In her voicemail to Michels, Kelsey suggested Michels should just give in to her demands because she had resources to hire a good attorney and would get whatever visitation she wanted. The Connecticut Supreme Court, in concluding that only the harm standard sufficiently protects parents' substantive due process rights, expressed well-founded concern regarding the wealth gap that often exists in cases like this: "(T)here is no real barrier to prevent a party, who has more time and money than the child's parents, from petitioning the court for visitation rights. A parent who does not have the up-front out-of-pocket expense to defend against the petition may have to bow under the pressure even if the parent honestly believes it is not in the best interest of the child. (citation omitted). The prospect of competent parents potentially getting caught up in the crossfire of lawsuits by relatives…demanding visitation is too real a threat to be tolerated in the absence of protection afforded through a stricter burden of proof." Roth v. Weston, 259 Conn. 202, 789 A.2d 431, 449 (2002).

to consider them before this case was certified. (Kelsey Court of Appeals Brief).

II. Michels and Lyons Have Not Forfeited Their Right to Object to the Legal Standard Applied by the Circuit Court.

Michels and Lyons raised their objection before the circuit court. (R. 63); (R. 64). Kelsey did not argue the issue had been forfeited or waived, and the circuit court decided the issue on its merits. (R. 70); (R. 88, pp. 14-16). Michels and Lyons raised the same objection on appeal. (Michels Court of Appeals Brief). In her court of appeals brief, Kelsey did not argue the issue had been forfeited or waived. (Kelsey Court of Appeals Brief). Only now, before this court, does Kelsey make that argument. It is thus *Kelsey's* argument that has been forfeited. Ironically, she concedes as much by correctly noting that Wisconsin appellate courts generally refuse to consider arguments made for the first time on appeal.

III. The *Roger D.H.* Presumption, as Understood and Applied by the Circuit Court and the Court of Appeals in *Nicholas L.*, Is Meaningless.

In their initial brief, Michels and Lyons observed:

> "With or without the presumption, a grandparent, to prevail, has to put forth evidence that convinces the court,

> by a preponderance of the evidence, that visitation is in the best interests of the child." (Michels Brief, p. 24).

Despite devoting a large portion of her brief to the issue, Kelsey makes no effort to explain how that observation is untrue. (Kelsey Brief, pp. 15-29). Instead, she urges this court to wade into esoteric debates regarding how presumptions that actually shift the burden of production from one party to another should be understood. Those debates are "a place fraught with danger, an impenetrable jungle, a mist laden morass - where more than one academician has been known to lose his way and, once returned, is never quite the same." In re the Interest of Kyle S., 194 Wis.2d 365, 384-85, 533 N.W.2d 794 (1995) (J. Abrahamson, dissenting), quoting Ronald B. Lansin, *Enough is Enough: A Critique of the Morgan View of Rebuttable Presumptions in Civil Cases*, 62 Or. L. Rev. 485, 485 (1983).

Luckily, the issue in this case is far more basic. It is whether a presumption that does not shift the burden of production or alter the burden of persuasion is meaningful. The above-quoted observation from Michels' and Lyons' brief demonstrates it is not meaningful. None of the authority Kelsey cites demonstrates otherwise.

Kelsey first relies on Wis. Stat. § 903.01. That section provides that common law presumptions can be overcome by disproving the presumed fact by a preponderance of the evidence. Wis. Stat. § 903.01. In other words, it simply dictates what the burden of persuasion will be once a presumption has shifted the burden to prove a fact from one party to another. This court recognized as much in Kyle S.:

> "(Section 903.01) recognizes that once established, a presumption *shifts the burden of production and persuasion to the party opposing the presumption*." 194 Wis.2d at 374 (emphasis added).

The presumption at issue in this case does not shift the burden of production from the parents to the petitioning grandparent and does not shift or alter the grandparent's burden of persuasion. In the absence of the presumption, the petitioning grandparent *already* had the burden to prove, by a preponderance of the evidence, that court-ordered visitation was in the child's best interests. With the presumption, the grandparent bears *the exact same burdens*.

Kelsey relies on this court's decision in Kruse v. Horlamus Industries, Inc., 130 Wis.2d 357, 387 N.W.2d 64 (1986). Her reliance is misplaced. The statute at issue in Kruse

was Wis. Stat. § 893.30. It provides that in every action to recover or for possession of real property, and in every defense based on legal title, the person who has legal title to the property is presumed to have been in possession of the property within the time required by law to avoid losing the property via adverse possession. Wis. Stat. § 893.30.

Thus, pursuant to Wis. Stat § 893.30, if a title holder initiates a declaratory judgment action to resolve a dispute over the ownership of property to which he holds title, he is relieved of the burden to produce evidence that he was in possession of the property. Id. Instead, he only has to prove he holds title to the property. The court must then presume he was in possession, even though he may have no evidence of possession. Id. The defendant then bears the burden to produce evidence of non-possession. Id. Section 893.30 thus shifts the burden of production on the issue of possession of the property from the plaintiff to the defendant. Similarly, in a case where a title holder is a defendant asserting a defense that requires proof of possession of the property, the statute shifts the burden on that element from the defendant to the plaintiff.

This court in Kruse held only that *once the burden of production has shifted from the title holder to the non-title holder*, the non-title holder can overcome the presumption by proving non-possession by a preponderance of the evidence. 130 Wis.2d at 366-67. The title holder in Kruse had argued the non-title holder should be required to prove non-possession *by clear and convincing evidence*. Id. at 365. In either case, however, the presumption was meaningful because it relieved the title holder of the burden of proving a fact he otherwise would have had to prove. The presumption simply would have been *more* favorable to the title holder had the non-title holder been required to prove non-possession by clear and convincing evidence.

This case is fundamentally different because the presumption at issue, unlike the presumption in Wis. Stat. § 893.30, will *never* relieve the party who is supposed to benefit from the presumption from the burden to produce evidence of a fact needed to prove a claim or affirmative defense. The procedural posture of grandparent visitation cases is always the same. The grandparent is the petitioner. The parent is the

respondent. Even without the presumption, the grandparent, as petitioner, will *always* have the burden to produce evidence that the requested visitation is in the child's best interests. The presumption will therefore never shift the burden of production on that issue.

Kelsey correctly notes the difference between a Morgan presumption and a Thayer or "bursting bubble" presumption. (Kelsey Brief, pp. 27-29). In a case involving Wis. Stat. § 893.30, if the presumption is a Morgan presumption, the non-title holder must produce enough evidence of non-possession to prove non-possession by a preponderance of the evidence. If his evidence is insufficient, the title holder will prevail by virtue of the presumption even if there is no evidence of possession. On the other hand, if the presumption is a "bursting bubble" presumption, once the non-title holder produces *any* evidence of non-possession, both parties equally bear the burden of persuasion, and the title holder can only prevail by producing evidence of possession that is more convincing than the non-title holder's evidence of non-possession.

The difference between the two types of presumptions is meaningless in this case because both presuppose the shifting of the burden of production on an issue from one party to the other. If that were not the case, a "bursting bubble" presumption would actually benefit the party *opposing* the presumption by easing his burden of production and leaving both parties equally bearing the burden of persuasion.

IV. No Other State Supreme Court Has Concluded That a Restated Best-Interests-of-the-Child Standard Is Sufficient to Protect Parents' Substantive Due Process Rights.

Kelsey, in two footnotes, lists more than a dozen foreign cases she contends support her view that the Roger D.H. presumption is enough "special weight" to protect parents' fundamental liberty interest in raising their children as they deem best. (Kelsey Brief, pp. 32-34). All the cases are distinguishable in one or more important ways.

Several cases actually require the petitioning grandparent to prove *by clear and convincing evidence* that the visitation sought is in the child's best interests. In re Adoption of C.A., 137 P.3d 318, 328-29 (Colo. 2006); Walker v. Blair, 382 S.W.3d 862, 874-75 (Ky. 2012); Polasek v. Omura, 2006 MT 103, ¶ 15

332 Mont. 157, 136 P.3d 519; Hamit v. Hamit, 271 Neb. 659, 715 N.W.2d 512, 526 (2006); In re Marriage of O'Donnell-Lamont, 337 Or. 86, 91 p.3d 721 733 (2004) (interpreting statute that imposed clear-and-convincing-evidence standard on grandparents who did not have a parent-like relationship with a child). Other cases Kelsey cites involve statutes that were narrowly tailored in a way courts found sufficient to protect parents' due process rights. Blakely v. Blakely, 83 S.W.3d 537, 543-44 (Mo. 2002); Hiller v. Fausey, 588 Pa. 342, 904 A.2d 875, 886-87; In re Rupa, 161 N.H. 311, 13 A.3d 307, 318 (2010); Smith v. Wilson, 90 So.3d 51, ¶ 23 (Miss. 2012); Kulbacki v. Michael, 2014 ND 83, ¶ 9 845 N.W.2d 625. For instance, the Pennsylvania statute limited visitation to grandparents whose child had died. Hiller, 904 A.2d at 886. The Missouri statute provided that no visitation could be ordered unless the parents had entirely denied visitation for a period of 90 days and even then allowed only for "minimal visitation." Blakely, 83 S.W.3d at 544.

Section 767.43(3) is not in any way narrowly tailored. It is not limited to grandparents whose child has died or to

grandparents who have a parent-like relationship with a grandchild. In fact, it is not even limited to grandparents who maintained some relationship with the child. It applies even to those who merely "attempted to maintain a relationship with the child." Wis. Stat. § 767.43(3)(d). It does not limit the visitation a court can order, as evidenced by this case, where the court granted Kelsey a week-long visit she never previously had and that both fit parents would have never agreed to. (R. 87, pp. 50, 67, 95-96).

Other cases Kelsey relies on require courts to give a parent's opinion regarding the best interests of her child "special weight" *beyond* the presumption that a fit parent acts in her child's best interests. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 462 (Ind. 2009); E.S. v. P.D., 8 N.Y.3d 150, 863 N.E.2d 100, 106 (2007); In re Marriage of Friedman and Roels, 244 Ariz. 111, ¶ 16-17 418 P.3d 884 (2018); Harrold v. Collier, 107 Ohio St. 3d 44, ¶ 42, 836 N.E.2d 1165 (2005). One case Kelsey cites distinguishes between cases where the non-custodial parent supports the visitation petition and cases where no parent supports the petition. In re Marriage of Harris, 34 Cal. 4th 210,

96 P.3d 141, 152 (2004). This case, of course, is the rarest of visitation cases. It has two fit parents who *both* believe the visitation sought is contrary to the best interests of their child.

As noted in Michels' and Lyons' initial brief, the majority of state supreme courts to have considered grandparent visitation statutes similar to Wis. Stat. § 767.43(3) have concluded that requiring the petitioning grandparent to show harm to the child is the only way to protect parents' fundamental liberty interest in the care, custody and upbringing of their children. The reasoning of those courts is persuasive and should be adopted by this court.

V. Protecting Parents' Substantive Due Process Rights Would Not Undermine Fundamental Principles of Wisconsin Law.

It is hard to imagine a principle of law more fundamental than the one enshrined in Article I, Section 1 of the Wisconsin constitution. Nevertheless, Kelsey argues that protecting the fundamental right enshrined therein undermines the "organizing principle of Wisconsin family law" - the best interests of the child. (Kelsey Brief, p. 37). It does not.

Courts in family law cases are commonly called on to determine the best interests of a child when the child's parents are unfit or when fit parents cannot agree as to what is in the child's best interests. In those cases, the court is *forced* into trying to determine what would be in the child's best interests. There is no one else to fill that role. This case is fundamentally different. It presents a threshold question - Who should be making the subjective determinations of whether and how much grandparent visitation is in the child's best interests? The two fit parents who raised the child since birth? Or a circuit court judge who hears a few hours of testimony? If Wisconsin parents' fundamental liberty interest in raising their children as they deem best means anything, the parents should be making the decision in all cases except those where a grandparent can show the parents' decision is harming the child.

VI. Section 767.43(3) Must Be Subject to Strict Scrutiny.

Kelsey's argument that strict scrutiny does not apply is based primarily on a pro-grandparent law review article. (Kelsey Brief, pp. 40-44, relying on David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32

Rutgers L.J. 711 (2001)). She argues that court-ordered grandparent visitation only incidentally affects parents' fundamental liberty interest and does not actually infringe on that interest. She cites Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673 (1978), where the United States Supreme Court struck down a Wisconsin law that provided that residents who were obligated to support minor children not in their custody could not marry without court approval. In doing so, the court noted:

> "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships…By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subject to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. (citation omitted). The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry." 434 U.S. at 386-87.

Section 767.43(3) plainly falls in the category of laws that interfere directly and substantially with a fundamental right. It empowers courts to order parents to cede care and control of their children to a third party against their will. It does not limit the amount of visitation that can be compelled. It therefore infringes directly on a fit parent's interest in the care, custody

and upbringing of her children and must be subject to strict scrutiny review.

The vast majority of state supreme courts to have considered the question have concluded that statutes like Wis. Stat. § 767.43(3) are subject to strict scrutiny review. Doe v. Doe, 116 Hawaii 323, 172 P.3d 1067, 1079-80 (2007) (collecting cases). This court should do the same. Once it does, it is clear Wis. Stat. § 767.43(3), as applied in this case, cannot survive strict scrutiny.

Under strict scrutiny review, a statute must be narrowly tailored to advance a compelling state interest that justifies interference with the fundamental liberty interest. In re the Termination of Parental Rights to Zachary B., 2004 WI 48, ¶ 24, 271 Wis.2d 51, 678 N.W.2d 831. As noted in Michels' and Lyons' initial brief, this court has never found that anything less than harm to a child is sufficiently compelling to justify interference with parents' fundamental liberty interest. Further, even if something less were sufficiently compelling, Wis. Stat. § 767.43(3) is anything but narrowly tailored, as noted in Section IV above.

CONCLUSION

Michels and Lyons respectfully request this court remand the case with instructions to dismiss Kelsey's petition.

Dated this 24th day of August, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

ADDRESS
3624 Oakwood Hills Pkwy
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786
(715) 839-8609 Fax

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font:

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this brief is 2,936 words.

Dated this 24th day of August, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the Supreme Court Reply Brief of Appellants Cacie M. Michels and Keaton L. Lyons, was sent by U.S. mail on August 24, 2018, to the Clerk of the Wisconsin Supreme Court, with three (3) copies served on the parties as follows:

Kari S. Hoel, Attorney at Law
Hoel Law Office, LLC
103 N. Bridge Street, Ste. 240
Chippewa Falls, WI 54729

Jeffrey A. Mandell/Eileen M. Kelley/Anthony J. Menting
Stafford Rosenbaum LLP
222 West Washington Avenue, Suite 900
P.O. Box 1784
Madison, WI 53701-1784

Dated this 24th day of August, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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Dated this 24th day of August, 2018.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

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SUPREME COURT OF WISCONSIN

In the matter of the grandparental visitation A.A.L.:
In re the Paternity of A.A.L.

Cacie M. Michels,

Petitioner-Appellant,

v. **Appeal No. 2107AP1142**

Keaton L. Lyons,

Respondent-Appellant,

Jill R. Kelsey,

Petitioner-Respondent.

Appeal from the Circuit Court for Chippewa County
The Honorable James M. Isaacson, Presiding

AMICUS BRIEF OF THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

LEGAL AID SOCIETY OF MILWAUKEE, INC.
728 n. James Lovell Street, 3-N
Milwaukee, WI 53233
Karen Kotecki, State Bar No. 1011648
Phone: 414 727-5366
Fax: 414 291-4988
kkotecki@lasmilwaukee.com

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STATEMENT OF THE ISSUE

The Court accepted this case at the request of the Court of Appeals to clarify the standard of proof required for a grandparent to overcome the presumption that the parents' decisions regarding the scope and extent of their child's visitation with the grandparent is in the child's best interest.

INTEREST OF THE LEGAL AID SOCIETY OF MILWAUKEE

The Legal Aid Society of Milwaukee (LAS) has broad experience and a decades-long interest in representing the best interests of children. Since 1981, the Guardian *ad litem* (GAL) Division has served as the court-appointed guardians *ad litem* (GALs) in Milwaukee county, representing the legal best interests of children in both Family and Children's Court. In 2017 alone, the 16 attorneys in the GAL Division represented the best interests of children in over 3,000 cases, including cases in Family court under Chapter 767, and Children's Court, under Chapters 48 and 54. Most are cases involving children of parents at or near the federal poverty guidelines. Many of these cases involve grandparent visitation issues and most parents in family court cases are unrepresented and unsophisticated in legal matters.

The Legal Aid Society of Milwaukee believes that the best interests of children are served by clear and objective rules of law that promote predictable results for the child, protect children from undue stress from involvement in litigation, and deter unwarranted disruption of the rights of fit parents to make decisions for the care and custody of their children.

Background

The essential facts are not in dispute. The parties agree that Jill Kelsey, "Ann's"[1] paternal grandmother, had a good relationship with Ann, who is now nine years old, and with Ann's parents. Ms. Kelsey had regular visits, including having Ann with her for overnight visits, particularly during Ann's preschool years. When Ann started school, the family had less time for frequent grandparent visits. Ann's mother testified that it was stressful to the family, and stressful to Ann, to have to accommodate school, activities, friends, shared placement with Ann's father and visits with Ann's

[1]We follow the Court of Appeals' choice to refer to the child in this action as "Ann" to avoid using her real name or cumbersome initials.

maternal grandparents, in addition to the time that Ms. Kelsey expected. Certification p. 2-3.

Friction escalated in December, 2015, when Ann's mother refused to allow Ms. Kelsey to take Ann on a vacation with a male friend of Ms. Kelsey's. Following the vacation dispute Ms. Kelsey sued for visitation. Certification p. 8.

The circuit court in Chippewa County entered an order granting Ms. Kelsey visits over the parents' objection, allowing her one Sunday each month and seven consecutive days in the summer with no restrictions on travel. In denying the parents' motion for reconsideration, the court addressed the parents' arguments that the visitation order violated their due process rights under *Troxel.* According to the court, it was appropriate to overrule the parents' visitation decisions, based on a finding that visits were in the child's best interest as long as the court believed it had applied a presumption in the parents' favor. *See* Petitioner-Respondent brief at p.9.

ARGUMENT

To ensure that "special" weight is given to the constitutional presumption that fit parents' decisions as to

grandparent visitation is in their child's best interest, a grandparent suing for visitation must demonstrate by clear and convincing evidence that the parents' limits on the grandparent's visits would be harmful to the child.

Introduction

In *Troxel v. Granville,* 530 U.S. 57(2000), the Supreme Court found the State of Washington's grandparent visitation statute unconstitutional specifically because it allowed a court to substitute its view, of whether guaranteed visits with the grandparent were in the child's "best interest" for those of a parent who had not been found unfit. The Court reaffirmed that, for a "fit" parent, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel* at 68-69. 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. *Id,* at 66.

The Court of Appeals correctly recognized that grandparent visitation decisions, falling under a parent's fundamental liberty interest in parenting, requires strict scrutiny and narrow tailoring of any statute that infringes on that interest. Certification p. 2. *See* also *Monroe Cty. DHS v. Kelli B.*, 2004 WI 48, ¶ 23, 271 Wis. 2d 51, 678 N.W.2d 831.

Wisconsin has yet to determine what showing is required to overcome *Troxel*'s constitutional presumption in favor of the parents' decision, when parents are confronted with a grandparent visitation lawsuit. The Legal Aid Society agrees with the parents that due process under *Troxel* requires a discernably heightened standard, absent in the instant case, to overcome the parents' visitation decisions. Although the circuit court asserted that it applied a presumption in the parent's favor, no special "fundamental rights" weight is apparent in the court's decision. Absent an articulation of what weight was given to any particular facts or factors, or how allowing the parents to make their own decision would be harmful, or otherwise detrimental to the child's interest, it

is impossible to discern how the circuit court's ruling was something other than the mere substitution of the court's choice for that of the parents. Wisconsin courts have in fact recognized that such substitution under the rubrick of best interest is not allowed under *Troxel*. *See e.g. Roger D.H*, at ¶ 19, quoted in *Meister* at ¶ 44. (The Due Process Clause does not tolerate a court giving no special weight to a fit parent's determination, but instead basing its decision on mere disagreement with the parents).

A. *Troxel* requires a strong showing beyond best interest to overcome the presumption in favor of a fit parent's right to determine the nature and frequency of their child's grandparent visits.

The four justice plurality in *Troxel* found Washington's grandparent visitation statute unconstitutional because it allowed a court to order grandparent visitation based only on a finding that visits would be in the child's best interest. Exercising judicial restraint, the Court did not establish a definitive test for how the presumption in favor of non-intervention can be overcome. Nonetheless, the decision signaled a high threshold for court interference,

commensurate with the fundamental family rights at issue. *Troxel* counseled that "[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. *Troxel* at 72-73. Accordingly the plurality required that at a minimum, overriding a parent's fundamental right to discretion over grandparent visits would require "special" weight be given to the "presumption" that parents' decisions were in the child's best interest. *Troxel* at 70. The Court referred to this "special" weight as "material" and "significant." *See Troxel* at 72.

Post-*Troxel*, a majority of states require a showing of harm to the child before the court can interfere with a fit parent's decision regarding grandparent visitation. *See*, Certification, p. 5, Brief of Petitioner-Appellants, p. 14-18.

B. Allowing a fit parent's decisions to be overruled by a court relying on an undefined best interest standard leads to the flawed decision making process that *Troxel* invalidated.

A judicial finding of "the child's best interest" is ultimately the dispositive factor for grandparent visitation according to the text of Wisconsin's §767.43(3).[2] However, Wisconsin courts recognize that a "best interest" determination as to grandparent visitation must be made under the constitutional constraints imposed by the Due Process clause. Accordingly "best interest" must be read to include *Troxel's* requirement that a strong presumption and "special" weight be accorded in favor of the parents' wishes. Without such added weight, best interest would impermissibly allow the court to impose its own view of the child's welfare over that of the parents. *See In re the Paternity of Roger D.H.*, 2002 WI App 35, ¶ 35 (rejecting a facial challenge to 767.43(3) based on *Troxel* because of the

[2] §767.43(3) allows courts to set reasonable visitation for a non-marital child whose parents have not subsequently married each other, where paternity has been established for the father if the father's parent is petitioning for visitation, the child has not been adopted, the grandparent has maintained or was prevented from maintaining a relationship with the child, the grandparent is not likely to act in a manner contrary to the custodial parent's decisions related to the child's physical, emotional, educational or spiritual welfare and visitation is in the best interest of the child.

judicial obligation to comply with *Troxel* regardless of the statutory text).

A *Troxel*-ized application of the Wisconsin statute in fact requires quite a lot of the circuit court's "best interest" analysis. The analysis must, at a minimum, recognize a constitutional presumption that the parent's wishes as to parental visitation will normally control and the court must also ensure that the parent's wishes are given "special" weight. In the instant case the circuit court's statement that it applied a presumption in the parents' favor was grossly insufficient to satisfy *Troxel*. Because neither the "presumption" nor the "best interest" is measurable, the circuit court's exercise of discretion does not address *Troxel's* central concern for avoiding implicit usurpation of parents' decision-making. *See Troxel* at 72-73, (parents' wishes must not be ignored simply "because the judge thinks he knows better" than the parents). An exercise of discretion is not an exercise of judicial will, but rather it requires that the court's rationale reflect a judicious thought process and correct

application of the law, with sufficient detail so as to allow appellate review. *See* e.g. *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). (in the context of criminal sentencing, discretion requires an explanation of the court's rationale).

C. Wisconsin has never adopted mere preponderance of the evidence as sufficient to satisfy the *Troxel* "special weight" /constitutional presumption for overcoming a parent's fundamental right to decide grandparent visitation.

Ms. Kelsey's effortful argument in favor of a weak "preponderance" of the evidence standard evades the central question posed by the Court of Appeals: exactly what kind of proof is necessary to overcome the *Troxel* constitutional presumption and to evidence that "special weight" was in fact accorded to fit parents' choices for their child's grandparent visits? There is no "clearly" accepted preponderance standard that the Court of Appeals simply missed, when asking this Court to address a critical gap in Wisconsin's family law jurisprudence. In fact, *Roger D.H.* and *Nicholas L.* and *Meister* never reached the question of what proof

Troxel requires in a given case. Nor does the general evidentiary presumption statute, Wis. Stat. §903.01 alone resolve the question of *Troxel* proof because *Troxel* controls over Wisconsin's evidence rules to the same extent it controls over the visitation statute.

Roger D.H., Nicholas L. and Meister together recognize only (a) that the grandparent visitation statute on its face does not violate the constitution and (b) that the *Troxel* "special weight" requirement attaches to and necessarily heightens the pro-parent presumption and any calculation of "best interest." *See In re the Paternity of Roger D.H.*, 2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440, (facial challenge to statute rejected because courts must read *Troxel*'s constitutional "special weight" requirement into the statute); *In re Nicholas L.*, 2007 WI App 37, 299 Wis. 2d 768, 731 N.W.2d 288 (*Troxel*'s "special weight" requirement was both acknowledged and satisfied, but it is not a "separate element" from whether the grandparent overcame *Troxel*'s constitutional presumption of deference to the parent's

wishes); *In re Marriage of Meister*, 2016 WI 22, 367 Wis. 2d 447, 876 N.W.2d 746 (as a matter of statutory interpretation of Wis. Stat. §767.43(1) a grandparent need not prove a "parent-child"- like relationship in order to petition for visitation rights). Each of these cases address a more narrow legal question and stopped well short of addressing the question of proof that the Court of Appeals identified to this Court.[3]

Ms. Kelsey's argument that preponderance of evidence is the standard of proof for overcoming any presumption, including the *Troxel* heightened burden protecting parent's fundamental rights, appears to rest entirely on Wisconsin's default rule for ordinary evidentiary presumptions, Wis. Stat. §903.01. *See* Petitioner-Respondent's brief at p. 23-29). In

3 In a passage to which Kelsey seems to attach significance, *Roger D.H.* notes that *Troxel*'s requirement is "only a presumption" and "the circuit court is still a obligated to make its own assessment of the best interest of the child." *See* Petitioner-Respondent's brief at 17-19. The quote omits the next sentence that states "What the Due Process Clause does not tolerate is a court giving 'special weight' to a fit parent's determination, but instead basing its decision on 'mere disagreement' with the parent. *See Roger D.H.* at ¶19 (also quoted in *Meister* at ¶ 44). *Roger D.H.* and the cases using the quoted passage, however, merely recognize that the *Troxel* presumption is not "irrebuttable" but it says nothing about what degree and kind of proof *Troxel*'s constitutional imperative requires.

this respect, Kelsey has a flawed understanding of the relationship between Wisconsin statutes and the United States Constitution. The question here is not what Wisconsin statutes require, but rather that the Due Process Clause and *Troxel* require of the Wisconsin statutes.

Wis. Stat. §903.01, like the visitation statute itself, is bound by the constitutional requirements imposed by the United States Supreme Court. A grandparent cannot overcome the burden with unspecified evidence that does not demonstrate that the parents' wishes were in fact accorded special weight commensurate with the fundamental right to control family decisions.

D. A factual showing of harm is necessary to protect parents' rights to determine what is in their child's best interest from arbitrary judicial interference.

As guardians *ad litem*, Legal Aid attorneys address children's "best interest" on a daily basis. The term "best interest" was not defined by *Troxel* and remains undefined in Wisconsin family law, despite being the legal touchstone in most child welfare and custody and placement disputes.

Ultimately the term "best interest" is a subjective, elusive and potentially unpredictable test, particularly when many of the parents in family court are legally unsophisticated and most are unrepresented.[4]

"Proof" of "best interest", moreover, is an inherently troubling concept in the instant case because "preponderance" or "clear and convincing" proof makes sense only for factual determinations. Best interest of the child, on the other hand, is a legal conclusion, entrusted to judicial discretion, much like sentencing in a criminal case. Addressing for the first time what *Troxel*'s "special" weight and its presumption in favor of parents' decisions require, it would be useful for practitioners and for the lower courts for this Court to address first "what" must be proven, before deciding "how much" evidence is needed, for a grandparent to prevail.

In the interest of clarity as well as adherence to *Troxel*, this *amicus* respectfully suggests that this Court follow the

[4] It is estimated that as many as 70% of family cases now involve litigants who represent themselves in court. *See* the *Wisconsin Pro Se Task Force Report*, The Wisconsin Pro Se Working Group. A Committee of the Office of Chief Justice of the Wisconsin Supreme Court (December 2000).

lead of those jurisdictions which require a factual showing of harm to the child based on a denial of court ordered grandparent visitation. Consistent with the fundamental rights at issue, the middle burden of proof of clear and convincing evidence should be required for any factual findings. *See Santosky v. Kramer*, 455 U.S. 745, 756 (1982). (The intermediate standard or proof, clear and convincing evidence, is mandated when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money).

Alternatively, the Court or legislature would provide useful guidance on meeting the *Troxel* burden by enumerating factors that a circuit court must consider. These might include the age of the child, the wishes of the child, the inconvenience, expense or stress on the custodial parent/family in accommodating grandparent visitation, the length and nature of the grandparent's relationship to the child, and any harm to the child in not having the extent or frequency of grandparent visits being sought.

These proposed factors would not control, but are *in addition to* requiring that the court articulate in sufficient detail, on the record, pursuant to *Troxel*, the manner and extent to which the court assigned "special" weight to the parents' decisions.

CONCLUSION

For the above reasons this *amicus* respectfully asks this Court to provide guidance to the lower courts by requiring that a grandparent seeking to overrule a fit parent's decisions on grandparent visitation show, by clear and convincing the evidence, that denial of the requested visitation is harmful to the child.

Dated this 20th day of August, 2018.

Legal Aid Society of Milwaukee, Inc.

By:_____
Karen Kotecki, State Bar No. 1011648
Amicus Curiae

728 N. James Lovell St., 3-N
Milwaukee, WI 53233
414 727-5300
Fax: 414 291-5488

FORM AN LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 2,860 words.

Dated: August 20, 2018.

_____

Karen Kotecki, SBN 1011648

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the text of the electronic copy of the brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief, filed with the court, and served on all opposing parties.

Dated August 20, 2018.

_____

Karen Kotecki SBN 1011648

CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the non-party brief of *Amicus Curiae*, was sent by U.S. mail on August 20, 2018, to the Clerk of the Wisconsin Supreme Court with three copies served on the parties as follows:

Ryan Steffes
Weld Riley, S.C.
P.O. Box 1030
Eau Claire, WI 54702-1030

Jeffrey A. Mandell
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

Kari S. Hoel
Hoel Law Office, LLC
103 N. Bridge Street, Ste. 240
Chippewa Falls, WI 54729

I further certify that the brief was correctly addressed and postage was prepaid.

Dated August 20, 2018.

_____
Karen Kotecki, SBN 1011648

No. 17AP1142

In the Supreme Court of Wisconsin

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF A.A.L.:
IN RE THE PATERNITY OF A.A.L.:

CACIE M. MICHELS,
PETITIONER-APPELLANT,

v.

KEATON L. LYONS,
RESPONDENT-APPELLANT,

JILL R. KELSEY,
PETITIONER-RESPONDENT

On Appeal From The Chippewa County Circuit Court,
The Honorable James M. Isaacson, Presiding,
Case No. 2010FA206

NON-PARTY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF PETITIONER-RESPONDENT

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
leroykm@doj.state.wi.us
(608) 267-2221

KEVIN M. LEROY
Deputy Solicitor General
Counsel of Record

Attorneys for the State of Wisconsin

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INTRODUCTION

Wisconsin law, like the law in many other States, authorizes grandparents to seek visitation rights under limited circumstances. Wis. Stat. § 767.43(3) (hereinafter "the Grandparent Visitation Statute" or "the Statute"). In *Troxel v. Granville*, a majority of the Justices of the U.S. Supreme Court held that, under the substantive-due-process doctrine, courts must give "special weight" to a parent's decision about the child's best interest when considering whether to award visitation. 530 U.S. 57, 70 (2000) (plurality op.); *id.* at 80 (Thomas, J., concurring in the judgment). The Court of Appeals certified the following question to this Court: what "standard of proof [is] required" to overcome the special weight afforded to parents under *Troxel* in order for a court to award visitation rights under the Grandparent Visitation Statute. *See* Cert. Op. 1–2, 4, No.17AP1142 (May 8, 2018).

This Court already answered this question in *In re Marriage of Meister*, 2016 WI 22, ¶¶ 40–47, 367 Wis. 2d 447, 876 N.W.2d 746, and there is no reason to reconsider the answer here. In *Meister*, this Court held that *Troxel* requires only a presumption that a parent's decision is in the child's best interest—which presumption the grandparent may rebut with contrary evidence that satisfies the circuit court—and that the Grandparent Visitation Statute may be given a saving construction to incorporate this presumption. *See id.* ¶¶ 43–47 (expressly affirming *In re Paternity of Roger D.H.*,

2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440). Appellants have offered no persuasive reason to unsettle *Meister*, which accords with *Troxel* and rightly avoids extending the dubious substantive-due-process doctrine.*

STATEMENT OF INTEREST

The Attorney General, through the Department of Justice, shall "appear for the state" before this Court in all matters, "civil or criminal," "in which the state is interested." Wis. Stat. § 165.25(1). Where, as here, a law's constitutionality and interpretation are at stake, the Attorney General is "entitled to be heard." Wis. Stat. § 806.04(11); *see also State v. City of Oak Creek*, 2000 WI 9, ¶ 35, 232 Wis. 2d 612, 605 N.W.2d 526.

ARGUMENT

I. *Meister* Already Upheld The Constitutionality Of The Rebuttable-Presumption Interpretation Of The Grandparent Visitation Statute, And Appellants Fail To Overcome *Stare Decisis*

"This court follows the doctrine of stare decisis scrupulously" and will "overturn prior decisions" only when provided with "special justification." *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶¶ 94, 96, 264 Wis. 2d 60, 665 N.W.2d 257. In *Meister,* this Court adopted a

* As the parties agree, proper application of the Grandparent Visitation Statute here depends on resolution of factual disputes. *Compare* Opening Br. 2–7, *with* Response Br. 1–9. The State takes no position on its proper application to the facts of this case.

rebuttable-presumption interpretation of the Grandparent Visitation Statute. *See* 2016 WI 22, ¶¶ 40–47. While Appellants ask this Court to ignore *Meister*'s holding, they fail to provide the "special justification" needed for the Court to overturn that decision.

A. The Grandparent Visitation Statute authorizes courts to grant grandparents visitation rights under limited circumstances. Wis. Stat. § 767.43(3). First, the grandparent must have "maintained" or "attempted to maintain a relationship with the child." *Id.* § 767.43(3)(d). Second, the grandparent must not be "likely to act . . . contrary to decisions that are made by a parent" about "the child's . . . welfare." *Id.* § 767.43(3)(e). And third, "visitation [must be] in the best interest of the child." *Id.* § 767.43(3)(f). When these showings are present, the court "may grant reasonable visitation rights" in its discretion. *Id.* § 767.43(3). The Statute is limited to only certain family situations: the grandchild must be "a nonmarital child whose parents have not subsequently married each other," the grandchild must "not [have] been adopted," and (where applicable) the "paternity of the child" must have "been determined." *Id.* § 767.43(3)(a)–(c).

The Legislature enacted the Statute, 1995 Wis. Act 68, as part of the wave of "state legislatures [ ] address[ing] problems stemming from [grandparent] visitation and custody disputes" in the past half-century, *see* Sara Elizabeth Cully, Troxel v. Granville *and Its Effect on the Future of*

Grandparent Visitation Statutes, 27 J. of Legis. 237, 238 (2015). This wave was "assuredly due . . . to the States' recognition" that grandparents have increasingly "undertake[n] duties of a parental nature in many households" and that "protecting the[se] relationships" "ensure[s] the welfare" of grandchildren. *Troxel*, 530 U.S. at 63–64 (plurality op.). Today, all 50 States "have some type of" grandparent-visitation statute. Cully, *supra*, at 238–39.

B. In *Roger D.H.*, the Court of Appeals adopted a saving construction of the Grandparent Visitation Statute in light of *Troxel*. 2002 WI App 35, ¶¶ 13–21. In *Troxel*, a majority of Justices of the U.S. Supreme Court held that the substantive-due-process doctrine requires state law to give "special weight" to a parent's view of her child's best interest when awarding visitation rights to grandparents. 530 U.S. at 67–68, 70 (plurality op.); *see id.* at 80 (Thomas, J., concurring in the judgment); *infra* pp. 6–8. The Court of Appeals first interpreted *Troxel* to require "a presumption that a fit parent's decision regarding non-parental visitation is in the best interest of the child." *Roger D.H.*, 2002 WI App 35, ¶ 18. The court then held that this requirement "may [be] read . . . into" the Grandparent Visitation Statute to "save it from [ ] constitutional invalidity." *Id.* ¶¶ 18–20. Importantly, *Troxel*'s presumption is rebuttable, given that "the circuit court is still obligated to make its own assessment of the best interest of the child." *Id.* ¶ 19; *see also In re Nicholas L.*, 2007 WI App 37, ¶ 12, 299 Wis. 2d 768, 731 N.W.2d 288 ("It is up

to the party advocating for nonparental visitation to rebut the [*Troxel*] presumption by presenting evidence" to the court.).

In *Meister*, this Court explicitly approved of and adopted *Roger D.H.*'s interpretation of *Troxel* and its saving construction of the Statute. 2016 WI 22, ¶ 40. Like *Roger D.H.*, this Court held that "*Troxel* requires that [state law] give special weight to a fit parent's opinions regarding the child's best interests as part of any best interest determination," including best-interest determinations under the Grandparent Visitation Statute. *Id.* ¶¶ 45–46. This Court explicitly agreed with *Roger D.H.* that *Troxel*'s substantive-due-process requirements "'may [be] read . . . into'" the Statute to save it from invalidity. *Id.* ¶ 44 (quoting *Roger D.H.*, 2002 WI App 35, ¶ 18). And it agreed that this presumption is rebuttable, since "'the circuit court is still obligated to make its own assessment of the best interest of the child.'" *Id.* (quoting *Roger D.H.*, 2002 WI App 35, ¶ 19). In short, this Court has already answered the question here: in light of *Troxel*, the Grandparent Visitation Statute requires as "part of [its] best interest determination" "a presumption in favor of a fit parent's" opinion, which may be subsequently rebutted by presenting contrary evidence to the circuit court. *See id.* ¶¶ 44–46.

C. Appellants have not provided this Court with the "special justification" needed to overrule *Meister*. *See Johnson Controls*, 2003 WI 108, ¶ 96.

Appellants erroneously claim that *Meister*'s adoption of the rebuttable-presumption interpretation of the Statute is undeserving of *stare decisis* because the Court's "analysis . . . was limited." Opening Br. 27. But *Meister* devoted eight substantial paragraphs to resolving this issue and endorsed *Roger D.H.*, *Meister*, 2016 WI 22, ¶¶ 40–47, which itself gave nine paragraphs to the question, *Roger D.H.*, 2002 WI App 35, ¶¶ 13–21. While Appellants complain that the response brief in *Meister* gave this issue short shrift, Opening Br. 27, this Court extensively examined the question at oral argument, *see* Oral Argument at 36:00–42:30, 45:45–48:00, 58:30–1:01:45, *Meister*, 2016 WI 22 (No. 14AP1283), http://www.wiseye.org/Video-Archive/Event-Detail/evhdid/10041 (quoting *Troxel*'s "special weight" holding at 38:10 and 1:00:53). And, of course, even if Appellants were correct that *Meister* did not fully address and resolve this point, they readily admit that *Roger D.H.* did. Opening Br. 25; *see* Br. of Appellant, *Roger D.H.*, 2002 WI App 35, 2001WL34359330, at *6–*15; Br. of Respondent, *Roger D.H.*, 2002 WI App 35, 2001WL34359331, at *1–*5; Reply Br. of Appellant, *Roger D.H.*, 2002 WI App 35, 2001WL34359332, at *1–*5. That decision also holds *stare decisis* effect in this Court, *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997), which Appellants again have failed to rebut.

Meister and *Roger D.H.* both correctly understood *Troxel*. *Troxel* considered a parent's claim that Washington State's broad visitation statute violated substantive due

process. 530 U.S. at 60 (plurality op.). That statute "permit[ted] any person to petition . . . for visitation rights at any time, and authorize[d] th[e] court to grant such visitation rights whenever visitation may serve the best interest of the child," as determined "solely" by "the judge." *Id.* at 60, 67 (plurality op.) (citation omitted). While a majority of Justices concluded that the substantive-due-process doctrine extended to parents' "fundamental right . . . to make decisions concerning the care, custody, and control of their children," no single opinion on the constitutionality of the Washington statute commanded a majority. *Id.* at 66 (plurality op.); *id.* at 77 (Souter, J., concurring in the judgment); *id.* at 87–88 (Stevens, J., dissenting); *id.* at 94–95 (Kennedy, J., dissenting); *accord id.* at 80 (Thomas, J., concurring in the judgment). *But see id.* at 91 (Scalia, J., dissenting).

Applying the "*Marks* rule" for interpreting split decisions like *Troxel* reveals only two controlling principles from the case. *Marks v. United States*, 430 U.S. 188, 193 (1977). The first principle, combining the plurality opinion with Justice Souter's concurrence in the judgment, is that a visitation statute that is "breathtakingly broad" like Washington's violates substantive due process. *Troxel*, 530 U.S. at 67, 73 (plurality op.); *id.* at 76–77, 79 & n.4 (Souter, J., concurring in the judgment). The second principle, combining the plurality opinion with Justice Thomas' concurrence in the judgment, is that a visitation statute must give a "presumption of validity" or "special weight" to a

parent's decision about her child's best interest. *Id.* at 67–68, 70 (plurality op.); *see id.* at 80 (Thomas, J., concurring in the judgment) (applying strict scrutiny). So, under the substantive-due-process doctrine, a judge may not "disregard or overturn" a parent's best-interest conclusion "based solely" on the judge's "mere disagreement" with the parent. *Id.* at 67–68 (plurality op.). In the plurality's view, Washington's visitation statute violated this principle since it placed "the burden" on a parent "of *disproving* that visitation would be in the best interest of [the child]." *Id.* at 69.

Wisconsin's Grandparent Visitation Statute easily complies with *Troxel*'s first principle. Unlike Washington's statute, Wisconsin's Statute is not "breathtakingly broad." *See Troxel*, 530 U.S. at 67 (plurality op.). Rather, it is limited to a subset of grandparents: those who have "maintained" or "attempted to maintain a relationship with" the grandchild, whose grandchildren are nonmarital children with parents who have not subsequently married and who have not been adopted, and (when relevant) whose grandchild's paternity has been established. Wis. Stat. § 767.43(a)–(d).

The Statute also complies with the second principle. As both *Meister* and *Roger D.H.* held, it is "fairly possible" to read the Statute to incorporate *Troxel*'s presumption in favor of a parent's best-interest decision. *See Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 63, 357 Wis. 2d 469, 851 N.W.2d 262 (citation omitted). Section 767.43(3) is silent on who bears the burden of proving that "visitation is in the best

interest of the child." Wis. Stat. § 767.43(3)(f); *compare In re Parentage of C.A.M.A.,* 109 P.3d 405, 411, 414 (Wash. 2005) (saving construction not possible because statute explicitly presumed visitation was in child's best interest). Further, Wisconsin's "best interest" standard itself readily incorporates the "wishes of the child's parent or parents." *See* Wis. Stat. § 767.41(5)(am)1. The Statute also authorizes the court to grant only "*reasonable* visitation rights," *id.* § 767.43(3) (emphasis added), text which easily supports the required thumb on the scale for parents. And the Statute explicitly incorporates a parent's wishes by conditioning visitation on the grandparent not acting "contrary to decisions . . . made by a parent," *id.* § 767.43(3)(e), so a saving construction in favor of parental rights would not "pervert[ ] the purpose of [the] statute," *State v. Hall*, 207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997).

Finally, Appellants claim that *Troxel* requires at least clear-and-convincing evidence to rebut the presumption in favor of parents, Opening Br. 23, 34 n.6, rather than evidence satisfying the preponderance standard only, *see generally* Wis. Stat. § 903.01 (establishing preponderance standard as default in Wisconsin). Yet no majority of Justices in *Troxel* supported that conclusion. Indeed, the *Troxel* plurality favorably cited some state visitation statutes incorporating a "rebuttable presumption" and others incorporating a "clear and convincing evidence" standard. 530 U.S. at 69–70 (plurality op.). All that *Troxel* forbade was a statute either

giving no weight to a parent's decision or requiring parents to "*disprov[e]* that visitation would be in the [child's] best interest." *Id.* at 69–70 (plurality op.); *id.* at 80 (Thomas, J., concurring in the judgment); *e.g.*, *C.A.M.A.,* 109 P.3d at 414.

II. This Court Should Not Go Beyond *Troxel* And Expand The Dubious Substantive-Due-Process Doctrine To Require A Showing Of Harm Before Permitting Grandparent Visitation

Appellants invite this Court to extend *Troxel*'s substantive-due-process principles and hold that visitation may not be awarded under the Statute unless the grandparents "show that *not* granting visitation would cause harm to the child." Opening Br. 29 (emphasis added). This Court should decline the invitation to extend the substantive-due-process doctrine in this manner.

Substantive due process, by which courts grant "'constitutional protection'" to unenumerated rights, is deeply disfavored because it places matters that are not found in the Constitution "'outside the arena of public debate and legislative action.'" *Black v. City of Milwaukee*, 2016 WI 47, ¶ 47, 369 Wis. 2d 272, 882 N.W.2d 333 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). As this Court has repeatedly recognized, "judicial self-restraint requires [it] to exercise the utmost care whenever [it is] asked to break new ground in this field." *State v. Lagrone*, 2016 WI 26, ¶ 37, 368 Wis. 2d 1, 878 N.W.2d 636 (citation omitted); *see Black*, 2016 WI 47, ¶ 47. Indeed, the Court "comes nearest to illegitimacy"

when it "breathe[s] still further substantive content into the Due Process Clause," since doing so "unavoidably pre-empts for itself another part of the governance of the [State] without express constitutional authority." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (citation omitted).

Given the dangers of a court selecting its own "'policy preferences'" for protection, this Court has adopted a demanding substantive-due-process test that narrows the doctrine's scope. *Black*, 2016 WI 47, ¶ 47 (quoting *Glucksberg*, 521 U.S. at 720). This Court will extend the doctrine only to rights that "'are, objectively, deeply rooted in this Nation's history and tradition,'" *Black*, 2016 WI 47, ¶ 47 (quoting *Glucksberg*, 521 U.S. at 720 (citation omitted)), and susceptible to "'careful description,'" *Blake v. Jossart*, 2016 WI 57, ¶ 47, 370 Wis. 2d 1, 884 N.W.2d 484 (quoting *Glucksberg*, 521 U.S. at 721). "Guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," thus this Court should be loath to find the test satisfied in a given case. *See Lagrone*, 2016 WI 26, ¶ 37 (citation omitted).

Troxel and the Grandparent Visitation Statute fully honor whatever requirements substantive due process imposes on visitation statutes by presuming that a parent's best-interest determination is correct. *Supra* Part I. There is no justification for this Court extending substantive due process beyond *Troxel* to include Appellants' harm standard.

The decision to adopt Appellants' harm standard is, in this Court's words, the type of "social . . . decision[ ] that fall[s]

within the province of the legislature," not "the judiciary." *Porter v. State*, 2018 WI 79, ¶ 29, 382 Wis. 2d 697, 913 N.W.2d 842 (citation omitted). It requires a sensitive "policy choice" involving the "weigh[ing]" of the "relative strengths" of both a parent's and a grandparent's "unquestionably important and legitimate" interests. *Glucksberg*, 521 U.S. at 723, 735. The correct balance is not found in this "Nation's history and tradition," as Appellants implicitly concede by failing to argue the point. *Black*, 2016 WI 47, ¶ 47 (citation omitted). And the correct balance is not self-evident since (among other concerns) requiring a grandparent to make the harm showing would likely damage the familial relationships of all involved. *Accord Troxel*, 530 U.S. at 64 (plurality op.) (preserving familial relationships "ensure[s] the welfare of [ ] children"). Therefore, whether to require the harm standard must be a choice between two conceptions of "liberty," a choice that the Constitution "leaves [ ] to the people," not one that the Court may "pre-empt[ ] for itself" via substantive due process. *Michael H.*, 491 U.S. at 122, 130 (citation omitted).

In all, constitutionalizing Appellants' harm standard would do what this Court has repeatedly warned against: place important issues of public policy "outside the arena of public debate and legislative action," *Black*, 2016 WI 47, ¶ 47, (citation omitted), without the necessary "[g]uideposts," *Lagrone*, 2016 WI 26, ¶ 37 (citation omitted). As the "diversity" of visitation statutes across the 50 States shows, Cully, *supra*, at 239–41, grandparent visitation is indeed the

subject of "earnest and profound debate," *Glucksberg*, 521 U.S. at 735. That debate will only deepen as the Legislature continues to "recogni[ze]" the increasingly important role grandparents play in modern family life. *See Troxel*, 530 U.S. at 63–64 (plurality op.). This Court ending that debate by further extending substantive due process would be the antithesis of "judicial self-restraint." *Lagrone*, 2016 WI 26, ¶ 37 (citation omitted).

CONCLUSION

This Court should affirm the circuit court's identification of the governing legal standard in this case.

Dated: August 24, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

KEVIN M. LEROY
Deputy Solicitor General
State Bar #1105053
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2221
leroykm@doj.state.wi.us

Attorneys for the State of Wisconsin

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

Dated: August 24, 2018.

_____

KEVIN M. LEROY
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: August 24, 2018.

_____

KEVIN M. LEROY
Deputy Solicitor General

SUPREME COURT OF WISCONSIN

In the matter of the grandparental visitation of A.A.L.:
In re the Paternity of A.A.L.:

CACIE M. MICHELS,

Appeal No. 17-AP-1142

Petitioner-Appellant,

v.

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

Appeal from the Circuit Court for Chippewa County
The Honorable James M. Isaacson, Presiding

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY

Ilya Shapiro
Pro Hac Vice
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, DC 20001
(202) 842-0200

Joseph S. Diedrich
State Bar No. 1097562
HUSCH BLACKWELL LLP
P.O. Box 1379
33 E. Main St., Suite 300
Madison, WI 53701-1379
(608) 258-7380

Attorneys for the Cato Institute

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INTRODUCTION

Although it involves visitation rights, this is no ordinary family-law case. The Court faces fundamental questions of individual liberty, with significant implications for Fourteenth Amendment jurisprudence in Wisconsin and beyond. To that end, this case presents a unique opportunity to analyze a key part of the U.S. Constitution from first principles.

This brief argues that the Court should adhere to the original public meaning of the Fourteenth Amendment. That means two things. First, the Court should consider all the liberty interests at stake. Second, it should identify grounds for the parties' rights that are consistent with the Privileges or Immunities Clause, not simply wedge them into the Due Process Clause under the U.S. Supreme Court's self-admittedly underdetermined jurisprudence.

STATEMENT OF INTEREST

The Cato Institute is a nonpartisan public-policy research foundation—a "think tank"—dedicated to advancing individual liberty, free markets, and limited government. This case involves issues central to Cato's mission, including the protection of individual liberty under the Fourteenth Amendment.

ARGUMENT

I. The Court should consider all the liberty interests at stake.

The lower courts and the parties have centered their attention squarely on the liberty interests of the parents, Michels

and Lyons. Indeed, the parents base their challenge to Wisconsin's grandparent-visitation statute and the visitation order solely on alleged interference with *their* interest in the "care, custody and upbringing" of Ann. (*E.g.*, Appellants' Br. 10.)[1] The parents' interest, however, is not the only interest at stake: both Ann and her grandmother, Kelsey, have their own, separate interests, too. The Court should recognize and protect all the liberty interests that its ruling will necessarily affect.

First, this case implicates Ann's liberty interests. Children, like adults, "are protected by the Constitution and possess constitutional rights"—rights that do not "come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). Yet although children were at the center of the dispute in *Troxel v. Granville*, the plurality opinion in that case, on which the parents here primarily rely, offers only silence on the interests of children. *See* 530 U.S. 57 (2000) (plurality op.). Throughout the *Troxel* litigation, "[n]obody asked" the children what they wanted, and "nobody represented their interests . . . ." Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & Fam. Stud. 71, 108 (2006).

Like the children in *Troxel*, Ann is the subject of this dispute, and she will undoubtedly be affected the most by its outcome. But unlike in *Troxel*, Ann's interests here were

[1] The parents are asserting their own rights and are not acting in a trustee-like capacity asserting rights on Ann's behalf. *Cf. Troxel*, 530 U.S. at 93 n.2 (Scalia, J., dissenting).

represented by a guardian ad litem. (R.29; R.87 at 123:11–20.) The Court should keep Ann's interests, both directly and as represented by the guardian ad litem, in the foreground. It must ensure that Ann does not become a mere object, to be shuffled around both literally and figuratively, as if she were "so much chattel." *Troxel*, 530 U.S. at 89 (Stevens, J., dissenting).

Second, this case also implicates Kelsey's liberty interests as a grandparent. Substantive-due-process doctrine does not "cut[] off any protection of family rights at the first convenient, if arbitrary boundary . . . of the nuclear family." *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977); *accord Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting). Given their direct familial connection, their contemporary and historic importance in Western culture, and their frequent position "in fact[,] if not in law" as "part of the child's emotional family[,]" Lawrence, *supra*, at 113, grandparents share an interest in the upbringing of their grandchildren. To that end, visitation may protect Kelsey's interests by allowing her "to contribute to the child's well-being by providing a sense of continuity." *In re Opichka*, 2010 WI App 23, ¶ 22, 323 Wis. 2d 510, 780 N.W.2d 159.

Grandparent-visitation cases involve "multiple overlapping and competing prerogatives of various" parties: parents, children, and grandparents. *Troxel*, 530 U.S. at 86 & n.7 (Stevens, J., dissenting). Unlike termination-of-parental-rights cases and "[u]nlike the typical substantive due process scenario," Lawrence, *supra*, at 113 n.259, this case and others like it present a contest between multiple private parties that goes beyond a "a bipolar

struggle between the parents and the State," *Troxel*, 530 U.S. at 86 & n.7 (Stevens, J., dissenting). While the state generally has no business interfering with the private ordering of family life, when that private ordering cannot overcome conflict and achieve a balance of intergenerational interests, a family-court judge may very well be the appropriate referee. Here, the Court should consider the interests of all those involved, balancing the "governing right of the parent[s]" with the "interests of the dependent child." Lawrence, *supra*, at 73.

II. The Court should identify grounds for the parties' rights that are consistent with the original public meaning of the Fourteenth Amendment.

The parents ask this Court to rule that the visitation order, entered under the grandparent-visitation statute, infringed on their substantive-due-process rights. Relying principally on *Troxel*, they argue that "substantive due process requires a petitioning grandparent to show that not granting visitation would cause harm to the child." (Appellants' Br. 29.)

In *Troxel*, the U.S. Supreme Court scrutinized a "breathtakingly broad" statute that permitted "any person" at "any time" to petition for visitation rights. *Troxel*, 530 U.S. at 67. Limiting its holding to that statute, the Court expressly declined to pass on the question of whether "all nonparental visitation statutes" require a "showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73. The plurality declared only that courts must give "special weight" to a parent's visitation preferences. *Id.* at 69–70.

The Wisconsin statute at issue here is narrower than the *Troxel* statute: it permits only a subclass of grandparents to obtain visitation rights under certain conditions. Yet despite this narrower reach, and despite how *Troxel* did not require a showing of harm, the parents nonetheless ask this Court to require such a showing. (Appellants' Br. 29.) A ruling in favor of the parents, then, would expand *Troxel* and the rights it envisions. The parents insist these expanded rights can be found under the Fourteenth Amendment's Due Process Clause.

But locating the asserted rights under the Due Process Clause—in particular, the substantive-due-process doctrine—is not necessarily consistent with the original meaning of the Fourteenth Amendment. Instead, to the extent they exist, the parents' asserted rights, along with any rights protecting Ann's and Kelsey's liberty interests, can likely be found in other locations more consistent with original meaning. In deciding this case, the Court should thoroughly explore alternative grounds for the parties' rights.

A. The Fourteenth Amendment was enacted in the aftermath of the Civil War to stymie state governments from violating the civil liberties of freed slaves and white Republicans, to ensure the constitutionality of the Civil Rights Act of 1866, and to combat the notorious and discriminatory "Black Codes." *See* Philip Hamburger, *Privileges or Immunities*, 105 Nw. U.L. Rev. 61, 116–17 (2011). Section 1 of the amendment provides, in relevant part:

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

These three clauses are known as the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause, respectively.

The Privileges or Immunities Clause contains what should be the Fourteenth Amendment's primary mechanism for limiting state infringement of substantive rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 808 (2010) (Thomas, J., concurring in part and concurring in the judgment). Indeed, the clause is most appropriately read "as a guarantor of substantive rights against all state action." Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Liberty 334, 345 (2005).

Such a reading is consistent with original meaning. Before and during the Reconstruction Era, "the words *rights*, *liberties*, *privileges*, and *immunities*" were treated as synonymous and "used interchangeably." Michael Kent Curtis, *No State Shall Abridge* 171–73 (1986); *accord McDonald*, 561 U.S. at 813–18 (Thomas, J., concurring) (citing Blackstone, colonial legislative acts, antebellum judicial decisions, dictionaries, and other texts). The clause's framers modeled it after the Privileges and Immunities Clause of Article IV, *see Saenz v. Roe*, 526 U.S. 489, 502–03 n.15 (1999), which protects "privileges and immunities" that are "in their nature, fundamental" and that "belong, of right, to citizens of all free governments[,]" *Corfield v. Coryell*, 6 F. Cas.

546, 551 (C.C.E.D. Pa. 1823) (Washington, J., riding circuit). Article IV, in turn, traces its lineage back to the Articles of Confederation, *see* art. IV (1781), and to colonial charters, *see, e.g.*, Virginia Charter of 1606.

Rep. John Bingham, the primary drafter of the Fourteenth Amendment, understood the Privileges or Immunities Clause to protect substantive rights. Cong. Globe, 39th Cong., 1st Sess. 2542, 2765–66 (1866); *see McDonald*, 561 U.S. at 829–35 (Thomas, J., concurring). Other members of the 39th Congress shared that understanding. Senator John Sherman, for example, explained that the clause would protect "the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it,) of citizens of the United States," as found in American and English common law, the U.S. Constitution, state constitutions, and the Declaration of Independence. Cong. Globe, 42d Cong., 2d Sess. 844 (1872). In these sources, courts interpreting the Privileges or Immunities Clause would "find the fountain and reservoir of the rights of American as well as of English citizens." *Id.*

But just a few short years after ratification, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the U.S. Supreme Court gutted the Privileges or Immunities Clause. In *Slaughter-House*, a Louisiana law granted a private monopoly on the sale and slaughter of livestock in New Orleans. Independent butchers challenged the law, alleging that it interfered with their substantive right to exercise their trade and earn a living. The Court, in a divisive 5-4 ruling, upheld the law, concluding that

the Privileges or Immunities Clause protected only very limited rights of national citizenship, such as the right to use navigable rivers. *Id.* at 79–80. But the clause did not, according to the *Slaughter-House* majority, protect any rights of state citizenship, including the rights asserted by the butchers and most other rights. *Id.* at 78–82.

There is now an established cross-ideological scholarly consensus, and an emerging judicial recognition, that *Slaughter-House* "blatantly" misinterpreted the Privileges or Immunities Clause.[2] Alan Gura et al., *The Tell-Tale Privileges or Immunities Clause*, 2009 Cato Sup. Ct. Rev. 163, 181–84 (2009); *see also McDonald*, 561 U.S. at 805 (Thomas, J., concurring); Laurence H. Tribe, *American Constitutional Law* 1320–31 (3d ed. 2000); Curtis, *supra*; Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Liberty 1096, 1098 (2005). "Virtually no serious modern scholar—left, right, or center—thinks [that *Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment." Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 n.327 (2000). Not surprisingly, there is also relative consensus that interpreting the Privileges or Immunities

[2] Worst of all, *Slaughter-House*'s narrow interpretation of the Privileges or Immunities Clause, which directly contradicts that clause's original meaning, was "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court." Charles Black Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* 55 (1997). *Slaughter-House* arguably allowed Jim Crow to reign in the South for nearly a century. *See McDonald*, 561 U.S. at 855–58 (Thomas, J., concurring) (citing *United States v. Cruikshank*, 92 U.S. 542 (1875)); Eric Foner, *A Short History of Reconstruction* 223–25 (1990).

Clause according to its original meaning would benefit Fourteenth Amendment jurisprudence.

To fill the void left by *Slaughter-House*, litigants and justices seeking to protect substantive individual rights turned to a "most curious place"—the Due Process Clause—as "an alternative fount of such rights," *McDonald*, 561 U.S. 742, 809 (Thomas, J., concurring), which ultimately lead to the substantive-due-process doctrine, *see, e.g.*, Akhil R. Amar, *The Bill of Rights* 209–10 (1998). Although the phrase "due process of law" was understood historically as including a limited substantive component—particularly in the "of law" part—"the redaction of the Privileges or Immunities Clause" and the corresponding use of "the Due Process Clause to textually justify the substantive scrutiny of laws" "wreak[] havoc on the coherence and original meaning of" the Fourteenth Amendment. Randy E. Barnett, *What's So Wicked About* Lochner*?*, 1 N.Y.U. J.L. & Liberty 325, 331 (2005).

Unfortunately but predictably, substantive due process has proven to be an inadequate substitute for the Privileges or Immunities Clause. *Id.* at 332–33; *see McDonald*, 561 U.S. at 812 (Thomas, J., concurring). It has "undermined the legitimacy of protecting the rights of individuals from violation by state governments" and, at the same time, "become a potent weapon against the practice of originalist constitutional interpretation." *Id.* Whatever its merits, substantive due process has been criticized by those across the ideological spectrum as inconsistent

at best and, at worst, an "atrocity." *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

B. Arguing that their asserted rights can be found under the Due Process Clause, the parents, following the lead of the *Troxel* plurality, rely on *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Yet at their core, *Meyer*, *Pierce*, and *Yoder* are not even about parental rights; they are about protecting individual liberty against state interference generally.

For one thing, these cases focus only superficially on the rights of parents *qua* parents in the way *Troxel* did. In *Meyer*, the plaintiff was not asserting rights as a parent, but rather as a schoolteacher—namely, the right to pursue a profession absent state interference. *Meyer*, 262 U.S. at 400–01. Neither side "mounted a parental rights argument in the written briefs[,]" and Meyer's own attorney and other contemporaries "characterized the case as providing a constitutional guarantee for the right to maintain private schools." Lawrence, *supra*, at 74–75, 111. The *Meyer* Court's opinion reiterates this education focus, homing in on how the challenged statute "interfere[d] with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401. "[T]he problem in *Meyer*," as indicated by the Court's own language, was "not state interference in the intimacies of home and family, but, rather the

state's attempt to limit the acquisition of knowledge and homogenize its populace." Lawrence, *supra*, at 77.

Pierce likewise rested on these common themes of knowledge and homogenization, with only a tertiary and background focus on any concept of parental rights. *See Pierce*, 268 U.S. at 534–35. So, too, was *Yoder* minimally occupied with any parental right to control a child's upbringing. *See Yoder*, 406 U.S. at 207–36.

What is more, substantive due process does not permeate the trio of cases. As for *Meyer* and *Pierce*, "had they been decided in recent times, [they] may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion." *See Troxel*, 530 U.S. at 95 (Kennedy, J., dissenting). *Yoder*, as the parents here concede, "involves the intersection of parental rights with the right to free exercise of religion." (Appellants' Br. 33 n.5.) And as Justice Thomas has indicated, the Privileges or Immunities Clause—not the Due Process Clause—may be the proper constitutional home for the rights protected in all three cases, as well as in *Troxel*. *See Troxel*, 530 U.S. at 80 (Thomas, J., dissenting).

C. Given the above discussion, the Court should identify alternative grounds for the parties' rights. Any decision that grounds rights in substantive due process, at least without first attempting to identify alternative grounds, perpetuates and compounds constitutional malapropisms. Rights grounded in substantive due process—and the judicial decisions announcing them—are viewed with suspicion and invite attack. Indeed, "the

use of the Due Process Clause" to do the work of the Privileges or Immunities Clause "has been vulnerable to historical claims of illegitimacy from its inception." Barnett, *supra*, at 332. When a constitutional doctrine is as maligned as substantive due process, there is ample reason to avoid relying on it to protect liberty interests, except when absolutely necessary. This is especially true here for two reasons.

First, while *Troxel* forms the foundation of the parents' claim to a right grounded in substantive due process, *Troxel* failed to produce a majority opinion; the justices splintered on both judgment and reasoning. Even the plurality expressly dodged defining the precise contours of any substantive parental right. *Troxel*, 530 U.S. at 73. Also, as explained above, the cases on which the *Troxel* plurality relied—*Meyer*, *Pierce*, and *Yoder*—do not contemplate a *Troxel*-like substantive-due-process parental right at all. *See supra* Part II.B.

Second, alternative grounds exist that are more consistent with the original meaning of the Fourteenth Amendment. As explained above, the Privileges or Immunities Clause was originally understood as the Fourteenth Amendment's primary mechanism for protecting substantive rights. *See supra* Part II.A. Other plausible grounds include the First Amendment's guarantee of freedom of association, the Wisconsin Constitution, and other constitutional, statutory, or common-law sources.

CONCLUSION

While *amicus* takes no position on which party should prevail, this Court should decide this case consistent with the original public meaning of the Fourteenth Amendment as set forth above.

Dated this 17th day of September, 2018.

By: 

Ilya Shapiro
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Joseph S. Diedrich
State Bar No. 1097562
HUSCH BLACKWELL LLP
P.O. Box 1379
33 E. Main St., Suite 300
Madison, WI 53701-1379
(608) 258-7380
(608) 258-7138 (fax)
joseph.diedrich@huschblackwell.com

Attorneys for the Cato Institute

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 17th day of September, 2018.

HUSCH BLACKWELL LLP
Attorneys for the Cato Institute

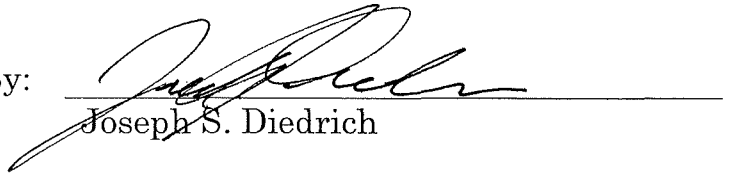
By: _____
Joseph S. Diedrich

ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief that complies with the requirements of Wisconsin Statutes section 809.19(12). The text of the electronic copy of this brief is identical to the text of the paper copy of this brief filed as of this date. A copy of this certification has been served with the paper copies of this brief filed with the Court and served on all parties.

Dated this 17th day of September, 2018.

HUSCH BLACKWELL LLP
Attorneys for the Cato Institute

By: 
Joseph S. Diedrich

Supreme Court of Wisconsin

IN THE MATTER OF THE GRANDPARENTAL VISITATION A.A.L.:
IN RE THE PATERNITY OF A.A.L.

CACIE M. MICHELS,

Petitioner-Appellant,

v. Case No. 17-AP-1142

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

Appeal from the Circuit Court for Chippewa County
The Honorable James M. Isaacson, Presiding

BRIEF OF AMICUS CURIAE GRANDPARENTS ADVOCATE OF AMERICA, INC. AND ALIENATED GRANDPARENTS ANONYMOUS, INCORPORATED

PERKINS COIE LLP
John S. Skilton, WI State Bar #1012794
David R. Pekarek Krohn, WI State Bar #1092062
Emily J. Greb, WI State Bar #1074263
1 East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499

Counsel for Amicus Curiae, Grandparents Advocate of America, Inc. and Alienated Grandparents Anonymous, Incorporated

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INTRODUCTION

Grandparents Advocate of America, Inc. ("GAA") and Alienated Grandparents Anonymous, Incorporated ("AGA") are organizations dedicated to supporting the rights of grandparents. Both organizations believe in the value of a strong connection between grandparents and grandchildren, and advocate on behalf of grandparents to promote—through legislation and otherwise—grandparental visitation. Moreover, the AGA in particular, has a strong focus on supporting research related to relationships between grandparents and grandchildren.

The GAA and AGA submit this brief of Amicus Curiae to provide the Court with an understanding of the importance of the grandparent-grandchild relationship, which is sometimes underappreciated. While the GAA and AGA do not take a position on the facts of this case or the proper "standard of proof required for a grandparent to overcome the presumption that parents' decisions regarding the scope and extent of their child's visitation with the grandparent is in the child's best interest," they do want to make sure this Court is aware of the potential harm that will occur to grandparents and grandchildren alike if this Court does not uphold Wis. Stat. § 767.43(3) as constitutional.

The importance of intergenerational connections between grandparents and grandchildren is based on academic research. As discussed below not only is this relationship valuable to both grandparents and grandchildren, but it can be harmful to the grandchild if an established relationship is unexpectedly severed. Further, the changing demographics of America make the relationship more important than ever.

STATEMENT OF INTEREST

As detailed above, the GAA and AGA are organizations that work to support and further grandparents' rights. Both groups work to further strong connections between grandparents and grandchildren and educate the public, legislatures, and courts regarding the importance of grandparents in the lives of their grandchildren, and about the importance of the relationship to the grandchildren's well-being.

ARGUMENT

I. THE INTERGENERATIONAL CONNECTION BETWEEN GRANDPARENT AND GRANDCHILD CAN BE VITAL TO BOTH

It is well understood that the connection between grandparent and grandchild is a unique relationship. *Grandparents: The Other Victims of Divorce and Custody Disputes: Hearing Before the Subcomm. on Human Servs. of the Select Comm. on Aging*, 97th

Cong. 18 (1982) [hereinafter *Hearing*] (statement of Max Chesens).[1] Unfortunately, society does not always recognize the importance of that relationship to both grandparent and grandchild. *Id.* at 55 (statement of Dr. Arthur Kornhaber). In particular, there are significant benefits to the happiness of grandchildren and grandparents that come from fostering the emotional attachment between them. *Id.* at 55-56.

Dr. Arthur Kornhaber, who has extensively studied the relationships between grandparents and grandchildren, found that "not only are grandparents and grandchildren important to one another they are indispensable for one another's emotional well-being." *Id.* at 56. Further, Dr. Kornhaber's research has shown that "[t]he grandparent-grandchild bond is second only in emotional importance to the bond between parents and children." *Id.* The overall consensus is that grandparents and grandchildren have "emotionally close" and "mutually satisfying relationships." Carol Hosmer Golly, *Pruning the Family Tree: The Plight of Grandparents who are Alienated from Their Grandchildren*, 7(2) INT'L J. AGING AND SOCIETY 21 (2016) [hereinafter Golly].

A long-term relationship between grandchild and grandparent is especially beneficial to the grandchild because the relationship can

[1] https://files.eric.ed.gov/fulltext/ED236515.pdf

meet the needs of the developing grandchild. Boaz Kahana & Eva Kahana, *Grandparenthood from the Perspective of the Developing Grandchild*, 3(1) DEV. PSYCHOL. 98, 104 (1970); Eva Kahana & Boaz Kahana, *Theoretical and Research Perspectives on Grandparenthood*, 2 AGING HUM. DEV. 261, 266 (1971) [hereinafter Kahana]. Grandparents can, for example "provide a sense of history and family continuity that encourages a child's sense of belonging and security." Jennifer Wilson, *A Family Unfriendly Plan*, ABC NEWS (June 21, 2011).[2] Indeed, the "love of grandparents is unique, and the life of a child bereft of this love is the poorer for it." *Id.* For instance, while the very young child may enjoy receiving gifts and indulgences from the grandparent, as the child gets older, the child may enjoy sharing activities with a grandparent. Kahana at 266. As discussed in Part III, the shifting demographics of America may allow more of this extremely beneficial long-term connection between grandchildren and grandparents.

Researchers have recognized that grandchildren who have a close relationship to their grandparents see specific benefits. First, such children grow up with a deeper understanding of, and respect for, older adults. *Hearing* at 57 (statement of Dr. Arthur Kornhaber). Second, because grandmothers and grandfathers often serve similar

[2] http://www.abc.net.au/news/2011-06-22/wilsongrandparents/2765218

roles in a grandchild's life, such children are less sexist. *Id.* Third, and perhaps most importantly, the relationship with a grandparent can provide a "sense of social immunity" or an "emotional sanctuary," "a place to go apart from their parents and the peer group when they have problems." *Id.* In this way, grandparents "may serve as valuable sources of social support for children during times of family stress." Golly at 22. "Continuity of the grandparent-grandchild relationship may provide a vital connection for a child when other family relationships undergo dissolution." *Id.*

Of course, the relationship between the parents and grandparents can affect the relationship between the grandchild and grandparents. Notably, however, there can be a beneficial grandparent-grandchild relationship in spite of a less-than-perfect grandparent-parent relationship. Grandchildren can sometimes "mirror[]" their parents' perception of their grandparents. *Hearing* at 58 (statement of Dr. Arthur Kornhaber). But, "[l]eft alone with their grandparents [the grandchildren] were quite happy, although they were hesitant to report this to their parents." *Id.* Grandchildren can even be used "as pawns by adult children to 'punish' grandparents for perceived wrongs." Golly at 22. Therefore, while the law recognizes the importance of parents' view of what is best for their children, those parents' view of the relationship between their children and the

grandparents may be biased. This is true even if that view is based on what their children tell them about the relationship, as the children may be hesitant to tell their parents they have a good relationship with their grandparents. In sum, the grandparent-grandchild relationship is vital to both, even if a child's parent has a difficult relationship with the child's grandparent.

II. SEVERING THE CONNECTION BETWEEN GRANDPARENT AND GRANDCHILD CAN CAUSE SIGNIFICANT HARM TO THE GRANDCHILD

Relatedly, once a connection between a grandparent and grandchild has been established, severing that vital relationship can cause harm to the grandchild. As detailed below, when children have an established relationship and are "suddenly uprooted," and have a relationship with a grandparent severed, it is often "unexpected, unexplained, and indefensible." *Hearing* at 20-21 (statement of Lee Sumpter, founder Grandparents/Children's Rights, Inc.) (Grandparents—Children's Rights, Inc. which "gathers information to share with concerned grandparents and others in the 50 states"). "The children are often confused because they do not understand why they cannot see or talk to their grandparents." *Id.* at 21. Moreover, they "develop mental and emotional problems because they cannot fight back, and they have no one to defend them." *Id.*

As detailed above, "[c]lose relationships with grandparents have been shown to be influential factors in the development of beliefs and values of grandchildren." Jordan Soliz and Jake Harwood, *Shared Family Identity, Age Salience, and Intergroup Contact: Investigation of the Grandparent-Grandchild Relationship*, 73(1) COMMC'N MONOGRAPHS 87, 89 (2006).[3] Such relationships moreover "provides grandchildren with their first and most frequent contact with older adults." *Id.* This vital connection causes children with such a relationship to "[be] deeply rooted in the family and the culture, more patriotic, do better in school, . . . [and be] emotionally secure in the knowledge that there are many people who care for them." *Hearing* at 52 (statement of Dr. Arthur Kornhaber). Moreover, children who maintain this connection "have a role model for the future and do not fear old age." *Id.* Children who do maintain this vital connection maintain "[c]ontinuity . . . when other family relationships undergo dissolution." Golly at 22. Given the significance of grandparent-grandchild relationships, severing the relationship can cause emotional trauma for the grandchild.

For example, the AGA has found that grandchildren may suffer from depression, helplessness, confusion, tension, pessimism, guilt,

[3] https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1008&context=commstudiespapers

and ambivalence when alienated from a grandparent. *Feelings of the Alienated Children*, AGA-FL.ORG.[4] Indeed, leading expert Dr. Glenn Ross Caddy has noted that "[t]he children who suffer this alienation have no context of cohesiveness or normalcy in . . . extended family life." *This is Abuse*, AGA-FL.ORG.[5] Moreover, Dr. Caddy has noted that children therefore "suffer profound emotional consequences." *Id.*

Children who have had these meaningful and close relationships severed "learn not to trust those close to them." *Id.* In some situations, grandparent alienation is considered to be a form of child abuse. *Id.* These children are also then often "forced into a severely shrunken circle of family to whom they can turn to for support when the inevitable conflicts arise with parents." Wilson, *supra*.

Moreover, while experts agree that maintaining ties with abusive grandparents is not reasonable, that is often not the case. To the contrary, Dr. Coleman has noted that his clinical experience shows "that most grandparents are denied contact, not because of [any] abusive behavior, but because of a recent or longstanding conflict between the parent and adult child or the adult child's spouse." *This*

[4] http://www.aga-fl.org/feelings_of_the_alienated_children (last visited Oct. 3, 2018)
[5] http://www.aga-fl.org/this_is_abuse (last visited Oct. 3, 2018)

is Abuse, *supra*. Indeed, the severing of ties is often the result of divorce and family feuding. Golly at 22-23.

While recognizing that this Court must work within the framework of the U.S. Constitution and the precedent of the Supreme Court of the United States, it is proper to consider the motivation of parents who seek to prevent their children from enjoying a relationship with their grandparents. As discussed above, the bond between grandparents and grandchildren is a unique and special one. And once that bond is established, there can be harm to the grandchild when it is broken. While the view of parents must be given special weight, the finder of fact should consider whether the parents' desire to separate grandchildren from grandparents is based on the best interests of the child, or is instead the result of unrelated animosity between the parent and grandparent. Certainly, however, severing ties between grandparents and grandchildren, in particular when a relationship has been established, harms grandchildren.

III. CHANGING DEMOGRAPHICS ARE AFFECTING THE ROLE OF GRANDPARENTS, MAKING THE INTERGENERATIONAL CONNECTION MORE IMPORTANT THAN EVER

Moreover, in light of changing demographics in America, the role of the grandparent is changing. In particular, there are two significant demographic changes that make the grandparent-

grandchild connection more important than ever. First, the rise of the non-traditional nuclear family makes the grandparental connection more valuable. Second, the fact that Americans are living longer allows for a deeper and longer-lasting relationship between grandparents and grandchildren.

The rising rate of divorce and remarriage means that many children are living with a stepparent. *Hearing* at 2 (statement of Mario Biaggi). And nearly nine percent of grandparents with grandchildren under five years old provide "extensive childcare of at least thirty hours per week." Golly at 22. In 2016 in Wisconsin, 32% of children were living in single-parent families. *Children in Single-Parent Families*, DATACENTER.KIDSCOUNT.ORG.[6] And another 4% of children were living with neither parent and 2% were living with a grandparent as the primary caregiver. *Children Living with Neither Parent*, DATACENTER.KIDSCOUNT.ORG;[7] *Children in the Care of Grandparents*, DATACENTER.KIDSCOUNT.ORG.[8]

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[6] https://datacenter.kidscount.org/data/tables/106-children-in-single-parent-families?loc=51&loct=2#detailed/2/51/false/870,573,869,36,868,867,133,38,35,18/any/429,430 (last visited Oct. 3, 2018)

[7] https://datacenter.kidscount.org/data/tables/111-children-living-with-neither-parent?loc=51&loct=2#detailed/2/51/false/870,573,869,36,868,867,133,38,35,18/any/439,440 (last visited Oct. 3, 2018)

[8] https://datacenter.kidscount.org/data/tables/108-children-in-the-care-of-grandparents?loc=51&loct=2#detailed/2/51/false/870,573,869,36,868,867,133,38,35,18/any/433,434 (last visited Oct. 3, 2018)

As noted above, one of the benefits to the grandchild of the grandparent-grandchild relationship is the "emotional sanctuary" that a grandparent can provide. This is especially important in situations where a child's parents are not behaving amicably towards each other. In such situations, a grandchild can look to a grandparent for support and to discuss problems they are having with their parents. As Wisconsin's opioid crisis continues, more children will need emotional and financial support beyond their parents. *Opioids*, DHS.WISCONSIN.GOV;[9] *See also Report Reveals that about 1 in 8 Children Lived with at Least One Parent who had a Past Year Substance Use Disorder*, SAMHSA.GOV (Aug. 24, 2017). [10] Grandparents are uniquely qualified to provide such assistance, and do so not just willingly, but with love and passion.

The fact that Americans are living longer means that the grandparent-grandchild relationship may last longer, and be more meaningful, than before. Golly at 21 ("Life expectancy has increased threefold in the past two-hundred years, allowing the possibility of lengthy familial multigenerational connections between children, parents, and grandparents.") Not only are Americans living longer, but they are remaining active longer. As discussed above, as children

[9] https://www.dhs.wisconsin.gov/opioids/index.htm (last visited Oct. 3, 2018)
[10] https://www.samhsa.gov/newsroom/press-announcements/201708241000

get older, they value sharing experiences with their grandparents over simple indulgences. As one researcher has noted, "[a]s secular changes point to the younger grandparent, the potential of sharing activities in a one-to-one relationship with their grandparent should increase." Kahana at 266. When they have seen a need, Grandparents have often stepped up, not stepped out, and that additional support has been a great benefit to their grandchildren.

CONCLUSION

As this Court considers this case, both the necessary standard of proof and the particular facts of the relationship between Ms. Kelsey and her granddaughter, the GAA and AGA implore this Court not to forget the unique and special bond between a grandparent and grandchild.

Dated this 5th day of October, 2018.

PERKINS COIE LLP

John S. Skilton, WI State Bar #1012794
David R. Pekarek Krohn, WI State Bar #1092062
Emily J. Greb, WI State Bar #1074263
1 East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499

Counsel for Amicus Curiae, Grandparents Advocate of America, Inc. and Alienated Grandparents Anonymous, Incorporated

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,211 words.

Dated this 5th day of October, 2018.

PERKINS COIE LLP

John S. Skilton, WI State Bar #1012794
David R. Pekarek Krohn, WI State Bar #1092062
Emily J. Greb, WI State Bar #1074263
1 East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499

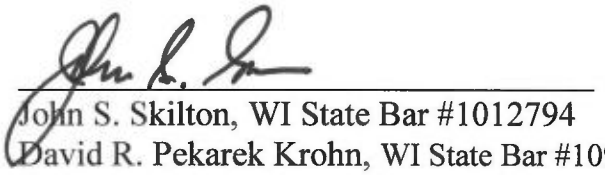
Counsel for Amicus Curiae, Grandparents Advocate of America, Inc. and Alienated Grandparents Anonymous, Incorporated

CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19 (12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 5th day of October, 2018.

PERKINS COIE LLP



John S. Skilton, WI State Bar #1012794
David R. Pekarek Krohn, WI State Bar #1092062
Emily J. Greb, WI State Bar #1074263
1 East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499

Counsel for Amicus Curiae, Grandparents Advocate of America, Inc. and Alienated Grandparents Anonymous, Incorporated

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October 2018, I caused three copies of this Brief to be served upon each of the following parties via U.S. Mail:

Attorney for Appellants, Cacie M. Michels and Keaton L. Lyons:

Ryan J. Steffes
Weld Riley, S.C.
3624 Oakwood Hills Parkway
P.O. Box 1030
Eau Claire, WI 54702-1030

Attorneys for Petitioner-Respondent, Jill R. Kelsey:

Jeffrey A. Mandell
Eileen M. Kelley
Anthony J. Menting
Stafford Rosenbaum LLP
222 West Washington Ave., Suite 900
P.O. Box 1784
Madison, WI 53701-1784

Guardian Ad Litem:

Kari S. Hoel
Hoel Law Office, LLC
103 N. Bridge St. Suite 240
Chippewa Falls, WI 54729

Dated this 5th day of October, 2018.

PERKINS COIE LLP

John S. Skilton, WI State Bar #1012794
David R. Pekarek Krohn, WI State Bar #1092062
Emily J. Greb, WI State Bar #1074263
1 East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499

Counsel for Amicus Curiae, Grandparents Advocate of America, Inc. and Alienated Grandparents Anonymous, Incorporated