Cause No. 20-0676

In the Supreme Court of Texas

IN THE INTEREST OF S.K. AND L.K., CHILDREN

On Petition for Review from the
Thirteenth Court of Appeals, Corpus Christi-Edinburg, Texas
Cause No. 13-19-00213-CV

BRIEF OF PARENTAL RIGHTS FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases Cited

Statutory Provisions

Rules Cited

INTEREST OF AMICUS

The Parental Rights Foundation is a national, nonprofit, nonpartisan advocacy organization with supporters in all fifty states.

The Parental Rights Foundation is concerned about the erosion of the legal protection of loving and fit parents to raise, nurture, and educate their children without undue state interference, and about the unfortunate, unintended consequences to innocent children caused by the routine overreach of the child-welfare system. The Parental Rights Foundation seeks to protect children by preserving the liberty of their parents by educating those in government and the public about the need to roll back some of the intrusive state mechanisms that have worked to harm more children than they help.

The United States Supreme Court has repeatedly held that parents have a fundamental right to direct the care, custody, and control of their children, most recently in *Troxel v. Granville*, 530 U.S. 57 (2000). Yet parents continue to encounter obstacles in exercising those rights—in schools, in hospitals, in their communities, and in the family court system. This case represents a too-common occurrence of undue interference: court-imposed changes in custody and visitation without first determining the fitness of a parent.

In furtherance of its interest, the Parental Rights Foundation has retained Tom Sanders, a Texas attorney, to file this Amicus Brief in Support of Respondent and

exclusively paid all legal fees and costs associated with the provision of those services. The Parental Rights Foundation submits this Amicus Curiae Brief pursuant to Rule 11 of the Texas Rules of Appellate Procedure and respectfully requests that it be received and considered by the Court pursuant to TEX. R. APP. P. 11.

STATEMENT OF FACTS

The Parental Rights Foundation adopts Respondent's Statement of Facts for the purpose of this brief and references individuals with the same designations as Respondent.

SUMMARY OF ARGUMENT

The Texas Supreme Court has a powerful opportunity to protect parental rights in the State of Texas by accepting this case for review and holding that there must be a finding of parental unfitness using clear and convincing evidence before overruling a custodial parent's decisions in the context of grandparent visitation.

State Supreme Courts around the country have failed to come to a consensus on this critical issue. While some State Supreme Courts have found that there must be a finding of parental unfitness using clear and convincing evidence before overruling a custodial parent's decisions in the context of grandparent visitation, others have only required some finding of harm, or have merely held that best interests of the child standard should apply with no finding of harm.

This case represents an opportunity for the Texas Supreme Court to take a strong stand for parental rights, both in Texas, and nationwide, to establish that when a non-parent is seeking some sort of access to the child, due process requires the first step to be proof of parental unfitness, supported by clear and convincing evidence. Without this first step, a court's substitution of its judgment for that of the parent can irreparably harm the parent-child relationship.

Particularly noteworthy are the decisions highlighted in this brief from State Supreme Courts in 19 states – Alabama, Alaska, Colorado, Connecticut, Georgia, Rhode Island, Idaho, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, Oklahoma, Oregon, South Carolina, South Dakota, Wisconsin, and Wyoming – where the use of a clear and convincing evidentiary standard can serve as a model for the Texas Supreme Court in the case pending before it.

ARGUMENT

I. Third parties who wish to overrule the wishes of parents should be required to prove parental unfitness by clear and convincing evidence.

A. The Fourteenth Amendment requires that the decisions of fit parents receive tremendous deference.

The United States Supreme Court has consistently recognized that the interest of parents "in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The fitness of the parent has long played a key role in disputes

over parental rights. In *Stanley v. Illinois*, the Court warned that the state "registers no gain towards its declared goals when it separates children from the custody of fit parents." 405 U.S. 645, 652 (1978). The fitness of the parent was also central to the Court's holding in *Santosky v. Kramer*, which warned that "the State cannot presume that a child and his parents are adversaries. . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." 455 U.S. 745, 760 (1982).

Troxel, the most recent decision from the Supreme Court on parental rights, reaffirmed that the fitness of parents plays a critical role in resolving any disputes between parents and third parties. One of the dispositive factors – listed first, in fact – was that "the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68.

B. Post-Troxel, proof of parental unfitness has become central to the State of Texas' public policy on disputes between parents and third parties.

Since *Troxel*, the Texas legislature has codified the centrality of this presumption in two statutes: TEX. FAM. CODE § 153.433, in the context of grandparent visitation, and TEX. FAM. CODE § 153.131, in the context of the appointment of managing conservators. Section 153.433(a)(2) was amended in 2005 to bar courts from ordering reasonable possession of or access to a grandchild unless the grandparent first "overcomes the presumption that a parent acts in the best

interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being."

Although the statute does not explicitly reference a finding of "parental unfitness" among the burdens of proof that a grandparent must meet, this Court recently stated, "we read any best-interest determination in which the court weighs a fit parent's rights against a claim to conservatorship or access by a nonparent to include a presumption that a fit parent acts in his or her child's best interest." *In re C.J.C.,* 603 S.W.3d 804, 818 (Tex. 2020).

However, as Justice Lehrmann predicted in his concurrence, the lower courts have continued to struggle with "the proper evaluation of whether the fit-parent presumption has been overcome in a particular case." *Id.* at 821. *See, e.g., Interest of N.H.,* 652 S.W.3d 488, 498 (Tex. Ct. App. 2022); *In re C.D.C.,* 05-20-00983-CV, 2021 WL 346428, at *2 (Tex. Ct. App., Feb. 2, 2021) *(memorandum opinion).*

This Court should use the clear and convincing evidence standard. The United States Supreme Court has explained that "the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 455 U.S. at 755. In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the U.S. Supreme court set forth a balancing

test requiring that courts weigh (1) "the private interests affected by the proceeding"; (2) "the risk of error created by the State's chosen procedure"; and (3) "the countervailing governmental interest supporting use of the challenged procedure." *See also*, *Santosky*, 455 U.S. at 754. Looking at the first *Mathews* factor, the U.S. Supreme Court has explained that the clear and convincing evidentiary standard is mandatory when the individual interests in the proceeding are "'particularly important'" and "'more substantial than mere loss of money.'" *Id.* at 756 (*internal citation omitted)*. The U.S. Supreme Court has specifically explained that a parent's right to the care, custody, and control of his or her child is "an interest far more precious than any property right." *Id.* at 758-59. And as a fundamental right, the clear and convincing evidence standard is the appropriate standard.

II. Thirty-eight states protect the fundamental right of parents by requiring third parties to provide either clear and convincing evidence or a showing of harm to the child.

Of the forty-nine sister jurisdictions in the United States, nineteen require third parties to meet the clear and convincing evidence standard before they can interfere with the decisions of fit parents. An additional nineteen states prevent third parties from interfering unless they show either harm to the child or parental unfitness. Only eleven states take some other approach, often in the face of significant criticism. We urge this Court to join the nineteen jurisdictions that have

protected parental rights to the highest degree, through the clear and convincing standard.

A. Nineteen states have adopted the clear and convincing evidence standard.

This Court would be in good company by adopting the clear and convincing evidence standard. Nineteen states have adopted this standard, which provides the greatest protection for parents.

Alabama

In *Ex parte E.R.G.*, 73 So. 3d 634 (Ala. 2011), *cert denied*, 2012 U.S. LEXIS 1580 (U.S., Feb. 21, 2012), the Alabama Supreme Court upheld the appellate court's finding that "a court cannot award grandparent visitation without clear and convincing evidence demonstrating that denial of the requested visitation would harm the child. … [A] grandparent seeking visitation with a child over the objection of a fit, natural, custodial parent, as an initial matter, must prove by clear and convincing evidence that the denial of the requested visitation would harm the child." *Id.* at 640.

Alaska

In *Evans v. McTaggart*, 88 P.3d 1078 (Alaska 2004), the Alaska Supreme Court held that clear and convincing evidence of parental unfitness was necessary, except where such court-ordered visitation would be plainly contrary to the best interests of the child standard, stating "[w]e believe that this can be accomplished

by imposing on the third person the burden of proving that visitation by the third person is in the best interests of the child and by requiring that this be established by clear and convincing evidence. This would provide effective protection for a parent's choice, except where the choice is plainly contrary to a child's best interests." *Id.* at 1089.

Colorado

In *N.F. v. R.A. (Adoption of C.A.),* 137 P.3d 318, 327 (Colo. 2006), the Colorado Supreme Court held that in order to rebut the parental presumption, grandparents must show "through clear and convincing evidence that the parental visitation determination is not in the child's best interests." The court also placed "the ultimate burden on the grandparents to establish by clear and convincing evidence that the visitation schedule they seek is in the best interests of the child." *Id.* The court concluded by holding that "[e]mploying the clear and convincing evidence standard in judicial grandparent visitation proceedings will accord due process to parents, as it does in the parental rights termination context." *Id.* at 327.

The court, however, declined to hold that grandparents were required "to demonstrate parental unfitness, or substantial or significant harm to the child from the parental determination." *Id.* at 326.

Connecticut

The Connecticut Supreme Court has provided strong protections for parental rights in the context of third-party visitation. In *Fish v. Fish,* 939 A.2d 1040 (Conn. 2008), the Court laid out the process:

> The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant [emotional] harm to the child. As we have stated, that degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm … that the child is neglected, uncared-for or dependent. The degree of specificity of the allegations must be sufficient to justify requiring the fit parent to subject his or her parental judgment to unwanted litigation. Only if these specific, good faith allegations are made will a court have jurisdiction over the petition. Second, once these high jurisdictional hurdles have been overcome, the petitioner must prove these allegations by clear and convincing evidence. Only if that enhanced burden of persuasion has been met may the court enter an order of visitation. These requirements thus serve as the constitutionally mandated safeguards against unwarranted intrusions into a parent's authority.

Id. at 1049-1050 *(cleaned up).*

Georgia

The Georgia Supreme Court unanimously held in *Patten v. Ardis*, 816 S.E.2d 633, 637 (Ga. 2018) that clear and convincing evidence of harm is necessary for a court to mandate grandparent visitation over a parent's wishes.

Rhode Island

In *Mactavish-Thurber v. Gauvin,* 202 A.3d 232 (R.I. 2019) the court held for the defendant father and stepmother against plaintiff grandmother:

> We have held, in citing with approval to the United States Supreme Court's decision in *Troxel*, that a party who seeks visitation with a child must overcome the otherwise applicable presumption in favor of honoring a fit custodial parent's determination not to allow such visitation. Here … defendant is a fit custodial parent. Therefore, plaintiff had the burden of proving, by clear and convincing evidence, [that she] has successfully rebutted the presumption that [defendant's] decision to refuse the grandparent visitation with [her grandchildren] was reasonable.

Id. at 239-40.

Idaho

The Idaho Supreme Court recently held Idaho's grandparent visitation statute unconstitutional in *Nelson v. Evans*, 517 P.3d 816 (Idaho 2022). The court found that since the statute did not limit grandparent visitation to situations where there was harm to the children, there was no compelling governmental interest to override a fit parents' decision disallowing grandparent visitation, and thus, the grandparent visitation statute failed strict scrutiny and was unconstitutional.

Kentucky

In *Walker v. Blair*, 382 S.W.3d 862, 866 (Ky. 2012), the Kentucky Supreme Court held that "a fit parent is presumed to act in the best interest of the child. A grandparent petitioning for child visitation contrary to the wishes of the child's parent can overcome this presumption of validity only with clear and convincing evidence that granting visitation to the grandparent is in the child's best interest."

In *Pinto v. Robison*, 607 S.W.3d 669 (Ky. 2020), the Kentucky Supreme Court went further, holding that the preponderance of the evidence standard established by

Kentucky's grandparent visitation statute failed to adequately protect the parent's rights as required under *Walker* and *Troxel.*

Maine

Maine's Supreme Judicial Court has limited grandparent visitation to very limited circumstances. In *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000), the Court upheld grandparent visitation only when "urgent reasons exist," *Id.* at 301, such as in the specific case before the Court when the grandparents had acted as the children's parents for many years. In *Pitts v. Moore*, 90 A.3d 1169 (Me. 2014), a *de facto* parent case, the Court reiterated the holding in *Rideout* when it held "[a] non-parent should have the opportunity to obtain the full panoply of rights and responsibilities only under the most exceptional circumstances, i.e., only when the non-parent can establish, by clear and convincing evidence, that harm to the child will occur if he or she is not acknowledged to be the child's de facto parent." *Id.* 1181.

Similarly, in *Curtis v. Medeiros*, 152 A.3d 605 (Me. 2016), the Court linked grandparent visitation with *de facto* parent caselaw, noting that "[w]e have consistently held—in the context of both the Grandparents Visitation Act … and de facto parenthood matters—that a third party seeking to interfere with the fundamental right to parent must affirmatively demonstrate, on a prima facie basis, standing to commence the litigation sufficient to justify the interference that is

created just by having to defend against such a petition." *Id.* at 611. The court then looked at caselaw "stating that a compelling state interest exists only in exceptional circumstances, that is, when the child will suffer harm without state intervention," *Id.*, and closed with stating that "a third-party petitioner is therefore required to attest, from the outset of the litigation, to the sufficiency of his or her relationship with the child or to some other extraordinary circumstance." *Id. (internal citations and quotations omitted).*

Michigan

In *DeRose v. DeRose*, 469 Mich. 320 (Mich. 2003), the Michigan Supreme Court struck down Michigan's grandparent visitation law, finding that it was "flawed for the following reasons: (1) the statute does not provide a presumption that fit parents act in the best interests of their children, (2) the statute fails to accord the fit parent's decision concerning visitation any special weight, and (3) the statute fails to clearly place the burden in the proceedings on the petitioners, rather than the parents." *Id.* at 336. The Michigan Supreme Court then went on to offer suggestions to the Michigan legislature for how the statute could be cured through revisions, including quoting with approval Nevada's grandparent visitation statute which requires that "the party seeking visitation must prove by clear and convincing evidence that it is in the best interests of the child to grant visitation." *Id.* at 337 *(citation omitted)*.

Minnesota

While the Minnesota Supreme Court does not have a specific case on point in the context of grandparent visitation, it wrestled with these issues in a third-party visitation case involving a former partner. In *SooHoo v. Johnson*, 731 N.W.2d 815, 824 (Minn. 2007), the Court held that "[b]alancing the interests involved in a petition for third-party visitation, we conclude that requiring the party seeking visitation to prove the requirements of subdivision by clear and convincing evidence is necessary to protect against the risk of erroneously depriving a parent of his or her interest in the care, custody, and control of his or her children."

Montana

In *Schwarz v. Schwarz (In re L.R.S.)*, 414 P.3d 285 (Mont. 2018) the Montana Supreme Court held that "[w]hen a grandparent petitions for visitation over a parent's objection, a court must first make a determination as to whether the objecting parent is a fit parent." *Id.* at 289 *(internal quotation omitted).* The Court continued, "[a]ccordingly, the District Court could only grant Grandparents visitation … upon finding, based on clear and convincing evidence, that contact with Grandparents was in [the child's] best interests and that the presumption in favor of Mother's wishes was rebutted." *Id. (internal citation omitted).*

Nebraska

While *Tilson v. Tilson*, 948 N.W.2d 768 (Neb. 2020) dealt with custody and not grandparent visitation, the Nebraska Supreme Court held that "[p]arental unfitness must be shown by clear and convincing evidence." *Id.* at 788.

In *Lindblad v. Lindblad*, 962 N.W.2d 545, 558 (Neb. 2021) the Court held that "a grandparent seeking visitation must prove by clear and convincing evidence that (1) there is, or has been, a significant beneficial relationship between the grandparent and the child; (2) it is in the best interests of the child that such relationship continue; and (3) such visitation will not adversely interfere with the parent-child relationship."

Oklahoma

In *Murrell v. Cox*, 226 P.3d 692 (Okla. 2009), the Oklahoma Supreme Court held the following:

> Grandparents' statutory right to reasonable visitation is conferred by [Oklahoma's grandparent visitation statute], upon a demonstration that: (1) it is in the best interest of the child, (2) parental unfitness has been demonstrated or the grandparent has rebutted, by clear and convincing evidence, the presumption that the fit parent is acting in the best interests of the child by showing that the child would suffer harm or potential harm without the granting of visitation rights to the grandparent of the child, and (3) the intact nuclear family has been disrupted by one of the events enumerated in the statute. One of those events is the death of a parent when the child has a preexisting relationship with the grandparent. … These are the only circumstances in which the [grandparent visitation] statute clearly divests parents of the right to decide what is in their child's best interest and gives that determination to the district court vesting grandparents with the standing to pursue visitation rights over the objections of the parents.

Id. at 698 *(internal quotations and citation omitted).*

Oregon

Oregon's high court has not yet taken up a grandparent visitation case with a question presented similar to the case pending before this Court. In *In re Marriage of O'Donnell Lamont*, 91 P.3d 721 (Or. 2004), *reconsideration denied,* 2004 Ore. LEXIS 519 (Or., July 27, 2004), *cert denied,* 2005 U.S. LEXIS 454 (U.S., Jan. 10, 2005), a custody case rather than a visitation case, the Court acknowledged that "a custody decision involves a greater potential intrusion on parental interests than a decision regarding visitation," *Id.* at 728. The Court then explained that the Oregon legislature imposed "the more demanding clear and convincing evidence standard when a person with an ongoing personal relationship seeks to overcome the parental presumption and obtain visitation or other rights regarding a child." *Id.* at 733 *(quotation marks omitted)*. The Court then addressed the issue of harm, stating "the legislature could have imposed a more rigorous standard than the standard that we have read *Troxel* to require. However, as discussed above, the legislature declined to do so. That fact further supports the conclusion that the presumption can be overcome without showing that a parent is unable to care for the child or will harm the child." *Id.*

South Carolina

South Carolina's Supreme Court ruled in 2003 that *Troxel* required a presumption of parental fitness that could only be overcome by clear and convincing evidence of parental unfitness. *Camburn v. Smith*, 586 S.E.2d 565 (S.C. 2003), *reh'g denied*, 2003 S.C. LEXIS 248 (S.C., Oct. 8, 2003). Even if the parent's refusal "is simply not reasonable in the court's view, [that] does not justify government interference in the parental decision." *Id.* at 579. A year later, the Court interpreted *Troxel* to require that "one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest." *Latimer v. Farmer*, 602 S.E.2d 32, 39 (S.C. 2004).

South Dakota

In *Zimmer v. Zimmer (In re A.L.),* 781 N.W.2d 482 (S.D. 2010), the South Dakota Supreme Court held:

> To accommodate both our Legislature's best interests standard and *Troxel's* "special-weight" and "special-factors" requirements, a court, before ordering grandparent visitation … must (1) presume that a fit parent acts in his or her child's best interests, (2) give special weight to a fit parent's decision to deny or limit visitation, (3) consider whether the parent has completely denied visitation or simply limited visitation, (4) shift the burden to the parent to offer evidence in support of the parent's decision only if the grandparents overcome the parental presumption, and (5) require the grandparents to bear the ultimate burden of establishing by clear and convincing evidence that special factors exist showing that the visitation they seek is in the child's best interests.

Id. at 488.

Wisconsin

In *Michels v. Lyons (In re A.A.L.),* 927 N.W.2d 486, 500 (Wis. 2019), the Wisconsin Supreme Court held that "a circuit court should consider the nature and extent of grandparent visitation only if a grandparent overcomes the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest. A circuit court should not substitute its judgment for the judgment of a fit parent even if it disagrees with the parent's decision."

Wyoming

In *Ailport v. Ailport,* 507 P.3d 427 (Wyo. 2022), the Wyoming Supreme Court held that "[p]arents have a fundamental due process right to guide the upbringing of their children, including determining the level of contact with their grandparents. To satisfy strict scrutiny, § 20-7-101 must be interpreted to protect parents' fundamental right by requiring grandparents to prove parents are unfit to make visitation decisions for their children or the parents' visitation decisions are or will be harmful to the children. Only after the grandparents make that threshold showing by clear and convincing evidence may the district court determine what visitation is in the best interests of the children." *Id.* at 442.

B. An additional nineteen states require grandparents to make a showing of harm or parental unfitness before they can overcome the parent's wishes.

We urge this Court to adopt the clear and convincing evidence standard when third parties challenge the decisions of fit parents. But if the Court does not adopt that approach, it should instead require third parties to demonstrate either harm to the child or parental unfitness before the decisions of fit parents can be overcome. Nineteen states have adopted this alternative approach.

Arkansas

In *Linder v. Linder*, 72 S.W.3d. 841 (Ark. 2002), the Arkansas Supreme Court held that in the context of grandparent visitation, there needed to be a showing of "some other special factor such as harm to the child or custodial unfitness that justifies state interference." *Id.* at 858. The Court continued:

> It appears that the trial court found Lea Ann [the mother] to be a fit parent for all purposes save one: making the decision about Brandon's relationship with his paternal grandparents. … It is only with respect to making visitation decisions that Lea Ann was found to be wanting and unfit. The question then becomes whether unfitness solely to decide visitation matters is a compelling interest on the part of the State that warrants intrusion on a parent's fundamental parenting right and overcomes the presumption in the parent's favor. We conclude that it is not. So long as Lea Ann is fit to care for Brandon on a day-to-day basis, the Fourteenth Amendment right attaches, and the State may not interfere without a compelling interest to do so. … In short, we decline to hold that unfitness to decide visitation matters objectively equates to unfitness to parent sufficient to warrant state intrusion on the parent's fundamental right. Were we to decide otherwise, any custodial parent refusing visitation would be subject to a trial court's nonparental visitation order on grounds that the parent was unfit to decide the matter. … There must be some

> other special factor such as harm to the child or custodial unfitness that justifies state interference.

Id. at 857-858.

Florida

While the Florida Supreme Court has not ruled on the standard of evidence, it has made clear that there must be showing of harm. In *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004), the Court held the following:

> Clearly, this Court has consistently held all statutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child standard, without the required showing of harm to the child, to be unconstitutional. We agree with the district court below and likewise hold that section 61.13(2)(b)2.c. of the Florida Statutes is unconstitutional as violative of Florida's right of privacy because it fails to require a showing of harm to the child prior to compelling and forcing the invasion of grandparent visitation into the parental privacy rights. Section 61.13(2)(b)2.c. provides that a court "may award the grandparents visitation rights with a minor child if it is in the child's best interest."§ 61.13(2)(b)2.c., Fla. Stat. (2001). This provision does not require a showing of the essential element of harm to the child should visitation with a grandparent be denied. Here, the grandmother did not claim in any pleading and has not asserted that any harm will come to the child if visitation with her does not occur. Under the authority of this Court's holdings in [other grandparent visitation cases], we hold that section 61.13(2)(b)2.c., which fails to require a showing of harm to the affected child, does not further a compelling state interest, and, therefore, it is facially unconstitutional as violative of a parent's fundamental right of privacy.

Id. at 37-38.

Hawaii

While the Hawaii Supreme Court has not established the standard of evidence, it has made clear that there must be showing of harm. In *Doe v. Doe*, 172 P.3d 1067,

1079 (Haw. 2007), the Court said "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."

Illinois

The Illinois Supreme Court has made it clear that in the context of grandparent visitation, "state interference should only occur when the health, safety, or welfare of a child is at risk." *Wickham v. Byrne*, 769 N.E.2d 1, 6 (Ill. 2002).

Iowa

The Iowa Supreme Court requires a showing of parental unfitness before moving on to visitation issues. In a ruling striking down a portion of the grandparent visitation statute as unconstitutional, the Iowa Supreme Court ruled that the statute "not only fails to recognize the degree of harm or potential harm to the child needed to support state intervention, but it fails to require a threshold finding of parental unfitness." *Howard v. Howard (In re Howard),* 661 N.W.2d 183, 192 (Iowa 2003) *(internal citation omitted).*

Maryland

Maryland's highest court, the Court of Appeals, requires that "if third parties wish to disturb the judgment of a parent, those third parties must come before our courts possessed of at least *prima facie* evidence that the parents are either unfit or

that there are exceptional circumstances warranting the relief sought before the best interests standard is engaged." *Koshko v. Haining*, 921 A.2d 171, 187 (Md. 2007).

Massachusetts

In *Blixt v. Blixt*, 774 N.E.2d 1052, 1060 (Mass. 2002), *cert denied*, 2003 U.S. LEXIS 1136 (U.S. Feb. 24, 2003), the Massachusetts Supreme Judicial Court required that "[t]o obtain visitation, the grandparents must rebut the presumption. The burden of proof will lie with them to establish, by a preponderance of the credible evidence, that a decision by the judge to deny visitation is not in the best interests of the child. More specifically, to succeed, the grandparents must allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare."

New Hampshire

The New Hampshire Supreme Court recently overturned a court-ordered grandparent visitation, stating *In the Matter of Desantis*, 2022 N.H. LEXIS 140 at *6 (N.H. 2022) (UNPUBLISHED) the following:

> We have held that the trial court must weigh the first two statutory factors more heavily than the remaining factors, according due deference to a fit parent's judgment as to the best interests of the child as part of the court's determination of the child's best interests. … Here, [the lower court] made no factual findings related to … whether the visitation would interfere with any parent-child relationship or with a parent's authority over the child. … Because the trial court failed to make sufficient factual findings, … we vacate the trial court's award of grandparent visitation.

New Jersey

In the 2003 case of *Moriarty v. Bradt*, 827 A.2d 203 (2003), *cert denied*, 540 U.S. 1177 (U.S., Feb. 23, 2004), the New Jersey Supreme Court held that "[b]ecause 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." *Id.* at 222. The court concluded that grandparents would need to show the "necessity for visitation to avoid harm to the children" by a "preponderance of the evidence." *Id.* at 223.

This position was sharply criticized by Justice Verniero, concurring in part and dissenting in part, who urged the Court to adopt the position of the American Civil Liberties Union (ACLU) in its *amicus* brief, and writing, "I agree that a fit parent's decision regarding his or her child's visitation with a non-parent can be overridden only by evidence of demonstrable physical or psychological harm to the child. Unlike the majority, however, I believe that the movant must establish such harm by clear and convincing proof, not by a simple preponderance of the evidence." *Id.* at 228 (Opinion of Verniero, J.).

New Mexico

While the New Mexico Supreme Court has not weighed in specifically on the fitness standard in grandparent visitation cases post *Troxel*, it did hold in *Tran v. Bennett*, 411 P.3d 345, 354 (N.M. 2018) that "[i]n a custody dispute between a parent and a non-parent, New Mexico has long recognized the parental preference doctrine. The parental preference doctrine limits the district court's discretion to award custody to a non-parent and requires the court to award custody to the parent unless the parent is unfit or extraordinary circumstances are present."

New Mexico's lower courts, however, have been less inclined to require that unfitness be shown before granting visitation over a parent's wishes. *See, e.g., Deem v. Lobato*, 96 P.3d 1186 (N.M. Ct. App. 2004), *writ of cert denied*, 100 P.3d 197 (N.M., Aug. 4, 2004); *Williams v. Williams*, 50 P.3d 194, 201 (N.M. Ct. App. 2002) ("we do not read *Troxel* as requiring a formal finding of parental unfitness before a court can order grandparent visitation. Rather, we interpret *Troxel* as requiring the presence of 'special factors' before a court can order grandparent visitation over the objections of a fit parent.").

North Dakota

The North Dakota Supreme Court has limited grandparent visitation to a very narrow range of situations. In *Bredeson v. Mackey*, 842 N.W.2d 860, 864 (N.D. 2014), the court explained that "[t]he rationale for awarding custody to the

grandparents is the existence of exceptional circumstances which will further the best interests of the child. It is appropriate to extend the application of that same rationale to the award to visitation to a non-parent. Visitation is only awarded to a non-parent if exceptional circumstances exist and it is in the best interest of the child."

North Carolina

While the North Carolina Supreme Court has not issued a relevant grandparent visitation case post-*Troxel,* its decision in *McIntyre v. McIntyre*, 461 S.E.2d 745 (N.C. 1995) strongly protected parental decisions regarding visitation:

> [T]he common law rule is that parents have a paramount right . . . to custody, care and nurture of their children, and that that right includes the right to determine with whom their children shall associate… [North Carolina's grandparent visitation statute] authorizes the court to provide for visitation rights of grandparents when custody of minor children is at issue in ongoing proceeding but does not allow court to enter a visitation order when custody is not at issue; parents who have lawful custody of the minor children have the prerogative to determine with whom their children shall associate … [the statute] does not grant plaintiffs the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact.

Id. at 632, 635.

Mississippi

The Mississippi Supreme Court declined to side with the grandparents on visitation because the grandparents did not allege the parents were unfit. *Stacy v. Ross*, 798 So. 2d 1275 (Miss. 2001). The Court held that "[t]he determination whether parents are unreasonable in denying visitation in whole or part to

grandparents is not a contest between equals." *Id.* at 1280. The Court concluded that because parents have a "paramount right to control the environment, physical, social, and emotional, to which their children are exposed, … forced, extensive unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents." *Id.* However, in *Smith v. Wilson*, 90 So. 3d 51 (Miss. 2012), *reh'g denied by, en banc,* 2012 Miss. LEXIS 337 (Miss., June 28, 2012), the Court declined to require a clear and convincing evidence standard in a grandparent visitation case, and likewise declined to require a finding of unfitness before a court ordered grandparent visitation.

Tennessee

In rejecting a trial court grant of visitation many years before *Troxel*, the Tennessee Supreme Court overturned a lower court's decision because "without finding that the parents were unfit…, the court imposed its own notion of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions." *Hawk v. Hawk,* 855 S.W.2d 573, 582 (Tenn. 1993).

In 2006, the Tennessee Supreme Court reiterated this, holding that "[a]llowing a grandparent to procure visitation without first requiring a showing of harm to the child if such visitation is denied … constitutes an infringement on the fundamental

rights of parents to raise their children as they see fit." *Smallwood v. Mann,* 205 S.W.3d 358, 363 (Tenn. 2006).

It is important to note that the Tennessee Supreme Court has held that "harm to a child is implicit in a divorce proceeding." *Tuetken v. Tuetken*, 320 S.W.3d 262, 272 (Tenn. 2010), *cert denied,* 2011 U.S. LEXIS 3645 (U.S., May 16, 2011).

Utah

Utah's Supreme Court held that "courts may not make a 'best interests' inquiry into nonparent custody of a child absent a determination that the legal parents are unfit." *Jones v. Barlow*, 154 P.3d 808, 818 (Utah 2007). In *Jones v. Jones*, 359 P.3d 603, 612 n. 12 (Utah 2015), the court stated that "[a] finding of unfitness or incompetence could quite likely sustain a compelling basis for a grandparent visitation order."

Vermont

The Vermont Supreme Court held the following in *Craven v. McCrillis*, 868 A.2d 740 (Vt. 2005):

> The family court may award visitation rights to a grandparent if the court finds that to do so would be in the best interest of the child. When evaluating the best interest of the child, a presumption of validity attaches to the parent's decision concerning grandparent visitation. To rebut this presumption, a grandparent must provide evidence of compelling circumstances to justify judicial interference with the parent's visitation decision. Circumstances satisfying this high burden include proving parental unfitness or that significant harm to the child will result in the absence of a visitation order. … although a grandparent may have a close relationship with the child such that the child might benefit from contact with the

> grandparent, and the parent may deny such contact for no good reason, these are not the kind of compelling circumstances contemplated by this decision. In order to establish parental unfitness, the grandparent must prove that the parent's actions or the failure to grant grandparent visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare. … We have set this high standard to minimize the risk that a court will substitute its judgment for that of the parent simply because the court disagrees with the parent's decision.

Id. at 742-43 *(cleaned up).*

Virginia

Prior to *Troxel,* in *Williams v. Williams*, 501 S.E.2d 417, 418 (Va. 1998), the Virginia Supreme Court held that "[b]efore visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation. A court reaches consideration of the 'best interests' standard in determining visitation only after it finds harm if visitation is not ordered."

Washington

Post *Troxel,* the Washington Supreme Court held in *In re Parentage of C.A.M.A.*, 109 P.3d 405 (Wash. 2005) that the grandparent visitation statute:

> directly contravenes the constitutionally required presumption that the fit parent acts in the child's best interests. Subsection (5)(a) states that "[v]isitation with a grandparent shall be presumed to be in the child's best interests," and provides that this presumption may be rebutted by the fit parent (who would presumably be opposing the visitation request) "by a preponderance of evidence showing that visitation would endanger the child's physical, mental, or emotional health." The United States Supreme Court held that a court must accord "special weight" to the parent's own determination,

> and because subsection (5)(a) establishes a presumption antonymous to that constitutionally required "special weight," the subsection must fail.

Id. at 411.

West Virginia

Finally, in *Alyssha R. v. Nicholas H.,* 233 W. Va. 746 (W.Va. 2014), the West Virginia Supreme Court struck down an order for grandparent visitation, stating "considerable weight must be afforded to a fit parent's decision-making authority, which precludes a court from intervening in a fit parent's exercise of parental discretion even on the basis of the child's best interests." *Id.* at 567. The Court concluded that "judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests of the child analysis." *Id.* at 568. Instead, courts must "give significant weight to the parents' preference," and since it was "conceded that the Mother is a fit parent, she has a constitutionally protected right to make decisions regarding the care, custody, and control of her children." *Id.*

C. Only eleven states have not adopted strong protections for parental rights in the context of visitation.

A supermajority of states offer heightened protections to parents when their decisions are challenged by third parties. Only eleven states provide minimal protections to parents, by adopting something that falls short of the clear and

convincing evidence standard, or the demonstration of harm or parental unfitness. Texas should not become the twelfth.

Arizona

Arizona's Supreme Court has not held to a high standard protecting parental rights in grandparent visitation cases. In *In re Marriage of Friedman*, 418 P.3d 884 (Ariz. 2018), the Court held the following in allowing grandparent visitation over the mother's objection:

> Neither *Troxel* nor Arizona's statutory visitation scheme supports *Goodman's* broad pronouncements that any nonparent who seeks visitation carries a substantial burden to prove that the parent's decision [to bar visitation] is harmful, and that [t]he nonparent must prove that the child's best interests will be substantially harmed absent judicial intervention. … In addition, although Arizona law requires a showing of significant detriment to the child when a nonparent seeks legal decision-making authority or child placement, § 25-409(A)(2), it contains no such requirement in the visitation context.

Id. at 890 *(cleaned up).*

California

While the California Supreme Court has not weighed in on the precise question at issue in the instant case, the California Supreme Court has opined obliquely on the burden of proof. In *In re Marriage of Harris*, 96 P.3d 141 (Cal. 2004), *reh'g denied*, 2004 Cal. LEXIS 10184 (Cal., Oct. 20, 2004), the Court stated: "In the present case, the mother was awarded sole custody of Emily and objected to grandparent visitation. Accordingly, the grandparents were required to overcome a rebuttable presumption that visitation is not in Emily's best interest. The record

before us reflects that the superior court did not consider this presumption, but rather expressly utilized a "best interest of the child" standard. Accordingly, we will remand this case to the superior court to reconsider the visitation order in light of the presumption that grandparent visitation is not in Emily's best interest." *Id.* at 154.

Two justices penned separate concurring and dissenting opinions, with both concerned that the majority's decision did not adequately protect the parent's fundamental rights. Justice Chin in particular wrote separately that "the relevant authority establishes that court-ordered visitation by a grandparent against the wishes of a fit custodial parent infringes on that parent's fundamental right to direct his or her child's upbringing, and that this state infringement on a parent's fundamental right is unconstitutional absent clear and convincing evidence to rebut the presumption [in state law] that such visitation is not in the child's best interests." *Id.* at 157 (Chin, J., concurring and dissenting).

Delaware

Delaware's Supreme Court has not provided strong protections for parents in the context of grandparent visitation. In *Thomas v. Nichols-Jones*, 909 A.2d 595 (Del. 2006), the court said "[i]n seeking visitation, the burden of proof is on the grandparent to establish by a preponderance of the evidence that the child's visitation with the grandparent is in the best interests of the child." *Id.* at 4.

Indiana

The Indiana Supreme Court has not addressed the precise issue before this Court. In *J.I. v. J.H. (In re K.I.),* 903 N.E.2d 453, 462 (Ind. 2009) the Court acknowledged the tension in grandparent visitation cases without settling on a clear standard: "[a]lthough grandparents do not have the legal rights or obligations of parents and do not possess a constitutional liberty interest with their grandchildren, nonetheless [the Indiana legislature] recogni[zes] that a child's best interest is often served by developing and maintaining contact with his or her grandparents."

Kansas

The Kansas Supreme Court held in *State v. Paillet*, 16 P.3d 962, 968 (Kan. 2001) that "[t]he legislature has placed the burden upon the grandparents to establish that visitation is both in the best interests of the grandchild and that a substantial relationship exists between the grandparents and their grandchild."

Louisiana

In *Huber v. Midkiff*, 838 So. 2d 771 (La. 2003), *reh'g denied,* 2003 La. LEXIS 736 (La., Mar. 21, 2003), the Louisiana Supreme Court declined to consider the constitutionality of Louisiana's grandparent visitation statute as the case was not properly before the Court. However, the Court did opine that Louisiana's grandparent visitation statute was narrow: "where the minor child's parents are divorced and the grandparents of the parent without custody are attempting to gain

visitation privileges in an effort to keep the extended family of the minor child intact." *Id.* at 775. Recognizing Louisiana's civil law heritage, the Court also did not feel that "the Legislature intended for Article 136(B) to apply to grandparents attempting to gain visitation of their grandchild from their own child. By allowing this, the legislature and the Court would be overstepping the authority of a parent granted custody of a minor child." *Id.*

Missouri

Missouri's Supreme Court has not extended strong protections to parental rights in the context of grandparent visitation cases. In *Barker v. Barker (in Re Barker),* 98 S.W.3d 532 (Mo. 2003), the Court affirmed a visitation order over the fit parents' objection simply because the trial court had found that the "parents' concerns were not legitimate[.]" *Id.* at 536.

However, Missouri's lower courts have adhered to a stronger protection of parental rights in the context of third-party visitation cases. In the Missouri Court of Appeals case of *A.A.B. v. A.D.L.*, 572 S.W.3d 562 (Mo. Ct. App. 2019), a case that dealt with third party visitation, not grandparent visitation, the appellate court found that Missouri law "does not authorize third-party custody or visitation merely because a court determines that it would be in the child's best interests. In addition, the Missouri statute carries a rebuttable presumption that the parent should have custody, and presumes parental custody is in the child's best interests. To rebut the

presumption, the third party seeking custody has the burden to show either that each parent is unfit, unsuitable, or unable to act as the child's custodian or that the child's welfare requires third-party custody. The third party must also establish that such a custody award is in the best interests of the child." *Id.* at 570 *(internal citations omitted).*

Nevada

While the Nevada Supreme Court has not addressed the specific question before this Court, in *Rennels v. Rennels*, 257 P.3d 396 (Nev. 2011), *reh'g denied*, 2011 Nev. LEXIS 101 (Nev., Sept. 13, 2011), the Court held that "when a nonparent requests visitation with a child, courts must accord at least some special weight to the fit parents' wishes. Nevada's nonparent visitation statute also provides such deference to the parent, providing that after a parent has denied or unreasonably restricted visits with the child, there is a rebuttable presumption that the [nonparent's] right to visitation . . . is not in the best interests of the child." *Id.* at 571 *(internal citations and quotations omitted).*

New York

New York's highest court has not extended strong protections to parents in grandparent visitation cases. In *In the Matter of ES v. PD*, 863 N.E.2d 100 (N.Y. 2007), a case where a grandmother had essentially served as a de facto parent, the court upheld visitation, finding that the lower court was "mindful of father's parental

prerogatives," *id.* at 106, but that the grandmother surmounted this, and visitation was in the child's best interests. The court did not require a finding of parental unfitness before granting visitation.

Ohio

In *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005), *cert denied*, 547 U.S. 1004 (U.S., Mar. 6, 2006), the Ohio Supreme Court held that Ohio's nonparental visitation statute is limited to cases where the mother or father of the child is deceased and limits the persons who can petition for nonparental visitation to the parents and relatives of the deceased mother or father. *Id.* at 1171. The Court held that *Troxel* did not require "courts to find overwhelmingly clear circumstances to support forcing visitation for the benefit of the child over the opposition of the parent." *Id.* at 1172.

Pennsylvania

The Pennsylvania Supreme Court's leading case on grandparent visitation is *Hiller v. Fausey*, 904 A.2d 875 (Pa. 2006), *cert denied*, 127 S. Ct. 1876 (U.S., Mar. 26, 2007). The majority concluded that "requiring grandparents to demonstrate that the denial of visitation would result in harm … would set the bar too high, vitiating the purpose of the statute … which is to assure the continued contact between grandchildren and grandparents when a parent is deceased, divorced, or separated. Instead, we conclude that the stringent requirements of [the statute] combined with

the presumption that parents act in a child's best interest, sufficiently protect the fundamental right of parents without requiring any additional demonstration of unfitness or specific requirement of harm or potential harm." *Id.* at 890. However, the chief justice penned a powerful dissent, stating "I would require a grandparent to demonstrate, by clear and convincing evidence, that absent an order granting the grandparent custody and/or visitation, the child is being or will be harmed." *Id.* at 905 (Cappy, C.J., dissenting).

CONCLUSION AND PRAYER FOR RELIEF

The Parental Rights Foundation respectfully prays that this Court grant review in the case pending before it, and adopt significant impairment to the child's physical health or emotional development, shown through clear and convincing evidence, as the standard necessary to overcome the parental presumption.

Respectfully submitted this 16th day of December, 2022,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with TEX. R. APP. P. 9. It was produced on a computer using Microsoft Word 365 and, in accordance with Rule 9 contains 8,331 words, as determined by the computer software's word count function, excluding the sections of the document listed in TEX. R. APP. P. 9.4 (i) (1) and is proportionally spaced using Times New Roman, 14 point.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was delivered to each party and/or their respective attorney of record on or before December 16, 2022, via electronic service in accordance with the Texas Rules of Appellate Procedure.

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