No. 99-138

IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Do Washington Revised Code 26.10.160(3) and the former RCW 26.09.240, granting third parties, including grandparents, the right to petition for visitation rights with a minor child if the visitation is "in the best interests of the child," impermissibly interfere with a parent's fundamental interest in the "care, custody and companionship of a child" as defined by the liberty and privacy provision of the United States Constitution?

2. Did the Supreme Court of Washington err in *Custody of Smith*, 137 Wn. 2d 1, 969 P.2d 21 (1998), in holding that Washington Revised Code 26.10.160(3) and the former RCW 26.09.240 are unconstitutional based upon the liberty interest of the Fourteenth Amendment and the fundamental right to privacy inherent in the United States constitution, when it used the flawed premise that a parent's fundamental right to autonomy in child rearing decisions is unassailable and that the state's parens patriae power to act in a child's welfare may not be invoked absent a finding of harm to the child or parental unfitness?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set out in the caption. The litigation concerns visitation to Natalie Anne Troxel and Isabelle Rose Troxel, both minors.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

TABLE OF APPENDICES

OPINIONS BELOW

The opinion of the Supreme Court of Washington, which is reported at 137 Wn. 2d 1, 969 P. 2d 21 (1998), is reprinted in the appendix to the petition for writ of certiorari ("Pet. App.") at pp. 1a-54a. The order of the Supreme Court of Washington denying petitioners' petition for rehearing, which is not officially reported, is set out at pages 81a-83a of the petition appendix. The decision of the Washington Court of Appeals is reported at 87 Wn. App. 131, 940 P.2d 698 (1997), and is set out at pp. 55a-71a of the petition appendix. The January 1996 Findings of Fact and Conclusions of Law of the Superior Court for Skagit County, which are not officially reported, are set out at J.App. 68a of the petition appendix. The May, 1995 Visitation Decree issued by the Superior Court, which is not officially reported, is set out at pp. 76a-80a of the petition appendix.

JURISDICTION

The decision of the Supreme Court of Washington was issued on December 24, 1998. A timely petition for reconsideration was denied on April 6, 1999. Petitioners filed their petition on July 6, 1999. This Court granted certiorari on September 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

The statutory and constitutional provision involved are reproduced in Appendix E.

STATEMENT OF THE CASE

This case arises out of the desire of petitioners Jenifer and Gary Troxel[1] to remain in contact with their granddaughters Isabelle and Natalie Troxel, now ages seven

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1. Gary Troxel is a longshoreman in Anacortes, Washington, and a long-time member of the musical group, The Fleetwoods. Jenifer Troxel is an accountant. Petitioners have three surviving children, and eight grandchildren.

and nine. Petitioners' state court petition for a visitation order has been opposed by respondent Tommie Wynn[2], the girls' mother. Brad Troxel, the father of the girls and the son of petitioners, died in 1993. The dispute about visitation arose after his death.

Respondent and Brad Troxel, although never married, lived together intermittently from 1988 to 1991. Natalie was born in November 1989 and Isabelle in December 1991. The parents separated permanently in June 1991; they subsequently agreed to a parenting plan, including custody and visitation arrangements, which was filed in state court in 1992. Brad Troxel lived with petitioners after his separation from respondent. Under the parenting plan the girls spent every other weekend with Brad, usually at the home he shared with petitioners. Thus while Brad was alive petitioners met regularly with their granddaughters. (Report of Proceedings ("R.P.") 23).

In May 1993 Brad Troxel committed suicide. For some time thereafter, while respondent dealt with the difficult situation caused by Brad's death, Brad's brother and sister assisted her in caring for the girls. (R.P. 41). Petitioners frequently met with their granddaughters while they were at the home of petitioners' son or daughter. Visitation continued without incident for five months after Brad Troxel's death. In October 1993, however, a disagreement arose between the parties regarding further visitations. (R.P. 31). All visits between petitioners and the girls then ended until April, 1994, when petitioners obtained a temporary visitation order.[3]

2. At the time this litigation commenced respondent was using the name, Tommie Granville. In 1994 respondent married Kelly Wynn. (Pet. App. 3a). Mr. Wynn is not a party to these proceedings. Respondent has three other children fathered by Jeff Granville, and one child fathered by Kelly Wynn. Mr. Wynn has two children from a prior marriage.

3. The parties disagree as to why no visits occurred during this four month period. *Compare* R.P. 60 *with* R.P. 198.

Respondent ended all telephone contact between petitioners and their granddaughters in February, 1994. (J.App. 54a).

In December, 1993, petitioners filed a petition in Washington state court seeking an order allowing them to visit with their granddaughters. Petitioners relied on RCW 26.10.160(3), which authorizes state judges to order visitation by grandparents or others when it would be in the best interests of the children. By the time the case came to trial, the differences between the parties had narrowed considerably. Respondent voiced no objection to direct regular contact between petitioners and their granddaughters. To the contrary, respondent[4], her attorney[5] and both of her experts[6] all agreed that visitation would be in the best interest of the girls. Respondent's objections were limited to certain aspects of the schedule which petitioners had proposed. For example, although petitioners had requested two weekend-long visits a month, respondent asked that the visits be limited to one afternoon a month. Respondent attempted to show that any overnight visits would be unwise until the girls were older. (J.App. 52a; R.P. 109, 159-60).

The trial was characterized by a laudable absence of acrimony on either side. Petitioners voiced no criticism whatever of respondent's fitness as a mother, and disavowed any animus towards her. (R.P. 28). Jenifer Troxel testified that she understood that respondent preferred that the younger girl be called Isabelle, rather than her middle name Rose — the name that had been used by Brad — and agreed to honor that wish. (R.P. 30). Respondent testified that she had never

4. Respondent's Pretrial Affidavit, pp. 3-4 ("I have always felt that it was in Natalie and Isabelle's best interest to have a relationship with their paternal grandparents.")

5. J.App. 31a ("[W]e'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured is why we are here. . . .")

6. J.App. 43a, 48a.

experienced any conflict with the petitioners in the presence of the children. (R.P. 193). One of respondent's experts acknowledged that there were no differences between respondent and petitioners regarding discipline, religion, or any other important issue affecting the girls.[7] Although one of respondent's experts suggested that issues might exist about the ability of petitioners to care for the girls, respondent personally disavowed any such suggestion. (J.App. 54a-55a).

In resolving the case, the state trial judge expressly gave considerable weight to respondent's views.

> [T]his is a situation where under the law the dictates of decisions made about children are generally made by the parents and Mrs. Wynn is the natural mother, obviously, of Natalie and Isabelle and should be able to have the ultimate say, to a large degree, as to what happens to those children.

(R.P. 214-15). The judge agreed with both parties that some visitation with petitioners would be in the interests of the girls (R.P. 213); he also concluded, however, that visitation of undue length might interfere with the ability of the girls to spend sufficient time with respondent's four other children and her side of the family, and thus to build a strong relationship with those relatives. (R.P. 214, 217, 220-23). Accordingly, the visitation approved by the judge was significantly more limited than that which petitioners had requested. Although the petition had sought an entire weekend visit every other week, the court only approved a once a month visit from 4:30 p.m. on Saturday until 6 P.M.

7. R.P. 105-06:

"A. There is a conflict of how frequent to visit.

Q. Any other conflict other than that?

Q. In other words are they conflicted on values or discipline or on anything, religion or do you know of anything else?

A. I don't know of anything else."

on Sunday. (Pet. App. 77a). The judge also denied petitioners' request for visitation on Christmas, Thanksgiving and Easter. The visitation decree included a summer visit of only a single week, half of what petitioners had sought, and short visits during each of the petitioners' birthdays, provisions which respondent had not opposed. (Pet. App. 78a).

In addition, the judge incorporated into the visitation order a number of safeguards to protect the interests of respondent. Petitioners were instructed that they were to call the youngest daughter Isabelle, as respondent preferred. Both parties were directed to avoid comments to the girls about the circumstances of Brad's death until petitioners and respondent had agreed on a joint explanation. Both parties were told to comments critical of the other in the presence of the girls. (Pet. App. 78a-79a).

Respondent, but not petitioners, appealed the judge's order. The specific provisions of that decree to which she objected on appeal was that it permitted the girls to stay at petitioners' home overnight and that it included a summer vacation visit.[8] Respondent also argued that the state law under which petitioners had brought suit did not authorize them to petition for visitation, an issue characterized by the state courts as a lack of "standing." The Washington Court of Appeals initially remanded the case for entry of findings of fact. (J.App. 68a). Thereafter, that court sustained petitioner's statutory argument, holding in light of a 1996 amendment that state law did not authorize petitioners to seek visitation rights. (Pet. App. 57a-63a). At petitioners' request, the Washington Supreme Court granted discretionary review.

In the Washington Supreme Court, this case was heard with two other similar appeals. The state Supreme Court rejected respondent's statutory argument (Pet. App. 5a-12a),

8. Brief of Appellant, In re The Visitation of Troxel, N. 36737-4-I, pp. 1-10.

but held that the RCW 26.10.160(3) violated the federal Constitution.[9] (Pet. App. 12a-23a). The effect of this decision was not only to overturn the limited portion of the 1995 visitation decree to which respondent had specifically objected, but also to invalidate the decree in its entirety.

Visitations took place without incident from the issuance of the April 1994 temporary visitation order until the end of 1998. The Washington Supreme Court decision was issued on December 24, 1998; since that time petitioners have seen Isabelle Troxel twice and Natalie Troxel only once.[10]

SUMMARY OF ARGUMENT

(1) The court below held that the Washington visitation statute is facially unconstitutional. To sustain such a facial challenge, respondent must show that the statute would be invalid in all or a large fraction of its actual applications. *United States v. Salerno*, 481 U.S. 739 (1987); *Planned Parenthood of Southeastern Pa. v. Casey*, 517 U.S. 1174 (1996).

(2) The lower court erred in assuming that *every* government action which interferes with a "parental decision" is unconstitutional unless justified by a compelling governmental interest. The proper assessment of such a constitutional claim turns on a circumstance-specific analysis of the manner and degree in which an asserted right has in fact been burdened. *Planned Parenthood*, 505 U.S. at 873-84. Heightened constitutional scrutiny is not required where a visitation order or other government action does not significantly burden familial relations.

Visitation orders in favor of grandparents do not, without more, violate a fundamental liberty interest. There is no well

9. The court also held unconstitutional the pre-1996 version of RCW 26.09.240, a provision not at issue in this case.

10. The parties disagree as to why this occurred. A public airing of those differences is not necessary to the resolution of the constitutional issue before this Court, and could complicate relations between the individuals involved.

established legal tradition of refusing such visitation; even prior to modern day legislation, a substantial number of state courts had held that such visitation orders were authorized by the common law. Today statutes in all fifty states specifically empower courts to order visitation on behalf of grandparents.

In a specific case, a party opposing a visitation order, or a decision on any other family law matter, may contend that in the particular circumstances at issue the government's action is unconstitutional. But the possibility of such a fact bound argument does not provide a basis for declaring the statute here facially unconstitutional. *Lehrer v. Davis*, 571 A. 2d 691 (Conn. 1990). There is no showing that all or a large portion of the visitation orders that have issued under the Washington law were unconstitutional.

(3) The determination of whether a government action unconstitutionally burdens a familial interest requires consideration of all of the competing familial interests involved. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The parent-child relationship is not the only constitutionally significant interest at stake in cases such as this. The relationship between a grandchild and grandparent is also an important part of family life. In some instances government action substantially interfering with the grandchild-grandparent relation would be unconstitutional. *Moore v. East Cleveland*, 431 U.S. 494 (1977).

We do not contend that grandparents have a constitutional right to visitation orders. Striking the balance between parent-child and grandchild-grandparent interests involves a difficult assessment of complex and often changing social, familial and personal issues. In general that is a choice for the states to make. *Michael H. v. Gerald D.*, 491 U.S. at 129.

Despite the presence in grandparent visitation disputes of competing familial interests, circumstances could arise

in which a particular visitation order was so intrusive as to violate the fundamental rights of the parent or parents involved. But the possibility of such a fact specific constitutional problem does not render the underlying statute facially unconstitutional.

ARGUMENT

I. INTRODUCTION

A. The History and Application of Grandparent Visitation Statutes

The "regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).[11] In the absence of significant federal constraints, state domestic relations law has changed — and continues to evolve — in complex and nuanced ways. Many of the standards, procedures and issues in state family law today were largely unknown at the turn of the century. Since 1960 there has been a virtual revolution in divorce law, with concomitant changes in custody and support statutes. A new type of state judicial institution, family court, has evolved in some states to deal with these issues in a less formal manner calculated to induce assent rather than merely issue judicial commands. The evolution of family law has been marked by great differences in the approaches taken by the different states. *See Sosna v. Iowa*, 419 U.S. at 405. Unlike, for example, commercial law, where the almost universal adoption of the Uniform Commercial Code has largely conformed state law to a single set of legal standards, the states have consistently balked at adopting proposed uniform legislation regarding

11. *Akenbrandt v. Richards*, 504 U.S. 689, 703 (1992) ("[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States") (*quoting In re Burrus*, 136 U.S. 586, 593-94 (1890)).

substantive domestic relations law.[12] Family law emphatically remains an area of state innovation and diversity in response to ever-changing social conditions.

State grandparent visitation statutes are one aspect of evolving family law. The types of problems to which these laws are addressed were far less common when the states first came into existence. In the past, sheer economic necessity often forced, or ethnic tradition induced, grandparents, parents and children to live in the same home.[13] In more recent years, as these circumstances have changed, the nuclear family on which children in the past relied has become less common; "[m]ore varied and complicated family situations arise as divorces, and decisions not to marry, result in single-parent families [and] as remarriages create step-families", making relationships with other family members all the more important. *Roberts v. Ward*, 126 N.H. 388, 493 A.2d 478, 481 (1985).

Today legal standards regarding grandparent visitation are largely a matter of statute; in a number of states even before the advent of such legislation, however, courts had held that they had the inherent authority to issue visitation orders in favor of grandparents.[14] Where that practice was already established, state legislation was described as merely codifying existing state caselaw.[15] In other states grandparent visitation statutes were a

12. As of 1999 the Uniform Marriage and Divorce Act had been adopted by only 8 states, the Uniform Adoption Act by 6 states, the Uniform Civil Liability for support Act by 3 states, and the Uniform Marital Property act by a single state. 9A Uniform Laws Annotated, pt. I, pp. 103, 159 (1998); 1999 Supp. pp. 95, 295.

13. On the other hand, if parents chose to move to another state, or even to another county, the cost and delay of travel could make visits with grandparents simply impracticable.

14. *See* n.45, *infra*.

15. *Brooks v. Parkerson*, 454 S.E.2d 769, 779 (Ga. 1995); *Heiss v. Eckert*, 12 Pa. D.&C. 6, 10 (Pa. Cty Ct. 1991); *Soergel v. Raufman*, 154 Wis. 2d 624, 453 N.W.2d 624, 626-27 (1990); *Skeens v. Paterno*, 60 Md. App. 48, 480 A.2d 820, 826 (1984); *Hughes v. Hughes*, 316 Pa.

(Cont'd)

significant change in state law.[16] Early legislation was frequently framed to authorize grandparent visitation only in specifically defined circumstances, particularly cases in which one parent had died.[17] Statutes were often broadened as state courts and legislatures discovered unanticipated types of family problems which simply did not fit within the terms of prior laws. In some instances, rather than trying to anticipate and specify which particular types of individuals — such as grandparents or step-parents — might in at least some circumstances be appropriate for visitation, the states simply provided that any person could make such a request. Legislation framed in this manner was not intended to authorize visitation suits by total strangers; so far as we have been able to ascertain, total strangers have not been awarded, or even requested, visitation under these laws.[18] The overwhelming majority of requests and awards under these statutes have in fact involved grandparents.

Grandparent visitation statutes are an area of intense ongoing innovation by the states. The different statutes adopted by the fifty states vary widely. (*See* Appendix A). No less significantly, the states are continually amending their own laws.[19] Washington statutes on this subject have repeatedly been

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Super. 505, 463 A.2d 478, 480 n.1 (1983); *Johnson v. Diesinger*, 589 A.2d 1160, 1161 (Pa. Super. 1961).

16. *Mimkon v. Ford*, 66 N.J. 426, 332 A.2d 199 (1975) (citing cases).

17. *Emanuel S. v. Joseph E.*, 577 N.E.2d 27,28-29 (1991). The New York statute adopted in 1966 appears to have been the first state legislation on this subject. *See* Appendix A.

18. Cf. *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (Pa. Super. 1978) (visitation for stranger will rarely if ever be awarded).

19. *See Beagle v. Beagle*, 678 So. 2d 1271, 1273 (Fla. 1996) (describing amendments to Florida statute); *In re Custody of H.S.H.-K.*, 533 N.W. 2d 419, 425-27 (Wis. 1995) (describing amendments to Wisconsin statute); *Bailey v. Menzie*, 542 N.E.2d 1015, 1017-18 (Ind. App. 3 Dist. 1989) (describing amendments to Indiana statute); *Evans*
(Cont'd)

amended since the first of them was adopted in 1973. (Pet. App. 7a-8a). The states have steadfastly refused to conform to any single standard.

The various state grandparent visitation statutes do have several basic elements in common. They do not confer on grandparents a *right* to visit their grandchildren[20]; grandparents are only authorized to make a request for visitation.[21] That request can be granted only if it is in the best interest of the child; whether or how much visitation might benefit the grandparents is not relevant[22]. The grandparents bear the burden of persuasion on this issue[23]; even where that burden is met, the court still has discretion to deny the request. The states which

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v. Evans, 302 Md. 334, 488 A.2d 157, 159-61 (1985) (describing amendments to Maryland statute); *Brown v. Meekins*, 666 S.W.2d 710, 282 Ark. 186 (Ark. 1984); *Castagno v. Wholean*, 239 Conn. 336, 684 A.2d 1181, 1187-89 (1996) (describing amendments to Connecticut statute).

20. *Sightes v. Barker*, 684 N.E.2d 224, 233 (Ind. App. 1997); *Brooks v. Parkerson*, 454 S.E.2d 769, 779 (Ga. 1995) (dissenting opinion); *Campbell v. Campbell*, 896 P. 2d 635, 643 (Utah App. 1995); *Michael v. Hertzler*, 900 P. 2d 1144, 1146-47 (Wyo. 1995); *Fairbanks v. McCarter*, 622 A.2d 121, 125 (Md. Ct. App. 1993); *Heiss v. Eckert*, 12 Pa. D.&C. 4th 6, 11 (Pa. Cty. Ct. 1991); *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049, 1053 (N.Y. 1981); *Wick v. Wick*, 403 A.2d 115, 116 (Pa. Super. 1979); *cf. Application of Goldfarb*, 6 N.J. Super. 543, 70 A.2d 94, 96 (1949).

21. In the courts below this status was characterized as "standing", using the term in a manner somewhat different from the federal constitutional requirement.

22. "[I]t is primarily 'the right of the child to . . . know her grandparents; which is being protected and not the interests of the grandparents." *Roberts v. Ward*, 493 A.2d 478, 482 (N.H. 1985).

23. *Wolinski v. Brownneller*, 115 Md. App. 285, 693 A.2d 30, 40 (1997); *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997) ("the burden is on the grandparent . . . to demonstrate by a preponderance of the evidence that court-ordered visitation is in the children's best interest."); *Commonwealth ex rel. Zaffarano v. Genaro*, 500 Pa. 256,
(Cont'd)

further limit visitation orders to specific identified circumstances usually include among those circumstances the death of the parent who was the child of the requesting grandparents.[24]

In other respects, however, state laws differ widely. Many establish additional general prerequisites that must be met before a visitation request can be granted or even entertained; some states, for example, require that such requests be made in connection with ongoing divorce or custody proceedings, or require a showing of some sort of special circumstances. A number of statutes spell out varying criteria to be used by the state judges in determining whether visitation would be in the best interests of a child. Some states permit visitation requests by persons other than a grandparent; in practice such requests have been infrequent and made either by other relatives or by

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455 A.2d 1180, 1183 (1995) (grandparents "must show reasons to overcome the parent's prima facie right to uninterrupted custody"); *Campbell v. Campbell*, 896 P.2d 635, 643 (Utah App. 1995) ("If the statute gave grandparents an unrestricted vested right of visitation, we would be far more likely to question its constitutionality. But under the existing statutory scheme, a court cannot grant visitation until . . . detailed findings of fact and conclusions of law are entered explicitly demonstrating that the best interests of the children will be served by granting visitation."); *Ridenour v. Ridenour*, 901 P.2d 770, 774 (N.M. App. 1995) ("there is no presumed beneficial relationship between grandparents and grandchildren; rather, visitation is appropriate only after the grandparents have . . . presented evidence to show . . . that visiting is in the child's best interests."); *R.T. v. J.E.*, 277 N.J. Super. 595, 650 A.2d 13, 16 (1994). *Bucci v. Bucci*, 351 Pa. Super. 457, 506 A.2d 438, 339-40 (1986); *Rosemary E.R. v. Michael G.Q.*, 471 A.2d 995, 996 (Del. Super. 1984).

24. According to one recent analysis, twenty state statutes expressly cover cases in which a parent is deceased. Averett, "Grandparent Visitation Right Statutes", 1999 B.Y.U. Journal of Public Law 355, 357-61 (1999); *see Preston v. Mercieri*, 573 A.2d 128, 131 (N.H. 1990) (citing statutes).

individuals who had a substantial role in raising the child in question.[25]

The practical significance of these statutes turns largely on the types of circumstances in which visitation is typically requested and approved. A substantial majority of the several hundred reported cases involve certain common elements. The party seeking visitation is usually one or two grandparents. The child ordinarily is living with only one of its biological parents, and only one of the biological parents is opposing visitation. The biological parent objecting to visitation is generally not the child of the grandparents seeking visitation. In most cases the grandparents at one time had significant contact and relationship with the grandchild in question, but some intervening event — such as the death or absence of the other parent, or personal or financial differences between the grandparents and custodial parent — led to an end to visitation. The disputed issue in litigated cases is most often whether the grandparents will be able to see their grandchildren at all, rather than about the details of an otherwise unopposed request for visitation.

A large number of grandparent visitation requests are made where, as in the instant case, a parent has died, and a dispute about visitation arises between the surviving parent and the parents of the deceased parent; a list of such cases is set out in Appendix B. A similar set of cases concern grandparents related to a parent who is for some reason absent and thus unable to

25. E.g. Pet. App. 2a (visitation sought by man who lived with biological mother and helped raise her child from age 2 to age 6); *Cox v. Williams*, 177 Wis. 2d 433, 502 N.W.2d 128, 129 (1993)(former stepmother who had helped raise child for five years); *Noonan v. Noonan*, 171 Wis. 2d 706, 492 N.W.2d 172, 173 (1992) (aunt who took care of child during illness and after death of mother); *Hendershot v. Hendershot*, 785 S.W. 2d 34 (1990) (great aunt who cared for her grand nephew for extended periods of time); *D.D.M. v. J.M.*, 137 Wis. 2d 375, 404 N.W.2d 530, 532 (1987) (aunt who had been child's guardian for six years); *Quirk v. Swanson*, 368 N.W.2d 557, 558 (N.D. 1985) (former husband, believing that he was the father of the child, cared for the child for one and one-half years).

provide them with access to their grandchildren. See Appendix C. In many of the other cases, the non-custodial biological parent, usually the son or daughter of the requesting grandparents, seems to have simply abandoned any significant relationship with the child in question.[26] A recurring special situation of particular importance to the child in question arises where the individual making the visitation request was earlier involved in actually raising the child, and may thus in the eyes of the child have filled the role of a parent.[27]

Many cases that have arisen under these statutes present circumstances that are quite unique, if not at times bizarre, posing practical problems that defy categorization or ready constitutional analysis. In *In re Custody of Smith*, 137 Wn. 2d 1, 969 P.2d 21 (1998), the grandparents lost access to their granddaughter when their son was murdered by his mother-in-law in a shoot out during which the mother-in-law also died. (Pet. App. 3a). In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the individual seeking visitation rights claimed to be the biological father of the child at issue, who had been born to the

26. E.g. *Ridenour v. Ridenour*, 901 P. 2d 770, 772 (N.M. App. 1995) (following divorce father with visitation rights "had very little contact with either Child or Grandparents").

27. E.g. *Roberts v. Ward*, 493 A.2d 478, 479 (N.H. 1985):

> The child and her mother lived with [the maternal grandparents] in [their] home for a year and a half after the child's birth April 10, 1974. This living arrangement was terminated by [the mother], following the [grandparent's] objections to their daughter's erratic behavior. The [grandparents] nonetheless maintained regular contact with their grandchild. They cared for her nearly every weekend from 1976 to 1979. They also picked her up from day care and provided her evening meal every day during that period while, they contend, their daughter worked and experimented with various life styles and male companions. From the fall of 1979, when the child began formal schooling, until 1983, the plaintiffs and child visited nearly every weekend.

A list of other such cases is set out in Appendix C.

wife of another man. In *Temple v. Meyer*, 208 Conn. 404, 544 A.2d 629 (1988), visitation was sought by a man who for years had believed he was the father of the child in question, and had raised him as his son, only to learn from a later paternity test that another man was the biological father.

Cases in which a grandparent sought visitation over the objection of the parents in an intact, nuclear family are less common, and such requests are often unsuccessful. A number of decisions have held that generally phrased state statutes were never intended to apply to intact families.[28] In other states, courts have applied a strong presumption against any visitation order in such circumstances.[29] Several state courts have held that their state constitutions ordinarily preclude application of a visitation statute to an intact nuclear family.[30]

Most of the family law matters which come before state courts involve sensitive personal problems; state judges have developed considerable experience and skill in the delicate task of assessing and resolving such disputes. State judges have brought those same abilities to bear on grandparent visitation requests. State courts have agreed that the "best interests of the child" concerns the child's interest in maintaining a familial relationship with the party seeking visitation, *see* p. 42, *infra*, a standard which usually cannot be met if there was no significant prior contact between that party and the child.[31] Those courts have repeatedly recognized

28. *Lingo v. Kelsay*, 651 So. 2d 499 (La. App. 1995); *Welsh v. Welsh*, 21 Pa. D.&C. 4th 246 (1993); *Dietrich v. Dietrich*, 17 Pa. D.&C. 4th 270 (1992); *Herron v. Seizak*, 321 Pa. Super. 1983, 468 A.2d 803 (1983).

29. *Castagno v. Wholean*, 239 Conn. 336, 684 A.2d 1181 (1996); *Steward v. Steward*, 890 P. 2d 777 (Nev. 1995).

30. *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993).

31. *O'Brien v. O'Brien*, 141 N.H. 435, 684 A.2d 1352, 1354 (Cont'd)

that visitation would not be in a child's interest if it would interfere with his or her relationship with the custodial parent.[32] Thus state judges have held that visitation would be inappropriate where the grandparents were disposed to criticize the parents in front of the grandchildren, or to disregard or undermine the parent's views about how the children should be raised.[33] Even where a child's parents may themselves have been responsible for past differences with the grandparents, courts have refrained from placing the children in a family crossfire.[34] State judges have understood that where visitation is likely to cause substantial emotional distress to a parent, the resulting impact on the child may make visitation inappropriate.[35] On the other hand, state courts have been able to recognize situations in which a parent's denial of visitation was unrelated to any concern for the child, but was instead the result of a collateral

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(1996); *Maner v. Stephenson*, 342 Md. 461, 677 A.2d 560, 562 (1996); *Matter of Rita VV*, 619 N.Y.S.2d 218, 221 (A.D. 1994); *New Jersey Div. Youth & Fam. Serv. v. E.D.*, 233 N.J. Super. 401, 558 A.2d 1377, 1386 (1989); *Hughes v. Hughes*, 316 Pa. Super. 505, 463 A.2d 478, 480 and n.1 (1983).

32. *Beckman v. Boggs*, 337 Md. 688, 655 A.2d 901, 904 (1995); *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121, 127 (1993); *Norris v. Tearney*, 422 Pa. Super. 246, 619 A.2d 339, 342 (1993); *Commonwealth ex rel. Shee v. Holewski*, 316 Pa. Super. 509, 463 A.2d 480, 483 (1983).

33. *Johnson v. Diesinger*, 589 A.2d 1160, 1164 n.7 (Pa. Super. 1991); *Commonwealth ex rel. Zaffarno v. Genaro*, 500 Pa. 256, 455 A.2d 1180, 1184 (1983); *Commonwealth ex rel. Flannery v. Sharp*, 151 Pa. Super. 612, 30 A.2d 810, 811 (1943).

34. *Commonwealth ex rel. Zaffarano v. Genaro*, 500 Pa. 256, 455 A.2d 1180, 1182-85 (1983); *Hughes v. Hughes*, 316 Pa. Super. 505, 463 A.2d 478, 479 (1983); *Commonwealth ex rel. McDonald v. Smith*, 170 Pa. Super. 254, 85 A.2d 686, 688 (1952); *Application of Goldfarb*, 6 N.J. Super. 543, 70 A.2d 94, 95-96 (1949).

35. *Rigler v. Treen*, 660 A.2d 111, 115-16 (Pa. Super. 1995); *Norris v. Tearney*, 422 Pa. Super. 246, 619 A.2d 339, 340-42 (1993).

personal or financial dispute between the grandparents and the custodial parent.[36] Frequently, visitation orders, like the order in this case, contain provisions framed to assure that the visitation does not interfere with the parent-child relationship.[37]

As is true of many family law matters, however, the issuance of a disputed court order is the last, and fortunately a less common, resort. Although Washington first enacted grandparent visitation legislation in 1973, there are only a handful of reported cases in which a parent appealed from a visitation order, and in only a few of these did the parent contend on appeal either that the order was not in the best interests of the child or that the type or amount of visitation approved was inappropriate. Often court-ordered or voluntary mediation results in a settlement of visitation issues. Where a court-appointed expert provides the parties with an objective, psychological evaluation of their differences, that report frequently provides the basis for an agreement. Once litigation has begun, most attorneys attempt to avoid actions by themselves or their clients that would aggravate existing differences. They seek to bridge the differences between parties whose lives are inextricably interconnected because of their shared relationship to the child involved.

As occurred in the instant case, state judges orchestrate their proceedings so as to encourage parties to understand the needs and concerns of one another, and to persuade them to accept in advance part if not all of the order that may be issued. Decisions in these and other domestic relations matters are often

36. *Herndon v. Tuhey*, 857 S.W.2d 203, 205 (Mo. banc 1993); *King v. King*, 828 S.W.2d 630, 631 (Ky. 1990); *Ward v. Ward*, 537 A.2d 1063 (Del. Fam. Ct. 1987); *Thompson v. Vanaman*, 210 N.J. Super. 225, 509 A.2d 304 (1986); *Ritter v. Ritter*, 36 Pa. D.&C. 3d 556, 557 (Pa. Cty Ct. 1985). *Commonwealth ex rel. Miller v. Miller*, 329 Pa. Super. 248, 478 A.2d 451, 452 (1984).

37. *Commonwealth ex rel. Miller v. Miller*, 329 Pa. Super. 248, 478 A.2d 451, 454 (1984); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70, 71 (1960).

solomonic in nature, involving a compromise structured to encourage the parties to work together in the future and to heal their family rifts. There are, to be sure, cases in which grandparent visitation requests are vigorously litigated, but these are the exception. Often these statutes lead to a civil, non-coercive resolution, by bringing each party to understand the personal and legal interests of the other and to focus on the interests of the child whom they all love, and through providing a carefully structured judicial forum for resolving past differences.

B. The Constitutional Issue Before the Court

The issue before this Court is not whether grandparent visitation statutes generally are good social policy, or how the particular statute that has been enacted by Washington might be improved. Nor is the Court asked to determine whether the state trial judge in this case erred in concluding that it would be in the best interest of Natalie and Isabelle Troxel to spend at least some time with their paternal grandparents. Although the parties are in disagreement about one aspect of the scope of the visitation order — whether the weekend visits should last overnight — that is a state law matter which remains open for resolution on remand. The only question here is whether the particular course Washington has chosen is unconstitutional.

The specific constitutional issue is a narrow one. The petitioners are not advancing an argument that grandparents have a constitutional right to visit their grandchildren[38]. Neither party is contending that the proceedings through which this case was resolved in the lower courts violated procedural due process. Both parties had ample notice of the proceedings, were represented by counsel, and were able to advance their contentions unencumbered by any presumptions against them.

38. Thus this Court has no occasion to consider, for example, whether it might in some instances be unconstitutional for a state court to enjoin a grandparent from having contact with his or her grandchild. *See Moore v. East Cleveland*, 431 U.S. 494 (1977); *Deweese v. Crawford*, 520 S.W.2d 522, 527 (Civ. App. Tex. 1975) (denying injunction against grandparents).

See Michael H. v. Gerald D., 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The Washington Supreme Court did not rely on, and respondent did not there advance, any circumstance-specific constitutional objection to the application of RCW 26.10.160(3) to this particular case. Respondent has never urged, for example, that visitation would interfere with her ability to determine the religion of the children, to shape their values, or to oversee their education. The court below properly dealt with this case as presenting only a facial challenge to the constitutionality of the Washington statute.

The appropriate constitutional standard for adjudicating a facial challenge to the validity of a statute has occasioned some disagreement within this Court. *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996). *United States v. Salerno*, 481 U.S. 739, 745 (1987), held that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." On the other hand, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992), held a statute facially invalid because it would be unconstitutional in a "large fraction" of the cases to which it applied. *See Washington v. Glucksberg*, 521 U.S. 702, 740 n.6 (1997) (Stevens, J., concurring) (facial challenge must be rejected if the statute has a "plainly legitimate sweep"). Rejection of respondent's facial challenge, of course, would not mean that every application of RCW 26.10.160(3) would necessarily be constitutional.

The Court need not resolve in this case any actual or apparent difference between the standard in *Salerno* and *Casey*. On the interpretation of substantive due process adopted by the court below, RCW 26.10.160(3) would indeed be unconstitutional in *all* cases. The Washington Supreme Court

held that a state visitation order under RCW 26.10.160(3) *always* interferes with the fundamental constitutional rights of the custodial parent, and that the best interests of the child is *never* a constitutionally sufficient justification for such interference. If those premises are indeed correct, the statute would indeed be facially invalid.

We advance a far less categorical approach. Although not every visitation order would interfere with the fundamental rights of a parent, circumstances could conceivably occur in which a particular order would do so. And while ordinarily the best interests of a child, in our view, is constitutionally sufficient to justify a visitation order, cases could arise in which that would not be so. The circumstance-specific nature of any possible constitutional defect in a visitation order under RCW 26.10.160(3), however, is fatal to respondent's facial challenge.

There is no showing that in virtually all or even some of the cases in which the statute has been applied by Washington courts the order in question would be invalid under this case-specific standard. The circumstances that would raise serious constitutional questions may not in fact have arisen in many Washington cases. Even if they were to occur, it is entirely possible — indeed likely — that any serious interference with parent-child relationships would lead Washington courts to conclude, as have courts in other states, that visitation would not be in the best interests of the child.[39] Whatever the difference between *Salerno* and *Casey*, it has never been doubted that a facial challenge cannot be based on "a worst-case analysis." *Ohio v. Akron v. Center for Reproductive Health*, 497 U.S. 502,

39. Possible constitutional problems might also be avoided by the manner in which RCW 26.10.160(3) may be construed by the state courts; prior to its consideration of the instant case, the Washington Supreme Court had never resolved any questions about the correct interpretation of that law. The statute, moreover, is merely permissive; it only allows, but does not require, a court to issue a visitation order where that would be in the best interests of the child. How Washington courts might use that discretion in future cases is at this juncture entirely unforeseeable.

514 (1990). Respondent bears the burden of establishing the facial invalidity of the statute; in the absence of a record regarding actual applications of RCW 26.10.160(3), her facial attack must fail.

The court below appears to have been particularly concerned about the constitutionality of a visitation order regarding a child who is living with his or her married biological parents. (Pet. App. 12a). Absent a showing of the general invalidity required by *Salerno* or *Casey*, however, there would be no occasion to consider the constitutionality of RCW 26.10.160(3) in circumstances other than those of the instant case. An attempt to litigate in this case the validity of a visitation order in other particular circumstances would face insurmountable jurisdictional problems under Article III; no case or controversy exists between the instant parties regarding such a question. Neither petitioners nor respondent have a personal interest in a determination of whether the Constitution would permit a state to order grandparent visitation over the objections of a child's married biological parents; since Brad Troxel is now dead, there is no possibility that any resolution of that constitutional question could affect the validity of a visitation order regarding his two daughters. At this juncture it is impossible to know what constitutional issue, if any, might arise in such cases, in part because the Washington courts have never had occasion to determine how, if at all, RCW 26.10.160(3) would apply to a visitation request resisted by a child's married biological parents.

Although we contend that RCW 26.10.160(3) is facially constitutional, the application of *any* domestic relations law could raise circumstance-specific constitutional questions. The facts presented by particular family law disputes are complex and varied beyond imagination. Any sweeping generalization in this area is likely to be confounded by a case presenting wholly unforeseeable events or actions. In dealing with such matters it is assuredly the case that "the [better] part of wisdom [is] not to attempt, by any general statement, to cover every

possible phase of the subject." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990), *quoting Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897).

II. A PARTY ATTACKING THE CONSTITUTIONALITY OF A VISITATION ORDER MUST DEMONSTRATE THAT GOVERNMENT ACTION HAS SIGNIFICANTLY BURDENED FAMILIAL RELATIONS

The central premise — and flaw — of the decision below was its assumption that strict constitutional scrutiny is triggered by government action which is inconsistent with *any* parental decision regarding his or her child. A compelling governmental interest is required, it reasoned, before "the state may step in and override a decision of a parent." (Pet. App. 15a). Any and all "parental decisions" are subject to this same degree of heightened constitutional protection. (Pet. App. 16a, 17a). Under the opinion of the state court, neither the subject matter nor the purposes of a parental preference are of further constitutional significance. The objecting parent need not prove or even contend that disregarding his or her wishes would have an impact on the manner in which he or she is trying to raise the child; indeed, no explanation whatever need be offered for any such objection. On this view a parent's constitutionally protected liberty interests are implicated whenever the government stands in the way of any decision — whatever its nature or purpose — related to a child.

(1) This Court has long emphasized that the constitutionality of a disputed government action turns in part on the magnitude of its impact on whatever underlying right might be at issue. The plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applied that approach to the liberty interest involved in abortion.

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. . . . Abortion is similar. . . . Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

505 U.S. at 873-74. "A finding of undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877.

> [N]ot every regulation the State imposes must be measured against the State's compelling interests and examined with strict scrutiny. . . .
>
> The requirement that state interference "infringe substantially" or "heavily burden" a right before heightened scrutiny is applied is not novel in our fundamental rights jurisprudence, or restricted to the abortion context. . . . If the impact of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears "some rational relationship to legitimate purposes." . . . Even in the First Amendment context, we have required in some circumstances that state laws "infringe substantially" on protected conduct . . . or that there be "a significant encroachment upon personal liberty."

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461-62 (1983) (O'Connor, J., dissenting).

In *Lyng v. Castillo*, 477 U.S. 635 (1986), this Court upheld a method of allotting food stamps which was based on a statutory definition of "household" that was allegedly overinclusive. The effect of the challenged definition was to reduce the amount of food stamps available to parents, children, and siblings who lived together. In sustaining that statute, the Court emphasized that the law did not "directly and substantially" interfere with or "heavily burden" the fundamental rights of the family involved. 477 U.S. at 638. Similarly, in *Zablocki v. Redhail*,

434 U.S. 374, 386 (1978), the Court made clear that strict scrutiny would not be applied to "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship."

No decision of this Court adopts the extraordinarily sweeping standard proposed by the court below. *Wisconsin v. Yoder*, 406 U.S. 204 (1972), on which that court relied, in fact utilizes a method of constitutional analysis that is far more focused and limited. The respondent in that case objected to sending his 15 year old daughter to school. According to the Washington Supreme Court, any such parental objection would alone have been sufficient to compel Wisconsin to adduce a compelling governmental interest, without regard to why Mr. Yoder opposed secondary education and without reference to Yoder's religious views and practices. But no member of the Court in *Yoder* thought the parent-child relationship sufficient by itself to support the asserted constitutional claim; Yoder's contentions were only colorable, and ultimately successful, because they were rooted, not in a "parental decision," but in his unique religious convictions.

Even with regard to Yoder's Free Exercise claim, the mere assertion of a religion-based opposition to secondary education would not have been sufficient. Mr. Yoder was required to demonstrate that in his case compulsory education "*unduly* burdens the free exercise of religion." 406 U.S. at 220. Constitutional scrutiny of that requirement was triggered because Yoder demonstrated that "[t]he impact of the compulsory-attendance law on [his] practice of the Amish religion is not only severe, but inescapable" and would "gravely endanger if not destroy the free exercise of [his] religious beliefs." 406 U.S. at 218-19.

> Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets. . . . [C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today.

406 U.S. at 218.

Yoder did not, as the court below implied, hold that all parents could withdraw their children from school simply by asserting an unexplained "parental decision" that the children cease further attendance. To the contrary, *Yoder* was expressly based on the unique religious convictions of the parents in that case, beliefs which this Court emphatically distinguished from secular preferences.[40] "[W]here nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts . . . constitutionally in requiring education to age 16." 406 U.S. at 233. "It cannot be overemphasized that we are not dealing with a . . . mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." 406 U.S. at 235.

None of the other decisions of this Court on which the Washington Supreme Court relied held that a state law could be invalidated, or called into question, by a parent's assertion, without more, that he or she preferred that a child not comply with its terms. To the contrary, the government action in question in these cases demonstrably interfered with a specific and vital aspect of the parent-child relationship. The statute struck down

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40. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matter of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

406 U.S. at 215-16. On the view of the court below a parent would not need even to articulate some philosophical objection to education.

in *Pierce v. Society of Sisters*, 268 U.S. 525 (1925), forbade parents from sending their children to private schools; the measure was held to "interfer[e] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. The Society of Sisters was a religious order that operated a Roman Catholic parochial school; "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. at 233. The state law at issue in *Meyer v. Nebraska*, 262 U.S. 390 (1923), prohibited the teaching of certain languages, in an "attemp[t] materially to interfere with . . . the power of parents to control the education of their own." 262 U.S. at 401. The legislation was evidently intended to sever a student's connections to foreign lands and cultures, was rooted in the animosities of World War I, 206 U.S. at 402, and had been enforced in a criminal action against an instructor in a Lutheran parochial school who had used a collection of bible stories written in German. 262 U.S. at 396-97. Thus *Meyer* and *Pierce*, like *Yoder*, involved parental control over a specific, exceptionally important aspect of a child's upbringing, one freighted with First Amendment protections.

The other decisions of this Court regarding familial relations have concerned government action that would have severed, often irrevocably, all contact between the parent and child. In *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the state had formally terminated all parental rights of the parents in question over their children. The Court noted in *Santosky* that "the private interest affected is commanding" because the parents were opposing "the irretrievable destruction of their family life." 455 U.S. at 758, 753. In *Lehr v. Robertson*, 463 U.S. 248 (1983), *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Caban v. Mohammed*, 441 U.S. 380 (1979), the government was seeking to approve the adoption of a child over his father's vehement objections. Justice White noted in *Lehr* that "a formal order of adoption, no less than a formal termination proceeding, operates to permanently terminate parental rights." 434 U.S. at

270 (dissenting opinion). In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), and *Stanley v. Illinois*, 405 U.S. 645 (1972), the petitioners were objecting to the government ordered loss of custody of the children in question, under circumstances in which it was unlikely that custody could be regained; the order opposed by the father in *Stanley* would have amounted to "the dismemberment of his family." 405 U.S. at 658. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the asserted biological father of Victoria D. was denied an opportunity even to visit with his daughter[41]. Because a visitation order, unlike a loss of parental rights, does not affect a parent's ability to make the basic decisions about a child's upbringing, and leaves the child in the physical custody of the parent most of the time, a lesser standard of constitutional justification is required.[42]

Adoption by this Court of the standard proposed by the court below would constitutionalize the entire body of custody and visitation litigation in the fifty states. In virtually every contested custody case, and every dispute about the visitation rights of a non-custodial parent, the court order which resolves the matter thwarts the "parental decision" of the losing parent. If Brad Troxel were still alive and sought, over respondent's objections, to take their daughter to visit petitioners, any judicial resolution of that dispute would necessarily override the "parental decision" of either the mother or the father. As

41. In two decisions this Court upheld denial of any visitation rights to a biological father based on a state court finding that such visits would not be in the best interests of the child. *Michael H.*, 491 U.S. at 135 (Stevens, J., concurring); *Quilloin*, 434 U.S. at 251.

42. *Fairbanks v. McCarter*, 330 Md. 39, 622 A.2d 121, 126 (1993) ("Visitation is a considerably less weighty matter than outright custody of a child, and does not demand the enhanced protections . . . that attend custody awards."); *Roberts v. Ward*, 493 A.2d 478, 482 (N.H. 1985) (" '[G]ranting visitation is a far lesser intrusion, or assertion of control, than is an award of custody" and thus not nearly as invasive of parents' rights."); *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (Pa. Super. 1978) ("an order granting visitation is a far lesser intrusion, or assertion of control, than is an award of custody.")

construed by the Washington Supreme Court, the Constitution forbids virtually any resolution of a traditional custody dispute. An award of custody to one parent against the wishes of the other would violate the constitutional rights of the latter unless the decision was necessary to avoid serious harm to the child; if, as is often the case, the child's physical and emotional health were not at risk, there would be no constitutionally permissible way to resolve the dispute. Even if, as we urge *infra*, a lesser degree of justification would be sufficient, the ability of state courts to deal with the delicate problem of inter-parent custody and visitation disputes would be seriously encumbered, if not paralyzed, if every such case posed a potentially serious constitutional problem.

The sweeping implications of the decision below are highlighted by its insistence that "parents should be the ones to choose whether to expose their children to certain people or ideas." (Pet. App. 22a). One need look no further than the nation's public schools to understand the revolutionary implications of such a constitutional rule. Students spend several thousand hours a year in classrooms being "expose[d] . . . to . . . ideas" selected by their teachers, and at times by their classmates. If parents had a constitutional right to control such matters, any parent would presumptively be entitled to veto the schoolbooks read by or to censor the things said in class to his or her children. The conflicting ideals of the various religious, political or other groups to which parents might adhere would gridlock the educational process. As Justice Jackson recognized, any one set of parents has

> as good a right as [another] to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything objectionable to any of these warring sects or inconsistent with their doctrines, we will leave public education in shreds.

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 235 (1948) (concurring opinion).

This is not a merely hypothetical problem. Parents have in fact sought to assert a constitutional right to control the curriculum taught to their children in public schools. In *Mozert v. Hawkins County Bd. of Education*, 827 F.2d 1058 (6th Cir. 1987), a group of parents waged a four year constitutional attack on their local school board's choice of textbooks. The parents objected not only to references to evolution[43], but also to "feminism," "pacifism," "false views of death," and "biographical material about women who have been recognized for achievements outside their homes." 827 F.2d at 1062-64. Any detailed discussion of religions other than their own, they insisted, had to be accompanied by an official statement that "the other views are incorrect and that the plaintiffs' views are the correct ones." 827 F.2d at 1062, 1064.[44] Plaintiff Mozert insisted that this proclamation of error would also have to be made regarding "the feelings, attitudes and values of other students that contradict the plaintiffs' religious views." 827 F.2d at 1062.

The plaintiffs in *Mozert* grounded their ultimately unsuccessful claims on an assertion that the Free Exercise Clause gave them a right to control the ideas to which their children were exposed. The decision of the court below is not even limited to religion based objections; indeed, that decision departs from established constitutional jurisprudence precisely because it accorded presumptive constitutional protection to any "parental decision," whatever its basis. On that rationale, respondent would be equally entitled to object to the exposure of her children, in the classroom or perhaps even in the school library, to ideas ranging from evolution or the "big bang" theory of cosmology to quadratic equations, the subjunctive tense, or French irregular verbs. A substantial constitutional claim would

43. The plaintiffs' lead witness insisted she found insufficient the fact that the textbooks "contained a disclaimer that evolution is a theory, not a proven scientific fact." 827 F.2d at 1062.

44. One plaintiff insisted that according to her beliefs "it is an 'occult practice' for children to use imagination beyond the limitation of scriptural authority." 827 F.2d at 1062.

arise whenever a mother or father made a "parental decision" that his or her child should not take a particular quiz, wear a school uniform, or stay after school for tardiness. If every parent has a right to control which people their children are exposed to, respondent could bar petitioners from attending a school Grandparents' Day, could veto teacher assignments, and could wield a peremptory challenge over her daughters' classmates. *Cf. Batson v. Kentucky*, 476 U.S. 79 (1986).

(2) The specific parental decision in question here — whether a child should visit with her grandparents — presents a more particularized issue. But no basis exists for concluding that even that decision *always* involves the exercise of a fundamental right.

A parent's asserted prerogative to prevent a child from visiting with his or her grandparents is not "an interest traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989). In the nineteenth century few state cases and apparently no state statutes addressed this issue. Since the turn of the century, state court decisions on this issue have been divided; decisions in a significant number of jurisdictions held that visitation orders in favor of grandparents could be issued even without express statutory authorization.[45]

45. *Brooks v. Parkerson*, 454 S.E.2d 769, 779 (Ga. 1995 (dissenting opinion) (citing Georgia cases dating from 1915); *Hughes v. Hughes*, 316 Pa. Super. 505, 463 A.2d 478, 480 and n.1 (1983) (statute codified prior caselaw); *D.D.M. v. J.M.*, 137 Wis. 2d 375, 404 N.W.2d 530, 535 (1987) (statute codified prior caselaw); *Beard v. Hamilton*, 512 So. 2d 1088, 1090, 12 F.L.W. 285 (1987) (statute codified prior caselaw); *Olson v. Olson*, 518 N.W.2d 65, 66 (Minn. 1994) (statute codified prior caselaw); *Hawkins v. Hawkins*, 102 Ill. App. 3d 1037, 1039, 430 N.E. 2d 652, 653 (1981); *Krieg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. App. 1981); *Looper v. McManus*, 1978 Okl. Civ. App. 26, 581 P.2d 487 (1978); *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1976); *Boyles v. Boyles*, 14 Ill. App. 3d 602, 603-04, 302 N.E. 2d 199, 201 (1973); *Scranton v. Hutte*, 339 N.Y.S. 2d 708, 711, 40 A.D.2d 296 (1973); *Mirto v. Bodine*, 29 Conn. Sup. 510, 294 A.2d 336, 337 (1972); *Ponsford v. Crute*, 56 Wis. 2d 407, 202 N.W.2d 5 (1972); *Weichman v. Weichman*, 50 Wis. 2d 731, 184 N.W.2d 882 (1971);

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"A long standing common law tradition clearly established the circumstances under which . . . grandparents . . . might be entitled to court ordered visitation with a minor child." *Hawkins v. Hawkins*, 430 N.E. 2d 652, 653 (Ill. App. 1981). Today, statutes in every one of the fifty states authorize grandparent visitation orders in at least some circumstances. *See Washington v. Glucksberg*, 521 U.S. 702, 716 (1997); *Michael H. v. Gerald D.*, 491 U.S. at 125.

Fundamental rights entitled to constitutional protection are not limited to long recognized prerogatives; some issues may not have been addressed by historical traditions simply because the underlying problems did not reach the courts with any frequency in years past. Respondent's argument might find historical support if she could identify a universal, long accepted social tradition that among a child's relatives parents and parents alone make decisions about the children. But there is no evidence that such a tradition existed when the Fourteenth Amendment was adopted, during a time when extended families often lived under the same roof. Today this paradigm may describe decision-making among many families, but certainly not among all. Within some Asian-American communities, a tradition of

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Anonymous v. Anonymous, 50 Misc. 2d 43, 269 N.Y.S.2d 500, 503 (1966); *Kewish v. Brothers*, 181 So. 2d 900 (Ala. 1966); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A. 2d 70, 71 (1960); *McKinney v. Cox*, 18 Ill. App. 2d 609, 153 N.E.2d 98 (1958); *Lucchesi v. Lucchesi*, 330 Ill. App. 506, 510-12, 71 N.E.2d 920, 922 (1947); *Consaul v. Consaul*,63 N.Y.S.2d 688, 691 (1946); *Solomon v. Solomon*, 319 Ill. App. 618, 621-22, 49 N.E.2d 807, 809 (1943); *Maddox v. Maddox*, 174 Md. 470, 199 A. 507 (1938); *Douglas v. Merriman*, 161 S.E. 452, 163 S.C. 210 (1931); *see Lippincott v. Lippincott*, 97 N.J. Eq. 517, 128 A. 254 (1925).

Even following the enactment of recent visitation statutes, state courts have repeatedly held that they retained their inherent authority to order visitation in circumstances outside the scope of the statute. *E.N.O. v. L.M.M.*, 711 N.E. 2d 886, 889-91 (Mass. 1999); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 430-34, 193 Wisc. 2d 649 (1995); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985);

respect for elders dictates that important family decisions, including decisions about children, be made in consultation with or with deference to grandparents. In many Native American tribes the raising of children remains a shared responsibility of all adults in the household. The views of particular grandparents may be accorded particular weight if the tribal tradition is strongly matriarchal, as among the Navajo, or patriarchal, like the Apache. These groups, of course, constitute a significant portion of the population of Washington today; when the Fourteenth Amendment was adopted in 1868, Native Americans and their traditions still predominated in the Pacific Northwest.

(3) Although neither all parental decisions nor all decisions regarding contact with grandparents necessarily involve a fundamental right, it is certainly possible that some such decisions would implicate such fundamental interests. A parent who wishes to mount a constitutional attack on a visitation order, or on any other government action, must identify some particular, constitutionally important aspect of the parent-child relationship and demonstrate that it has been significantly burdened. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 842-47 (1977). But because the constitutionality of a disputed visitation order "depends upon the intrusiveness of the competing state concern", "[u]ntil the [parents] establish a factual basis for the alleged violation of their constitutional rights, they have not established the predicate conditions for the adjudication of their constitutional claim." *Lehrer v. Davis*, 571 A. 2d 691, 693, 694 (Conn. 1990).

Past decisions of this Court identify a number of aspects of that relationship that are of especial constitutional significance, and which in particular circumstances might be obstructed by a visitation order. Parents make fundamental decisions regarding matters such as education and religion, which shape a child's values and identity. *Meyer v. Nebraska*, 262 U.S. 390 (1923). A visitation order that sent an Amish teenager to spend a month each summer with grandparents who worked in a Las Vegas casino might well be as intrusive as the compulsory education

in *Yoder*. A visitation order which took a child out of his or her parent's home for inordinately long periods would begin to interfere significantly with the parent's ability to spend time with the child, a consequence less severe than but related to a loss of custody.[46] *See Stanley v. Illinois*, 405 U.S. 645 (1972). Government compelled visitation with a grandparent whose own actions undermined the child's personal relationship with his parent or parents would raise similar problems. According visitation to a total stranger, or perhaps a grandparent who by choice had had no prior relationship with the child, could interfere with the privacy of the parents and children. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

But unlike the sweeping per se rule adopted by the court below, these far more focused constitutional claims would entail a fact-bound inquiry into the circumstances of a particular case. Few grandparent visitation cases are likely to present these constitutional issues. Many good faith disputes simply are not of constitutional magnitude.

The specific circumstances of this case fall far short of identifying a specific imperiled constitutionally protected aspect of the parent-child relationship. The decree here authorized several forms of visitation which neither respondent nor her experts asserted were objectionable. Paragraph 3.3(4) granted

46. The usual rule is that visitation of greater length must meet a heavier burden of justification. *Earon v. Earon*, 9 Pa. D. & C. 4th 101, 105 (Pa. Cty. Ct. 1991): *Johnson v. Diesinger*, 589 A.2d 1160, 1164-65 (Pa. Super. 1991); *Sketo v. Brown*, 559 So. 2d 381, 383 (Fla. App. 1 Dist. 1990); *Commonwealth ex rel. Zaffarano v. Genaro*, 500 Pa. 256, 455 A.2d 1180 (1983); *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (1978) ("As the amount of time requested moves the visit further from a visit and closer to custody, the reasons offered in support of the request must become correspondingly more convincing"). Thus application of the best interest standard ordinarily, at least, may solve this problem. ["]Visitation should not be excessive . . . . Our interpretation is based in part on the fact that if the statute allowed a great amount of visitation, we would be more likely to find an undue burden on the family and hold that these sections are unconstitutional." *Herndon v. Tuhey*, 857 S.W.2d 203, 210-11 (Mo. banc 1993).

four hour visits during each of the petitioner's birthdays, and paragraph 1 assured petitioners of notice of events such as school plays and open houses. (Pet. App. 77-78). It is difficult to understand how an order directing respondent to take steps which she did not oppose could somehow violate her fundamental rights.

Respondent did object to that portion of the decree which provided for a monthly overnight visit at petitioners' home. Although the girls had regularly stayed there several years earlier while their father was still alive and living at the home, respondent sought to prove that the girls were too young to be away from their mother's home overnight. The trial judge rejected this contention, in part because respondent's witnesses had never interviewed petitioners and because the contention was based on inaccurate information about petitioners' home. (Pet. App. 74a). This is precisely the sort of dispute that state court judges decide every day; it presents no constitutional issue.

Respondent's attorney did raise in the state Superior Court one issue of constitutional significance. After the trial had been completed and the judge had already issued his ruling, respondent's counsel for the first time in the proceeding raised a question related to religion, asking the judge to forbid petitioners to take the girls to church with them. (R.P. 225). The posture of that issue below, however, was utterly different from the proceedings and record in *Yoder*. Unlike Mr. Yoder, respondent proffered no testimony that her religious views or practices actually differed from those of petitioners, that attending church with their grandparents would affect with the girls' religious upbringing, or that she had ever asked petitioners simply to agree not to take the girls to church. The trial judge rejected on state procedural grounds the requested prohibition, explaining that it was both untimely and not supported by any evidence introduced by respondent at trial (R.P. 226); respondent did not pursue this issue on appeal. *See Wainwright v. Sykes*, 433 U.S. 72 (1977).

Even where a colorable constitutional claim is asserted, its resolution — like the analysis in *Yoder* — will depend on a

careful evaluation of the particular circumstances involved. A visitation order involving only a few hours a year, for example,[47] is far less likely to substantially burden any fundamental right of a parent. In some cases constitutional problems that might otherwise have existed may be prevented by including in the visitation order appropriate limitations or safeguards.

In order to support a facial challenge to RCW 26.10.160(3), respondent would have to establish that every, or virtually every visitation order issued pursuant to that statute would substantially burden an identifiable fundamental right. Although it is possible that some visitation orders would impose such burdens, there is no showing that orders of that sort are the norm under RCW 26.10.160(3), or even that they have occurred at all.

III. IN RESOLVING A CLAIM OF IMPERMISSIBLE INTERFERENCE WITH FAMILIAL RELATIONSHIPS, THE COURT MUST CONSIDER THE IMPACT OF THE CHALLENGED ACTION ON ALL AFFECTED FAMILIAL RELATIONSHIPS

(1) Even where a visitation order significantly interfered with a parental right, it would not follow in every case that the order was unconstitutional.[48] This Court has repeatedly

47. E.g. *Campbell v. Campbell*, 896 P.2d 635, 638 n.4 (Utah App. 1995) (grandparents awarded a single four hour monthly visit at which they could see only one of the five grandchildren at issue, plus certain holidays); *Spradling v. Harris*, 778 P. 2d 365, 366 (Kan. App. 1989) (a five hour visit once a month, and one phone call a week); *Bucci v. Bucci*, 351 Pa. Super. 457, 506 A.2d 438 (1986) (a two hour visit on the first Sunday of February, May, September and December); *Boyles v. Boyles*, 14 Ill. App. 3d 602, 302 N.E. 2d 199, 200 (1973) (a summer vacation each year); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70, 71 (1960) (a two hour visit every third Saturday).

48. The court below insisted that a state may take actions which interfere with a parent-child relationship only where that action is necessary to protect the health or safety of the child. (Pet. App. 15a, 16a, 18a, 19a-20a). That proposed restriction is for several reasons unsound. (Cont'd)

admonished that in determining whether one individual has a constitutionally protected interest in a familial relationship, consideration must be given to whether recognition of that relationship would adversely effect some other familial relationship.

In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), the petitioners asserted that foster parents were entitled to a hearing before a child in their care was returned to a biological parent. The Court explained that whatever

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First, states can and do take such actions in order to protect a child's relationship with some other family member. Custody and visitation disputes between separated or divorced parents are usually resolved on the basis of the best interests of the child; issues of harm to the physical and emotional health of the child, fortunately, are frequently absent in such cases.

Second, innumerable aspects of government which serve important purposes unrelated to the health or even the best interests of the child will at times interfere with a parent-child relationship to a degree at least as intrusive as a visitation order. If, for example, a parent is incarcerated for a crime, he or she is likely to have little opportunity to relate to his or her children; in most cases other than domestic abuse, imprisonment is ordered for reasons unrelated to the existence or welfare of the child. Compulsory education removes school-age children from their homes for thousands of hours of each year, separating them from their parents during those periods; the two girls in the instant case spend far more time in school than they would with their grandparents under the disputed visitation order. Education assuredly benefits children in many ways, but a parent's decision to keep his or her child out of school entirely, or for several weeks or months, would not necessarily pose any risk of harm to the physical or emotional health of the child.

Third, the decision below fails to take into consideration the quite substantial differences in the scope and degree of possible intrusiveness of the various forms of visitation orders that a court might approve. The magnitude of the interest needed to justify action infringing on constitutional rights often turns on the degree of the infringement at issue. One provision of the order in the instant case, for example, merely required respondent to notify petitioners of school plays or other activities in which the girls might be involved; the justification needed for such an order would surely be minimal.

constitutionally protected familial rights a foster parent might otherwise have were limited where they conflicted with the familial interests of the parents.

> It is one thing to say that individuals may acquire a liberty interest against arbitrary government interference in the family-like association into which they have freely entered. . . . It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest . . . . Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

431 U.S. at 846-47.

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court noted that the interest of a biological father in maintaining a familial relationship with his child would often enjoy constitutional protection:

> [w]here, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband in the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.

491 U.S. at 129. Both the biological father and the husband in *Michael H.* could plausibly have asserted they had a liberty interest in the resolution of that case. Regrettably, one of them would unavoidably have to pay a price if the state chose to respect the interest of the other, either

> Michael by being unable to act as father to the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and [his daughter] have established. Our disposition does not choose between these two

> "freedoms," but leaves that to the people of California.

491 U.S. at 130.

As *Michael H.* makes clear, the assessment of which individuals have a familial relationship with a child can be a complex one. In that case Gerald D., at least assertedly, was not Victoria's biological father; yet the Court had no doubt that it was appropriate to recognize that Gerald D. had a familial relationship with Victoria, inter alia because he had raised her as his own child. The existence of a constitutionally significant familial interest may depend more on an adult's personal relationship with a child than on a mere biological connection.[49]

In some instances the liberty interest of another family member affected may be so great that a state is constitutionally required to disregard the preferences of a parent. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 476 (1983), minors were forbidden to obtain an abortion without parental approval; that law was framed to give controlling force to a "parental decision" and the liberty interest parents would have in controlling a medical procedure performed on their child. This Court nonetheless ruled the statute unconstitutional because it interfered with the child's own liberty interest in obtaining an abortion; "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be *in her best interests*." 462 U.S. at 439-40 (Emphasis added); *see Bellotti v. Baird*, 443 U.S. 622, 644-48 (1979) (plurality opinion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976). Similarly, *Parham v. J.R.*, 442 U.S. 584 (1978), held that a state could not institutionalize a child based solely on the decisions of his or

49. *Compare Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978) *with E.N.O. v. L.M.M.*, 711 N.E. 2d 886 (Mass. 1999); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. 1996); *In re custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

her parents, but was required, inter alia, to provide a "neutral factfinder" to independently assess the need for confinement.

In a visitation case, the competing constitutional interests will rarely if ever be so compelling as to require the state to order visitation over the objections of a parent. But, as in *Michael H.*, it often will be the case that those other familial interests are of sufficient significance that the decision regarding how to balance the various interests involved is one which the Constitution leaves to the states.

(2) In its analysis of the constitutional claim and rights at stake in this case, the court below referred interchangeably[50] to the rights of a "family"[51], the rights of a child's "parents"[52], and the rights of "*a* parent."[53] Although in some circumstances the differences between these references might be of no practical or legal significance, in this case the distinctions are of controlling importance.

The Washington court's analysis of the familial relationships at issue in this case focused exclusively on the parent-child relation between respondent and her daughters. In common parlance, however, petitioners and their granddaughters would also be described as being part of the same "family", albeit in a somewhat broader sense.[54] Grandparent visitation

50. The paragraph at pet. app. 22a-23a, for example, begins with the statement that "*Parents* have a right to limit visitation of their children with third persons" (emphasis added), then refers to families, and finally closes with a holding that two Washington statutes "impermissibly interfere with *a parent's* fundamental interest in the 'care, custody and companionship of the child.' " (Emphasis added).

51. Pet. App. 12a, 13a, 14a, 15a, 16a.

52. Pet. app. 12a, 13a, 16a, 18a, 22a.

53. Pet. App. 14a, 15a, 17a, 18a, 20a n.4, 21a, 23a.

54 One dictionary notes that the term "family" has several related but distinct usages, including "parents and their children, considered as a group, whether dwelling together or not" and "any group of persons closely related by blood." Webster's College Dictionary, p. 481 (1991).

statutes are grounded on a recognition that grandparents are part of a child's family.[55]

> The legislative determination to allow grandparents . . . the opportunity to demonstrate that they may significantly contribute to the best interest of the child, finds constitutional support . . . in the recognition that "[t]he constitutional concerns are not entirely parental . . . " . . . "[T]he children themselves have constitutionally protectible interests."

Lehrer v. Davis, 571 A.2d 691, 695 (Conn. 1990) (citations omitted).[56] Even vis à vis one's own parents, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution . . . ." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. at 74.

> [T]he day has long passed when the rights of infants to be properly nurtured are subordinate to the strict legal rights of parents or others, in and over them, and they regarded as chattels to be disposed of as if title to them passed like any ordinary property.

55. *Sightes v. Barker*, 684 N.E.2d 224, 230 (Ind. App. 1997) ("Grandparents are members of the extended family whom society recognizes as playing an important role in the lives of their grandchildren, the importance of which has been given added meaning by the legislature's policy judgment, underlying the [grandparent visitation law]"); *Herndon v. Tuhey*, 857 S.W.2d 203, 209 (Mo. Banc 1993) ("the grandparents are members of the extended family whom society has traditionally recognized as playing an important role in the raising of their grandchildren").

56. *See Michael v. Hertzler*, 900 P. 2d 1144, 1150 (Wyo. 1995) ("the right to associate with one's family is identified as a fundamental liberty under the Wyo[ming] Const[itution]. . . . We perceive this interest to be an equivalent fundamental right to that asserted by [the children's adoptive father]. It is available to children and grandparents, as well as parents, and the state has an equal duty to protect the fundamental rights of the grandparents and the children.")

In re Lippincott, 96 N.J. Eq. 260, 124 A. 532, 533 (1924). By the time a child reaches adulthood, the opportunity for developing a relationship with a grandparent may have passed.[57]

The court below believed that the family accorded protection by the Constitution is limited to parents and their children. "The *law's* concept of the family," it assumed, is restricted to parents and children (Pet. App. 22a) (emphasis added); only the parent-child relationship is given "the protective status accorded the family as a societal institution." (Pet. App. 14a). On this view the familial relationship between the grandchildren and their grandparents is constitutionally irrelevant.

The notion that the "family" protected by the Constitution is defined in this narrow manner was expressly rejected two decades ago in *Moore v. East Cleveland*, 431 U.S. 494 (1977). In that case the city of East Cleveland had adopted an ordinance which made it a crime for Inez Moore to live with her two grandchildren. The city sought to defend the validity of that ordinance by insisting that for constitutional purposes only parents and their children constitute a family.

> The city would distinguish the cases based on *Meyer* and *Pierce*. It points out that none of them "gives grandmothers any fundamental rights with respect to grandsons," Brief for Appellee 18, and suggests that any constitutional right to live together as a family extends only to the nuclear family — essentially a couple and their dependent children.

431 U.S. at 500 (plurality opinion). The plurality opinion emphatically rejected

> what the city urges here: cutting off any protection of family rights at the first, convenient, if arbitrary boundary — the boundary of the nuclear family.

57. *In re Lippincott*, 124 A. at 533 (the child's "grandparents are all advanced in years, and probably none of them can rationally expect to live for a great while longer, certainly not until this boy attains his majority.")

431 U.S. at 502 (plurality opinion).

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.

431 U.S. at 504-05 (plurality opinion) (footnote omitted).[58] In a concurring opinion, Justice Brennan also rejected limiting the constitutional protection accorded to familial relations to parents and children.[59] Justice Stewart, in a dissenting opinion, argued that the Constitution left to the city the decision whether to include or exclude grandparents from the definition of a "family." 431 U.S. at 539. Significantly, however, no member of the Court suggested that East Cleveland was constitutionally *required* to recognize only parents and their children as members of the same family.

The overarching purpose of state grandparent visitation statutes is to protect the familial relations that children have with their grandparents.

> The [Utah] Legislature promulgated [Utah's grandparent visitation statute] to promote intergenerational contact and strengthen the bonds

58. The plurality noted that in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the relative asserting family rights was actually the aunt of the child involved. 431 U.S. at 505 n.15.

59. 431 U.S. at 507 ("East Cleveland may not constitutionally define 'family' as essentially confined to parents and the parents' own children.")

> of the extended family. Modern society has witnessed a general trend toward the disintegration of the nuclear family. Changes in the demographics of domestic relations, the rise in the divorce rate, and the increasing numbers of children born to single parents are but a few of the factors contributing to the destabilization of the traditional nuclear family. Given such circumstances, it is not unreasonable for our legislature to attempt to strengthen intergenerational ties as an alternative or supplementary source of family support for children.

Campbell v. Campbell, 896 P. 2d 635, 643 (Utah App. 1993).[60]

> It must be remembered that grandchildren, too, have the natural right to know their grandparents and that they benefit greatly from that relationship. Grandparents give love unconditionally — without entanglement with authority or discipline, and often without the pressures of other burdensome responsibilities. Children derive a greater sense of worthwhileness from grandparental attention and better see their place in the continuum of family history. Wisdom is imparted that can be attained

60. *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997) ("the legislature determined that, in modern society, it was essential that some semblance of family and generational contact be preserved. As a result, the legislature designed the [Indiana grandparents visitation] Act to promote intergenerational contact and strengthen the bonds of the extended family"); *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992) ("In an era in which society has seen a general disintegration of the family, it is not unreasonable for the General Assembly to attempt to strengthen familial bonds. . . . "[T]he grandparents' visitation statute was an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society. . . . [T]he General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved." (citation omitted)).

> nowhere else. The benefits derived by a grandchild from the society of his or her grandparents have been touched upon by psychologists and psychiatrists. . . .

Bishop v. Piller, 637 A.2d 976, 978-79 (Pa. 1994).[61] The familial benefits to grandchildren are particularly significant where a parent has died,[62] or where visitation preserves an important

61. *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997) ("few would dispute that there are benefits to be derived from the establishment of a bond between grandparent and grandchild."); *Heiss v. Eckert*, 12 Pa. D.&C. 6, 10 (Pa. Cty. Ct. 1991); *Mimkon v. Ford*, 66 N.J. 426, 437, 332 A.2d 199, 204-05 (1975) ("It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known."); *Graziano v. Davis*, 50 Ohio App. 2d 83, 361 N.E.2d 525, 530 (1976) ("the breaking down of family life . . . is a symptom and cause of social disorganization. The overall effect on American society has been devastating. The experts now acknowledge that the increase in teenage drug addi[c]tion and alcoholism, the rise of suicide in young people, the high delinquency rate are nationwide problems, and, in many instances, these problems can be traced to a stripped-down model of family living. . . . Few contemporary American families include grandparents, aunts, uncles and cousins — all of whom used to be around like the front porch, to widen the family circle.")

62. *Sightes v. Barker*, 684 N.E.2d 224, 231 (Ind. App. 1997) ("the state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved."); *Commonwealth ex rel. Miller v. Miller*, 478 A.2d 451, 455 (Pa. Super. 1984) ("The relationship between a child and his or her grandparents is a special one. When a child loses a natural parent at an early age, this relationship becomes even more special as the grandparents can help to fill the void which exists due to the loss of a parent"); *People ex rel.*

(Cont'd)

pre-existing relationship with the grandparents.[63] Visitation orders are particularly important if there would otherwise be little contact between the child and grandparents.[64]

We do not contend that a child's interest in maintaining a familial relationship with his or her grandparents will always be so significant as to permit the state to override familial interests of the parents which might be affected, or that the

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Sibley v. Sheppard, 429 N.E.2d 1049, 1052 (N.Y. 1981) ("When one or both of the parents have died, the child usually suffers great emotional stress. . . . [T]he Legislature has recognized that . . . the child should not undergo the added burden of being severed from his or her grandparents, who may also provide the natural warmth, interest and support that will alleviate the child's misery."); *Mimkon v. Ford*, 332 A.2d at 205 ("in the unfortunate case of parental separation or death . . . the continuous love and attention of a grandparent may mitigate the feelings of guilt or rejection, which a child may feel at the death of or separation from a parent, and ease the painful transition."); *Preston v. Mercieri*, 573 A.2d 128, 134 (N.H. 1990) ("In a situation such as the present one, where the child's natural parent has died suddenly, the love and commitment of grandparents can be a source of security which lessens the trauma occasioned by the parent's death"); *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985) ("It would be shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship which has formed in the absence of a nuclear family."); *Deweese v. Crawford*, 520 S.W.2d 522, 524 (Tex. Civ. App. 1975) (where father has died visitation with paternal grandparents can "keep their son alive in the minds and hearts of their grandchildren.")

63. E.g. *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super. 1, 159 A.2d 70, 71 (1960).

64. *Krigg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. App. 1981) *citing Commonwealth ex rel. Williams v. Miller*, 254 Pa. Super. 227, 385 A.2d 992, 995 (1978) ("Except under unusual circumstances, no child should be cut off entirely from one side of its family."); *Commonwealth ex rel. Goodman v. Dratch*, 192 Pa. Super 1, 159 A.2d 70, 71 (1960) ("we consider it to be almost inhuman to completely isolate the child from his grandparents").

child's interests require a state to do so. Grandparent-grandchild relationships vary greatly; the value to a grandchild of a court-ordered visitation may be insubstantial where there has been no prior contact with the grandparents, or where the child is likely to be adversely affected by conflicts between the grandparents and the parents. If the injury to the familial interests of the parents greatly outweighs the benefits to the child, an order directing a particular type or frequency of visitation, or possibly even any visitation at all, could be unconstitutional.

But that possibility simply is not sufficient to support a purely facial challenge to RCW 26.10.160(3). Respondent bears the burden of establishing that the familial interests of the grandchild and grandparent will almost invariably be too minor to justify *any* visitation order of any length or form. There is nothing in Washington's experience with grandparent visitation orders, or in the experience of the other forty-nine states regarding grandparent visitation statutes, to support such a contention.

(3) A state also acts to further *parental* rights when, following the death of one parent, it intervenes where necessary to insure continued contact between a child and the grandparents on the side of the deceased parent.

If a deceased parent was, during his or her lifetime, providing his or her parents with access to their grandchildren, it would certainly be reasonable for the state to assume that continued visitation with those grandparents would have been the deceased's preference, and to act on that premise. Numerous state laws on matters such as intestate succession proceed on assumptions of this sort; the practice of attempting to place abandoned or orphaned children for adoption by individuals of the same faith as their biological parents has a similar foundation. The grandparent visitation laws that single out grandparents related to a deceased parent are grounded on the entirely reasonable belief that in providing such visitations the state is carrying out the likely wishes of that parent.[65]

65. *Preston v. Mercieri*, 573 A.2d 128, 131 (N.H. 1990) (statutes (Cont'd)

That the state was implementing a parental decision of the decedent would be crystal clear if he or she had left a will expressing such a preference; in reality, however, even those parents who make wills simply do not address such matters, if only because they do not anticipate that differences between their spouse and their own parents may later arise and, in retrospect, render such an expression important.

During the early years of their lives, Natalie and Isabelle Troxel had two parents. Before his death, Brad Troxel palpably wanted his daughters to spend time with their paternal grandparents. If while Brad Troxel was alive respondent had sought to prevent Brad from taking his daughters to see petitioners, insisting that any contact with them violated her "parental decision" that the girls not see those grandparents, a constitutional challenge on that basis would assuredly have failed. Brad Troxel's own familial relation with his daughters, and his "parental decision" to bring about that visitation, would surely have enjoyed the same constitutional status and protection as petitioner's objections. Were Brad Troxel alive today, the Constitution clearly would not afford respondent a right to prevent him from taking his daughters to visit petitioners; as in *Smith* and *Michael H.*, the state of Washington could chose to respect his wishes even in the face of the mother's objections.

In the wake of Brad Troxel's death, respondent does not contend that Brad Troxel, who regularly brought his daughters to stay and visit with their paternal grandparents, would have wanted those visits to end after his death. The question here is whether the Constitution either forbids the state of Washington to continue to respect a parental decision after the parent has died, or prohibits the state from doing so unless that decision

(Cont'd)
authorize grandparent visitation when parent has died because that parent "can no longer ensure continued contact with grandchildren"); *Lucchesi v. Lucchesi*, 71 N.E.2d 920, 922 (Ill. App. 1947) (where father had been killed in action in France during World War II, "a decent respect for the wishes of the dead" supports award of visitation rights to paternal grandparents).

has been embodied in a will or other formal written document. Surely, absent extraordinary circumstances, the states are free to make such choices.

Because visitation orders arising out of the death of a parent constitute a large portion of the applications of grandparent visitation statutes, respondent cannot establish — as she must to support a facial challenge — that almost all applications of the Washington law are unconstitutional.

CONCLUSION

For the above reasons, the decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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APPENDIX