WISCONSIN SUPREME COURT

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

CACIE M. MICHELS,

Petitioner-Appellant,

v.

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

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

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

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

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

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

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STATEMENT OF THE ISSUE

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

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

STATEMENT OF THE FACTS AND OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

The court ultimately concluded:

> "(T)he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Id. at 72-73.

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

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

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

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

> "(W)e do not consider the primary constitutional question passed on by the Washington Supreme Court – whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." Id. at 73.

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

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

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

The court then concluded:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "(T)he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." 530 U.S. at 72-73.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Tennessee Supreme Court has noted:

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

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

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

CERTIFICATION

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

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

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

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

CERTIFICATE OF SERVICE

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

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

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

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

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

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

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

CERTIFICATION OF APPENDIX

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

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

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

Dated this 11th day of July, 2018.

WELD RILEY, S.C.

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

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