No. 17AP1142

In the Supreme Court of Wisconsin

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

CACIE M. MICHELS,
PETITIONER-APPELLANT,

v.

KEATON L. LYONS,
RESPONDENT-APPELLANT,

JILL R. KELSEY,
PETITIONER-RESPONDENT

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

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

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INTRODUCTION

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

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

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

STATEMENT OF INTEREST

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: August 24, 2018.

Respectfully submitted,

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CERTIFICATION

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

Dated: August 24, 2018.

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KEVIN M. LEROY
Deputy Solicitor General

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

I hereby certify that:

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

I further certify that:

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

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

Dated: August 24, 2018.

_____

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