No. 17-913

In the Supreme Court of the United States

D.T.,

Petitioner,

v.

W.G.,

Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Civil Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case does not present the broad question posed in the petition. Fairly characterized, the only question presented is whether the grandparent visitation order in this case violates the Fourteenth Amendment's Due Process Clause.

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INTRODUCTION

In petitioner's view (Pet. i), this case presents the question "[w]hether the Fourteenth Amendment gives adoptive parents the same right as biological parents to direct the upbringing of their children." That is so, according to petitioner (Pet. 28), because Alabama's grandparent visitation regime "sharply differentiates between biological and adoptive parents, * * * provid[ing] the former with a suite of protections it denies the latter."

That is unequivocally wrong.

Alabama law provides for contested grandparent visitation in two circumstances. Under Alabama's general grandparent visitation statute—Section 30-3-4.2—grandparents may obtain a visitation order over the objection of the child's parents when the court finds that denial of visitation would affirmatively harm the child, and the grandparent agrees to cooperate with the child's parents. Ala. Code § 30-3-4.2(e)(1)-(2). This provision applies identically to *both* natural *and* adoptive parents. See Ala. Code § 30-3-4.2(a)(1), (b)(4).

Section 26-10A-30 provides that a grandparent may obtain court-ordered visitation under a less demanding standard, but only in cases where the child has been adopted by his or her natural grandparent, great-grandparent, aunt or uncle, great-aunt or great-uncle, or sibling. Section 26-10A-30 is the exclusive means for obtaining grandparent visitation in cases involving such intrafamily adoptions—but it does not apply in cases where the child has been adopted out-of-family. The relevant distinction in this case is thus not whether the parent is a natural parent or an adoptive parent. It is whether the adop-

tion is intrafamily or out-of-family.

Alabama (like other States) has good reason for differentiating between intrafamily and out-of-family adoptions with respect to grandparent visitation. *Out-of-family* adoptions typically involve a clean and absolute break from the child's natural family, and adoptive parents in such cases do not expect the adoptee's biological family to so easily reinsert themselves. *Intrafamily* adoptions, by contrast, involve a preservation and continuation of biological family relationships. Grandparent visitation in such cases is thus inherently less intrusive and, indeed, often crucial to the maintenance of emotional stability in the midst of trying times. It is common sense that the State, in setting the terms for grandparent visitation, may take this important distinction into account.

This case therefore does not turn on petitioner's status as an adoptive parent. It turns, instead, on her status as AKS's natural grandmother *before* the adoption took place.

Against this backdrop, the petition unravels. To begin, there is no conflict among the lower courts on the question actually presented here: None of the cases cited in the petition suggests that any other court would invalidate Alabama's intrafamily grandparent visitation statute or that it would, for any other reason, require denial of visitation in this case. Nor can petitioner seriously argue that Alabama's grandparent visitation scheme is inconsistent with the plurality decision in *Troxel* v. *Granville*, 530 U.S. 57 (2000), which likely does not state a controlling rule of law in any event. Finally, this would be a poor vehicle for review of the question posed in the petition. Alabama statutory law expressly provides

that adoptive parents have all the rights of natural parents, and respondent would likely be entitled to visitation under the requirements of Section 30-3-4.2 either way.

The petition accordingly should be denied.

STATEMENT

A. Legal background

1. Alabama's Adoption Code establishes a two-track adoption scheme: one for adoption by those who are *not* close family members of the adoptee, and one for those who *are*.

a. On the first track—in cases of general adoption by non-family members—Alabama Code Section 26-10A-5 provides as a baseline that any adult person (or spouses jointly) "may petition the court to adopt a minor."

An adoption proceeding commences with the filing of a petition with the county probate court. Ala. Code § 26-10A-16. The petition must be served upon the adoptee's biological parents, legally appointed custodians or guardians, and the State's investigative agency. Ala. Code § 26-10A-17. A grandparent does not need to be served unless he or she is the surviving parent of a deceased parent of the adoptee. *Ibid.*

As in other States, all adoptions in Alabama are conditioned on the petitioner's demonstration of fitness to care for the child. *See* Ala. Code § 26-10A-19. The State thus conducts both pre- and post-placement investigations of adoptive parents "to determine the suitability of each petitioner and the home in which the adoptee will be placed." *Ibid.* The State also prohibits payments for adoptions and thus

requires adopting parents to report any fees paid in connection with the adoption, whether to an adoption agency or to the natural parents. See Ala. Code § 26-10A-23. As a general matter, however, once an adoption is finalized, "the adoptee shall be treated as the natural child of the adopting parent or parents and shall have all rights and be subject to all of the duties arising from that relation, including the right of inheritance." Ala. Code § 26-10A-29.

b. When an adoption petition is granted to someone who is not related to the adoptee, Section 30-3-4.2 governs subsequent petitions for visitation rights filed by the biological grandparents of the adoptee. Contrary to petitioner's assertion (Pet. 4), Section 30-3-4.2 applies by its terms to petitions for visitation of children of both natural and adoptive parents. See Ala. Code § 30-3-4.2(a)(1), (b)(4).

Section 30-3-4.2 provides that a grandparent may petition the circuit court for "reasonable visitation rights with respect to the grandchild." Ala. Code § 30-3-4.2(b). In such proceedings, "[t]here is a rebuttable presumption that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child." Ala. Code § 30-3-4.2(c)(1). The presumption may be overcome with clear and convincing evidence that "petitioner has established a significant and viable relationship with the child for whom he or she is requesting visitation" and "[t]he loss of an opportunity to maintain a significant and viable relationship between the petitioner and the child has caused or is reasonably likely to cause harm to the child." Ala. Code § 30-3-4.2(c)(2), (e)(2). The petitioning grandparent must also demonstrate that he or she is "willing to cooperate with the parent

or parents if visitation with the child is allowed." Ala. Code § 30-3-4.2(e)(3).

c. On the second track of Alabama's adoption scheme—cases involving adoption by specified close family members—somewhat different rules apply. Section 26-10A-28 provides that, if the adoptee has resided with the prospective adoptive parents for one year or longer, the adoption may proceed without an investigation as to fitness or a report concerning fees that may have been paid. This rule applies to adopting grandparents, great-grandparents, great-uncles and great-aunts, aunts and uncles, siblings and half-siblings, and their respective spouses, if any. Ala. Code § 26-10A-28. And Alabama Code Section 26-10A-27 extends the same exceptions to adopting stepparents.

Once again, when an adoption is finalized, "the adoptee shall be treated as the natural child of the adopting parent or parents and shall have all rights and be subject to all of the duties arising from that relation, including the right of inheritance." Ala. Code § 26-10A-29.

d. Although intrafamily adoptions covered by Section 26-10A-28 are not conditioned on passing pre- and post-adoption fitness determinations, they *are* conditioned on acceptance of a more permissive scheme for court-ordered grandparent visitation. The Alabama Code provides, in particular, that grandparent visitation rights following an intrafamily adoption under Section 26-10A-28 "may be maintained or granted at the discretion of the court at any time prior to or after the final order of adoption is entered upon petition by the natural grandparents, if it is in the best interest of the child." Ala. Code § 26-10A-30. The burden is on the petitioning grand-

parent to demonstrate the child's best interests favor visitation. Pet. App. 21a-22a.

The Alabama Supreme Court addressed the apparent tension between Sections 26-10A-29, which provides that the adoptee shall be treated as the natural child of the adopting parents, and 26-10A-30, which creates a special rule for grandparent visitation in cases of intrafamily adoption, in *Ex parte D.W.*, 835 So. 2d 186, 191 (Ala. 2002). There, the court concluded that

> [i]t was the clear intent of the Legislature in enacting § 26-10A-30 to give the trial court the authority to grant post-adoption visitation rights to the natural grandparents of the adoptee, when the adoptee is adopted by a family member. The only reasonable conclusion is that the Legislature intended to limit the rights of the adopting parents by allowing the possibility of court-ordered grandparent visitation [even] over the objections of the adopting parents.

Ibid. In other words, although the legislature intended for adopting parents to assume the status of natural parents as a general matter, it did not intend for close family members to use adoption as a tool for cutting out grandparents whose involvement in the child's upbringing remains in the child's best interest.

2. a. States have well recognized reasons to treat intrafamily adoptions differently from out-of-family adoptions. "When a child is adopted by a non-relative * * * the ultimate effect * * * [is] a termination of previous familial relationships and the creation of new familial relationships." *In re Hunter H.*, 744

S.E.2d 228, 232 (W. Va. 2013). See *id.* at 231-232 (discussing and generally approving "the distinction between adoptions that occur inside and outside of the family"). Thus, out-of-family adoptive parents ordinarily expect—and the State rightly provides—a clean break from the adoptee's natural family. See, *e.g.*, *In re Adoption of Child by W.P.*, 748 A.2d 515, 525 (N.J. 2000). As just one example, state law often provides that when children are adopted out-of-family, their inheritance rights under state intestacy law are extinguished vis-à-vis their natural parents. *E.g.*, Iowa Code Ann. § 633.223(1); N.Y. Domestic Relations Law § 117.

Intrafamily adoptions are different. As the New York Surrogate's Court has explained, "in cases where a child is adopted by a close family member," it is likely that there will be "continued contact" with the adoptee's natural family. *In re Estate of LaBelle*, 26 N.Y.S.3d 445, 447 (N.Y. Sur. 2016). "Because there is a likelihood of [continued] contact with" biological family members "in intrafamily adoptions, the policy concerns of severing adoptees from their biological parents and securing them in new families are not implicated." *Ibid.* (citing *Matter of Best*, 485 N.E.2d 1010 (N.Y. 1985)). An intrafamily adoption therefore often will *not* terminate the adoptee's inheritance rights within his or her natural family. *Ibid.* Accord, *e.g.*, *Best*, 485 N.E.2d at 1056.

That is the distinction underlying the difference between Sections 30-3-4.2 and 26-10A-30. Because intrafamily adoptions involve a preservation and legal reaffirmation of pre-existing natural family relationships, many States provide more permissive grandparent visitation schemes in cases of intra-family adoptions. *See, e.g.*, W. Va. Code § 48-10-902

(an out-of-family adoption will terminate a pre-existing grandparent visitation order, whereas an intrafamily adoption will not).

b. These different grandparent visitation schemes reflect, in part, the widely recognized importance of grandparent relationships, coupled with the destabilizing effect that a change in family circumstances (like an intrafamily adoption) may have. Cf. Sara M. Moorman & Jeffrey E. Stokes, *Solidarity in the Grandparent-Grandchild Relationship and Trajectories of Depressive Symptoms*, 56 Gerontologist 408 (2016) (noting that "affinity with a grandparent is associated with fewer depressive symptoms").

"[T]he relationship between children and their grandparents is an important and unique one with significant emotional implications." *In re D.C.*, 4 A.3d 1004, 1011 (N.J. 2010). "The emotional attachments between grandparents and grandchildren have been described as unique in that the relationship [does not involve] the psycho-emotional intensity and responsibility that exists in parent/child relationships." *Ibid.* (collecting sources). In addition, grandparent relationships foster "cultural and historical sense of self." *Ibid.* (quoting *Moriarty* v. *Bradt*, 827 A.2d 203, 211 (N.J. 2003)). Thus, the fact that "grandparents and grandchildren normally have a special bond cannot be denied." *Michael* v. *Hertzler*, 900 P.2d 1144, 1149 (Wyo. 1995).

The role of grandparents in the lives of their grandchildren has grown more important in modern times. In a range of circumstances, including homes with one parent or two working parents, "persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing." *Troxel* v. *Granville*, 530 U.S. 57, 64

(2000). Indeed, at the time that *Troxel* was decided, "approximately 4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents." *Ibid.*

Courts thus uniformly recognize the "increasingly important role in a child's development" of the grandparent relationship, which often "become[s] crucial to the child's physical or emotional security." *Blixt* v. *Blixt*, 774 N.E.2d 1052, 1064 (Mass. 2002). "A very special relationship often arises and continues between grandparents and grandchildren * * * and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship." *Goff* v. *Goff*, 844 P.2d 1087, 1090 (Wyo. 1993).

B. Factual background

This case involves an intrafamily adoption under Section 26-10A-28, which is the exclusive avenue for grandparent visitation in cases involving intrafamily adoptions. Petitioner DT is the adopted child's maternal grandmother and adoptive parent. Respondent WG is the child's paternal grandmother.

WG has been closely involved in AKS's life from the beginning. She was present at AKS's birth (Pet. App. 3a) and for most of the child's early life, she lived within 30-60 minutes by car. WG visited AKS every other weekend for the first six months of the child's life, providing diapers, wipes, food, and clothing. *Ibid.* She also occasionally cared for AKS overnight and during the day at AKS's home. *Id.* at 3a-4a.

When AKS was six months old and the child's parents separated, AKS and her biological mother moved to Demopolis to live with the child's maternal

great-grandmother. Pet. App. 4a. WG lived very close to AKS during that time and visited even more often, continuing to provide assistance with diapers, food, money, and other necessities. *Id*. at 6a-7a.

By March 2010, when AKS was 18 months old, her living conditions had begun to deteriorate. Pet. App. 7a. DT, who lived just outside Tuscaloosa and also had been involved with AKS's upbringing, therefore sought and was granted custody. *Id*. at 4a, 7a. WG was aware of this change and assented to it. *Id*. at 7a. She thereafter continued to maintain a close connection with AKS and to provide emotional and financial support. *Ibid*.

AKS has remained in DT's custody ever since. Pet. App. 4a. All the while, WG continued to visit regularly and to provide financial and emotional support. *Id*. at 7a. WG occasionally kept AKS overnight in her home in Demopolis through January 2012. *Id*. at 4a. Each year through 2013, WG threw a birthday party for AKS. *Id*. at 7a.

In 2013, WG was forced to move to Louisiana to care for her ailing father and for work reasons. Pet. App. 5a. Around the same time, DT filed a petition for adoption without informing WG. *Id*. at 7a. She also began restricting WG's visits with her granddaughter, permitting WG to see AKS just four times in calendar-year 2013. ROA54.[1]

The probate court issued a final decree of adoption on November 12, 2013. The adoption proceed-

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[1] We cite to the record on appeal (from the more recent appeal on the merits) as ROA__. As petitioner notes (Pet. 3 n.1), the record contains the parties' full names and other sensitive information and is therefore sealed pursuant to state law.

ings took place entirely "unbeknownst to [WG]." Pet. App. 7a.

After the final adoption decree issued, and without explanation, DT further reduced WG's contact with AKS, this time to just a couple of two-hour supervised visits in 2014. In September 2014, DT summarily terminated all interactions between WG and AKS. Pet. App. 4a. Although WG repeatedly contacted DT that year, her phone calls and text messages went unreturned. *Ibid*. DT eventually blocked WG's phone number because DT found WG's requests to see AKS "annoying" and because WG "refused to take no for an answer." Pet. App. 8a.

C. Procedural background

1. WG resorted to the courts for relief. Unaware of the adoption that had been finalized in 2013, WG first filed for an order of visitation in the Juvenile Court, which was the court that had granted DT legal custody of AKS in 2010. Pet. App. 4a. DT moved to dismiss, asserting that her adoption of AKS deprived the Juvenile Court of jurisdiction. This was the first time—16 months after it had been finalized—that WG was informed of the adoption.

2. WG thereafter filed a petition for visitation in the Tuscaloosa Probate Court under Section 26-10A-30. Pet. App. 24a-25a. After an appeal concerning a procedural matter that is not relevant to the issues here, the probate court held a one-day trial, during which the probate judge considered and weighed the parties' testimony, exhibits, and legal arguments. Pet. App. 2a.

The probate court found that it was in AKS's best interests that she be allowed to maintain her relationship with WG. Pet. App. 8a, 16a. For her part,

DT testified that she stopped allowing overnight visits with WG because WG had allowed her fiancé to stay the night at the same time as AKS. *Id.* at 18a. She testified she ultimately cut off the visits altogether because WG would not promise to keep AKS's biological father from seeing the child. *Id*. at 8a. But the probate court did not find these explanations credible, concluding that DT "offered no evidence to support her decision to cut-off [WG's] long-standing relationship with the * * * child." Pet. App. 8a. The court therefore granted WG's petition for visitation.

3. DT moved to vacate or amend the final order of visitation (ROA60), presenting an Equal Protection Clause challenge for the first time. The probate court summarily denied the motion.

4. The Alabama Court of Civil Appeals affirmed. Pet App. 1a-23a. With respect to DT's due process challenge to Alabama's intrafamily-adoption grandparent visitation statute, the court observed that "our [state] supreme court has already rejected the argument that § 26-10A-30 is unconstitutional." Pet. App. 9a-10a (citing *Ex parte D.W.*, 835 So. 2d 186 (Ala. 2002)). The court concluded that it was "bound by the holding of *Ex parte D.W.*, and * * * therefore not at liberty to reach the conclusion that the adoptive parent urges." *Id*. at 10a. The court did not reach DT's equal protection argument, which DT had not presented to the probate court until after issuance of that court's final order of visitation.

The court also upheld the probate court's factual findings. Recognizing that it owed great deference to the probate court's credibility determinations and weighing of the evidence (Pet. App. 20a-21a), the court would not set aside the probate judge's finding

"that [WG] and the child had enjoyed a close, loving relationship, that that relationship was a benefit to the child, and that [DT] had not presented evidence satisfying the probate court that her decision to terminate that relationship was warranted or necessary" (*id.* at 22a). It was not an abuse of discretion, in other words, for the probate court to conclude that "an award of visitation to [WG] was warranted because of the close, loving, and beneficial relationship that the child had enjoyed with her, that the relationship should be allowed to continue so that the child could maintain a connection with her paternal relatives, and that no evidence indicated that the child's best interest would be better served by denying the requested visitation." *Ibid.*

5. The Alabama Supreme Court denied further appellate review, with two Justices noting dissents. Pet. App. 33.

ARGUMENT

A. This case does not present the question posed in the petition

Petitioner asserts (Pet. i) that this appeal presents the broad question of "[w]hether the Fourteenth Amendment gives adoptive parents the same right as biological parents to direct the upbringing of their children." That question is not, in fact, presented by the circumstances of this case.

As we have explained (*supra* at 3-6), Alabama has two grandparent visitation statutes. Ordinarily, grandparents seeking visitation must satisfy the strict requirements of Section 30-3-4.2, which applies in precisely the same way to both natural and adoptive parents. See Ala. Code § 30-3-4.2(a)(1), (b)(4). It requires proof that, among other things,

"[t]he loss of an opportunity to maintain a significant and viable relationship between the petitioner and the child has caused or is reasonably likely to cause harm to the child" and that the petitioning grandparent is "willing to cooperate with the parent or parents if visitation with the child is allowed." Ala. Code § 30-3-4.2(e).

But petitioner does not challenge Section 30-3-4.2 because it does not apply here. Such a challenge would surely fail under the plurality's reasoning in *Troxel* v. *Granville*, 530 U.S. 57 (2000), in any event, as even petitioner appears to acknowledge (*e.g.*, Pet. 15 n.7). Indeed, we are unaware of any court anywhere in the country to have held that visitation statutes in the general form of Section 30-3-4.2 violate the Due Process Clause—and several of petitioner's own cases uphold far less demanding statutes against constitutional attack under *Troxel*. See, *e.g.*, *SooHoo* v. *Johnson*, 731 N.W.2d 815 (Minn. 2007); *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006).

Lacking any basis to challenge Section 30-3-4.2, petitioner instead challenges Alabama's second, narrower grandparent visitation statute: Section 26-10A-30. But that statute does not draw the distinction that petitioner challenges here. The difference between Section 26-10A-30 and Section 30-3-4.2 is not that the former applies to adoptive parents while the latter applies to natural parents; it is, instead, that Section 26-10A-30 applies to cases involving *intrafamily* adoptions, whereas Section 30-3-4.2 applies in all other circumstances. Thus, the probate court applied a different standard to DT from the standard that would have applied in a circuit court action under Section 30-3-4.2, not because she is an

adoptive parent, but because she is a close relative of AKS to whom Section 26-10A-30 applies. See *Ex parte D.W.*, 835 So. 2d 186, 189 (Ala. 2002) (Section 26-10A-30 is "limited [to the] context of intrafamily adoptions").

In arguing otherwise, petitioner ignores the statutory scheme and instead focuses on snippets of dictum from the lower court's opinion. See Pet. App. 14a ("the rights of adoptive parents are not equivalent to those of natural parents"). Accord *D.W.*, 835 So. 2d at 190. If that language actually formed the basis for the decision below, this case might be different. But it did not. That matters because "this Court reviews judgments, not opinions." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (citing cases).

Here, the court's judgment is limited to grandparent visitation under the terms of Section 26-10A-30, which applies strictly to intrafamily adoptions. On this point, there can be no dispute: The lower court disposed of petitioner's due process argument because it was "bound by the holding of *Ex parte D.W.*" (Pet. App. 10a), and *D.W.* stated plainly that its holding was "limited [to the] context of intrafamily adoptions" (835 So. 2d at 189).

Properly evaluated against Alabama's statutory scheme, therefore, the question in this case is whether a State may constitutionally apply more permissive grandparent visitation standards to cases involving intrafamily adoptions. But petitioner has not preserved that line of argument, and it is therefore waived. In any event, the answer to that question is assuredly *yes*, as we explain below in Section D. For present purposes, however, it is enough to note that this case simply does not present—and

therefore does not give the Court an opportunity to answer—the much broader question posed in the petition.

B. There is no relevant split among the lower courts

Having misstated the question presented here, petitioner unsurprisingly fails to demonstrate a pertinent split among the lower courts. See Pet. 12-15. Three of the six decisions that petitioner cites as conflicting with the holding below did not involve intrafamily adoption at all and are therefore wholly inapposite. *In re Scarlett Z.-D.*, 28 N.E.3d 776 (Ill. 2015); *In re D.C.*, 4 A.3d 1004 (N.J. 2010); *SooHoo* v. *Johnson*, 731 N.W.2d 815 (Minn. 2007). The remaining three ostensibly conflicting decisions cited in the petition give no reason to believe that the outcome below would have been any different if this case had arisen in a different State. *In Matter of P.B.*, 117 A.3d 711 (N.H. 2015); *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006); *Visitation of Cathy L.(R.)M.* v. *Mark Brent R.*, 617 S.E.2d 866 (W. Va. 2005) (per curiam). There accordingly is no conflict for the Court to resolve.

1. Three of the cited cases do not involve intrafamily adoption

Take first the decisions of the supreme courts of Illinois, Minnesota, and New Jersey. None addressed the question of grandparent visitation in the context of intrafamily adoption, and thus none can be said to conflict with the decision below.

a. The Illinois court's decision in *In re Scarlett Z.D.*, 28 N.E.3d 776 (2015)—which receives only a passing citation and no discussion in the petition (see Pet. 13)—involved a custody dispute between a man

and woman who were engaged but never married. *Id.* at 781-782. While the two were together, the woman adopted a child. The man acted as a "father figure" to the child—living with the mother and child and providing financial support—but never sought legal recognition as the child's father. *Id.* at 782. After the couple split and the woman took the child with her, the man filed a petition for a declaration of parental rights and, ultimately, for custody. *Ibid.*

Scarlett has no relevance here whatsoever. To begin, it is not a visitation case, but a custody case. Beyond that, the petitioner there was not a grandparent, and the adoptive mother had no pre-existing natural family relationship with the child. The issue presented on appeal was whether the petitioner was a "parent" at all, with standing to commence a custody proceeding under Illinois law. 28 N.E.3d at 782. The Illinois Supreme Court held that he was not—a conclusion wholly unrelated to the issues presented in the petition.

b. The Minnesota court's decision in *SooHoo* v. *Johnson*, 731 N.W.2d 815 (2007)—another case that receives only passing citations in the petition (Pet. 13, 15 n.7)—is distinguishable on similar grounds. That case involved a dispute between two never-married women. As in *Scarlett*, one of the women formally adopted a child; the other, who did not formally adopt, lived with the adoptive parent and child as a de facto co-parent. *Id.* at 818-819.

After the couple separated, the non-adopting co-parent sought an order of visitation, which was granted. 731 N.W.2d at 819. The Supreme Court of Minnesota upheld the order against constitutional attack, holding Minnesota's visitation statute to be "narrowly drawn to the state's compelling interest in

protecting the general welfare of children by preserving the relationships of recognized family units." *Id*. at 824. The court observed that its holding on that point was "consistent with what other state supreme courts have concluded regarding [similar] statutes." *Id*. at 824 n.3.

As in *Scarlett*, the petitioner in *SooHoo* was not a grandparent, and the adoptive parent was not a close natural family member. On top of that, the court *affirmed* the visitation order. Thus, nothing in the disposition of *SooHoo* remotely suggests that WG would have been denied visitation if her petition had arisen in Minnesota rather than Alabama.

c. The same is true of the New Jersey Supreme Court's decision in *In re D.C.*, 4 A.3d 1004 (2010). After twins were adopted by their foster mother, the previously granted visitation rights of the twins' adult siblings were terminated. When the district court and court of appeals refused to grant visitation under a New Jersey statute similar to Section 30-3-4.2, the New Jersey Supreme Court reversed. *Id.* at 1010. The court explained in particular that, although the "right of fit parents, biological or adoptive, to raise their children without outside interference" is "deeply-embedded," ordering visitation so that a close sibling could "continu[e] an emotionally sustaining relationship" was a "diminution of parental autonomy" that was a "proper exchange for the protection of the child." *Id.* at 1022-1023.

Once again, nothing in what the court said in *D.C.* suggests that this case would have turned out any differently in New Jersey. That is particularly so because the court in *D.C.* did not have before it a visitation statute limited to intrafamily adoption cases.

2. The remaining three decisions are not in conflict with the decision below

Petitioner's remaining three decisions, although involving intrafamily adoptions, are likewise unhelpful to petitioner. In the end, there is no reason to think that any of these courts would have denied WG's petition for visitation for any reason.

a. Petitioner's reliance (Pet. 13-14) on *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006), is especially puzzling. There, the Colorado Supreme Court considered the case of paternal grandparents seeking visitation with their grandchild, who had been adopted by their maternal aunt and uncle after their natural parents both had died. *Id.* at 319-320. Like the court below, the Colorado court *rejected* the adoptive parents' argument that Colorado's grandparent visitation statute violated the Due Process Clause under *Troxel*. What is more, the Colorado court did not have before it—and thus had no basis to opine upon—the constitutionality of a distinct intrafamily adoption statute like Section 26-10A-30. Thus nothing in the court's holding in *C.A.* can be said to conflict with the decision below.

b. So too of the New Hampshire Supreme Court's decision in *In Matter of P.B.*, 117 A.3d 711 (2015). True, the court there affirmed a denial rather than a grant of visitation rights. But like Colorado, New Hampshire does not employ a different visitation standard for intrafamily adoptions and thus had no opportunity to pass upon the constitutionality of an intrafamily-adoption grandparent visitation statute like Section 26-10A-30. Like the Colorado statute at issue in *C.A.*, moreover, New Hampshire's grandparent visitation statute allows for visitation when the grandparent overcomes the "presum[ption] that

fit parents naturally act in the best interests of their children" with proof that court-ordered "visitation would be in the best interest of the child." *Id.* at 715. That is what was required of WG here. See Pet. App. 21a-22a. There is therefore no reason to suspect that WG's petition for visitation would have been decided any differently in New Hampshire.

Indeed, there is particular reason to believe that WG *would have* obtained a visitation order in New Hampshire: The court in *P.B.* suggested that a "secretive" intrafamily adoption may well favor a grant of visitation rights. 117 A.3d at 716. That is, of course, exactly what happened here.[2]

c. That leaves only the West Virginia Supreme Court's decision in *Visitation of Cathy L.(R.)M.* v. *Mark Brent R.*, 617 S.E.2d 866 (2005) (per curiam). That case, too, is inapposite. There, after a child was adopted by her great-uncle and great-aunt, the child's grandparents sought a visitation order under West Virginia's general grandparent visitation statute. *Id.* at 868. West Virginia's statute prescribes the same general standard as Section 26-10A-30, except that it also lists 13 statutory factors that courts must consider in evaluating the best interests of the child. *Id.* at 870. Applying that framework, the family court granted visitation. *Id.* at 868. The West

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[2] In *P.B.*, the adoptive parents (the adoptee's natural aunt and uncle) argued that the statute was unconstitutional because it treats adoptive and natural parents differently. 117 A.3d at 714. The New Hampshire Supreme Court disagreed, concluding as a matter of state statutory interpretation that the New Hampshire law "permits grandparents to seek visitation with both natural and adopted grandchildren and requires judicial deference to a natural or adoptive parent's judgment." *Ibid.* That state-law holding has no relevance here.

Virginia Supreme Court reversed on appeal, but it did so on case-specific grounds:

> Devoting appropriate weight to the [adoptive parents'] preferences in this very difficult case and based upon our review of statutory authority and applicable precedent, we find that grandparent visitation should not have been granted in this case. The preferences of the parents were not adequately considered by the family court, and proper weight was not given to those preferences.

617 S.E.2d at 875. Accord *ibid.* ("[T]he preponderance of the evidence in the present case, when the parents' wishes are properly incorporated in the analysis, does not indicate that visitation is in the best interests of [the child]."). Nothing in that fact-bound, state-law conclusion suggests that the West Virginia court would invalidate Alabama's grandparent visitation statute or the specific order in this case under *Troxel*.

Indeed, the court's opinion suggests the opposite. West Virginia's statute "distinguishes between adoptions occurring within the family and those occurring outside the family," in that a preexisting grandparent visitation order is *not* automatically terminated by an intrafamily adoption, where it *is* automatically terminated by an out-of-family adoption. 617 S.E.2d at 871. That approvingly-cited distinction is the same one at issue in this case.

There is, in short, no split here: None of the cases cited in the petition suggests that any other court would invalidate Alabama's grandparent visitation scheme or otherwise require denial of grandparent visitation in this case. In asserting otherwise, peti-

tioner picks isolated snippets of dictum from the opinions she cites, attempting to drum up a conflict by comparing them with equally isolated snippets from *Ex parte D.W.* See Pet. 13-15. But she declines to discuss the *facts* and *holdings* of these cases, which present no conflict at all. And as we have noted (*supra*, at 15), "this Court reviews judgments, not opinions." *Chevron*, 467 U.S. at 842.

C. Section 26-10A-30 is consistent with *Troxel*

Certiorari is unwarranted for an additional reason: The holding below is correct.

Petitioner's due process argument proceeds in two steps: She argues, first, that adoptive parents are entitled to the same due process protections as are natural parents (Pet. 20-24); and, second, that the State therefore may order grandparent visitation with respect to adopted children only in accordance with this Court's decision in *Troxel* (Pet. 24-27). That reasoning falls short, however, because Section 26-10A-30 is consistent with *Troxel*.

1. It first bears emphasizing that the petition does not address *Troxel*'s failure to produce a majority opinion. Under *Marks* v. *United States*, 430 U.S. 188 (1977), "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193. But as highlighted by the Court's grant of review in *Hughes* v. *United States*, No. 17-155 (set for argument March 27, 2018), application of the *Marks* framework to a divided opinion is often a difficult task, at times requiring the placement of square pegs in round

holes. This is a case in point: It is doubtful that either of the *Troxel* concurrences can be said to rest on "narrow[er] grounds" than the plurality opinion, or vice versa. It is therefore equally doubtful whether *Troxel* produced a binding rule of law at all.

2. Even accepting the petition's implicit assumption that the *Troxel* plurality opinion is binding, the decision in this case is fully consistent with the plurality's view.

The Washington statute at issue in *Troxel* was "breathtakingly broad." 530 U.S. at 67. It allowed a court to grant visitation of a child to "any person," "at any time," based on the court's independent judgment of the best interests of the child, without an iota of deference to the child's parents' own judgment. *Ibid*. The statute thus "effectively permit[ted] any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review," with "no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." *Ibid*. The plurality found it particularly troubling that the trial court in *Troxel* had *presumed* that grandparent visitation was in the child's best interests and put the burden on the parents to rebut that presumption. *Id*. at 69. The plurality expressly "rest[ed] [its] decision on the sweeping breadth" of this statutory scheme, and on "the application of that broad, unlimited power in [that] case." *Id*. at 73.

The circumstances here are quite different. To begin, Section 26-10A-30 does not allow "any person," "at any time" to seek visitation; rather, it allows only grandparents to seek visitation, and even then only when the child has been adopted by a close relative. This narrow scheme isn't close to the "breathtakingly

broad" statute that was at issue in *Troxel*. That is especially so because, under Section 26-10A-30, it was WG's burden to prove that AKS's best interests favored visitation, and not the other way around. See Pet. App. 21a-22a.

Other decisions—those cited by petitioner herself as supposedly conflicting with the holding in this case—have rejected *Troxel* challenges to statutory schemes that apply standards similar to those found in Section 26-10A-30. The Supreme Court of Minnesota, for example, upheld Minnesota's visitation statute against a *Troxel* challenge, holding that it was "narrowly drawn to the state's compelling interest in protecting the general welfare of children by preserving the relationships of recognized family units." *SooHoo*, 731 N.W.2d at 824. And as we noted in Section B, the court's holding was "consistent with what other state supreme courts have concluded regarding [similar] statutes." *Id*. at 824 n.3. See, *e.g.*, *C.A.*, 137 P.3d at 319, 326.

It also bears mention that the *Troxel* plurality found it relevant that "there [was] no allegation that [the parent] ever sought to cut off visitation entirely." 530 U.S. at 71. The disagreement in that case was only over *how much* visitation to allow. *Ibid*. Here, of course, DT has attempted to eliminate WG from AKS's life altogether. Pet. App. 8a. And she has done so after surreptitiously obtaining her adoption order. Pet. App. 7a.

This case therefore does not involve the kind of obnoxious judicial micromanagement of private family affairs that was at issue in *Troxel*; it is, instead, about the court's justifiable refusal to allow one family member to use the State's adoption laws to exclude another family member at the expense of

the child's best interests. There is accordingly no reason to think that Alabama's statutory scheme or the specific adoption order in this case runs afoul of the standard stated in the *Troxel* plurality opinion.

D. Petitioner's equal protection argument is neither preserved nor persuasive

Perhaps sensing the weakness of her argument under *Troxel* (Pet. 24-27), petitioner dedicates a larger portion of her brief (Pet. 27-32) to a novel equal protection argument. But she did not preserve this argument before the probate court, and the Court of Civil Appeals declined to reach it. For this reason alone, the Court should not review the equal protection issue here—and, if the equal protection contention is thought to be substantial, that is a reason to deny review of the petition altogether so that the issue could be considered in a case where it is properly presented. Regardless, the equal protection argument is meritless.

1. In Alabama, a legal defense must be raised either in a motion to dismiss under Rule 12, in an answer under Rule 7, in a motion for judgment on the pleadings, or at the trial on the merits—or else it is waived. See Ala. R. Civ. P. 12(h)(2).[3] Thus, a legal defense "first advanced in [a] post-judgment motion to alter, amend, or vacate * * * is untimely." *Consol. Pipe & Supply Co.* v. *City of Bessemer*, 69 So. 3d 182, 189 (Ala. Civ. App. 2010). The upshot is straightforward: "[C]onstitutional issues may not be raised for the first time in a post-judgment motion." *Ibid.*

[3] Pursuant to Section 26-10A-37, the Alabama Rules of Civil Procedure apply to adoption proceedings in probate court. See also Ala. Code. § 12-13-12.

(quoting *USAA* v. *Wade*, 544 So. 2d 906, 917 (Ala. 1989)).

As petitioner candidly acknowledges (Pet. 7-8), she raised her equal protection argument for the first time in her post-judgment motion to alter, amend, or vacate the probate judge's order. Her argument was thus "untimely" (*Consol. Pipe*, 69 So. 3d at 189) and not properly preserved for appellate review (*USAA*, 544 So. 2d at 917).[4]

Petitioner's failure to preserve her Equal Protection Clause challenge likely explains why the Court of Civil Appeals declined to reach it. As the lower court noted with respect to a separately waived point, it "cannot * * * consider" issues not properly preserved before the probate judge. Pet. App. 12a. That by itself "constitutes an independent and adequate state-law ground preventing [this Court] from reaching" petitioner's equal protection argument. *Osborne* v. *Ohio*, 495 U.S. 103, 123 (1990). And either way, this Court generally will "decline to reach an issue that was not decided below." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 553 (2001).

2. Petitioner's equal protection claim is, in all events, meritless. As a general matter, a classification satisfies the Equal Protection Clause if it is

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[4] Petitioner notes (Pet. 8 n.3) that "[u]nder Alabama law, a trial court has the discretion to consider a new legal argument in a post-judgment motion." But the probate court declined to exercise such discretion in this case. Cf. *Espinoza* v. *Rudolph*, 46 So. 3d 403, 416 (Ala. 2010) (when "[t]here is no indication that the trial court considered the merits of the legal argument raised for the first time in [appellant's] postjudgment motion," Alabama courts "will not presume that it did"); *Special Assets, LLC* v. *Chase Home Fin., LLC*, 991 So. 2d 668, 677-678 (Ala. 2007) (same).

"reasonable, not arbitrary, [and] rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). That is just what Section 26-10A-30 does.

As we noted in the Statement (at 6-9), there are good reasons for differentiating between intrafamily and out-of-family adoptions as does Alabama's two-tract grandparent visitation scheme. "[I]n cases where a child is adopted by a close family member," it is likely that there will be "continued contact" with the adoptee's extended natural family. *In re Estate of LaBelle*, 26 N.Y.S.3d 445, 447 (N.Y. Sur. 2016). "Because there is a likelihood of [continued] contact with" biological family members "in intrafamily adoptions, the policy concerns of severing adoptees from their biological parents and securing them in new families are not implicated." *Ibid.* (citing *Matter of Best*, 485 N.E.2d 1010 (N.Y. 1985)). That is why an intrafamily adoption often does not terminate the adoptee's inheritance rights, whereas an out-of-family adoption does. *Ibid.* Accord, *e.g.*, *Best*, 485 N.E.2d at 1013.

In contrast, "[w]hen a child is adopted by a non-relative * * * the ultimate effect * * * [is] a termination of previous familial relationships and the creation of new familial relationships." *In re Hunter H.*, 744 S.E.2d 228, 232 (W. Va. 2013). Thus, out-of-family adoptive parents ordinarily expect and are accorded an absolute break from the adoptee's natural family, including from his or her natural grandparents. See, *e.g.*, *In re Adoption of Child by W.P.*, 748 A.2d 515, 525 (N.J. 2000).

That rationale is the common-sense explanation for the differences between Sections 30-3-4.2 and 26-10A-30. Because intrafamily adoptions preserve pre-existing natural family relationships, including those of the adoptee's grandparents, the law favors grandparent visitation in those circumstances. This makes sense given the importance of grandparent relationships in particular (*D.C.*, 4 A.3d at 1011) and the destabilizing effect that a change in family circumstances may have. See *supra*, at 8.

Thus, in *Hunter*—another case that petitioner puzzlingly claims to be in conflict with the decision below (Pet. 13, 15)—the West Virginia Supreme Court upheld West Virginia's differential treatment of intrafamily and out-of-family adoptions. Under West Virginia law, an out-of-family adoption will terminate a preexisting grandparent visitation order, whereas an intrafamily adoption will not. See W. Va. Code § 48-10-902; *Hunter*, 744 S.E.2d at 229. The West Virginia court cited that differential treatment favorably on its way to rejecting a request for grandparent visitation in cases involving an out-of-family adoption. 744 S.E.2d at 233. We are unaware of, and petitioner does not cite, any court that has disapproved this common sense distinction.

3. A contrary rule—one that subjects intrafamily and out-of-family adoptive parents to the same standard for grandparent visitation—would perversely encourage a race to the courthouse among close family members vying for an advantage in disputes over visitation with children who are no longer in the care of their natural parents. Sadly, "[i]ntrafamily adoptions * * * generate some of the most bitterly contested proceedings." Joan Heifetz Hollinger, *Adoption Law*, 3 Future of Children 43, 44

(1993). Rewarding family members who hastily (or secretly) obtain adoption decrees to obtain advantage in private family disputes would encourage abuse of the State's adoption laws and risk exacerbating family infighting, to the child's detriment.

Given the clear and rational connection between these reasonable policy objectives and the distinctions drawn in Alabama's adoption and visitation laws, there is no equal protection problem here.

E. This is a poor vehicle for review

Even supposing this appeal actually presented the question posed in the petition, this case would present a poor vehicle for review for two reasons.

First, petitioner asserts that Alabama does not "afford adoptive parents the same rights as biological parents" *because*, according to the Alabama Supreme Court, "'the rights of adopting parents are purely statutory.'" Pet. 15, 20 (quoting Pet. App. 40a-41a). Even if that issue were presented here, this case would not cleanly present it, because the Alabama legislature has expressly conferred all of the rights of natural parents on adoptive parents *as a matter of statute*. Section 26-10A-29 provides, in particular, that "the adoptee shall be treated as the natural child of the adopting parent or parents and shall have all rights and be subject to all of the duties arising from that relation." This case therefore would not implicate the question posed in the petition under any circumstance.

Second, a reversal here would at most call for a remand for reconsideration under Section 30-3-4.2. In that case, the circuit court could—and, we submit, likely would—award WG visitation under the harm-to-the-child standard. Prior to the adoption, WG had

a very close relationship with her granddaughter. Many lower courts have recognized that a close pre-existing grandparent-grandchild relationship can overcome a parent's objection to visitation under the harm standard. See, *e.g.*, *Moriarty* v. *Bradt*, 827 A.2d 203, 222-227 (N.J. 2003) (upholding visitation under a harm standard where the grandchildren had a "special relationship" with their grandparents and denial of visitation would "alienat[e]" the children from their mother's half of the family); *Luke* v. *Luke*, 634 S.E.2d 439, 443 (Ga. Ct. App. 2006) (affirming an award of grandparent visitation to prevent "emotional harm" to the children based on the trial court's observation that there was a "strong, emotional bond between [the grandfather] and the * * * minor children"); *Chamberlain* v. *Brown*, 2016 WL 7340428, at *7 (Tenn. Ct. App. 2016) (similar).

There is thus reason to believe that even if the Court did address the overly broad question presented in the petition, it would not change the outcome of this case.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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[5] Representation by a clinic affiliated with the Yale Law School does not reflect the institutional views of the Yale Law School or Yale University.