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,

Appeal No. 17-AP-1142

Petitioner-Appellant,

v.

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 FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF NO PARTY

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INTRODUCTION

Although it involves visitation rights, this is no ordinary family-law case. The Court faces fundamental questions of individual liberty, with significant implications for Fourteenth Amendment jurisprudence in Wisconsin and beyond. To that end, this case presents a unique opportunity to analyze a key part of the U.S. Constitution from first principles.

This brief argues that the Court should adhere to the original public meaning of the Fourteenth Amendment. That means two things. First, the Court should consider all the liberty interests at stake. Second, it should identify grounds for the parties' rights that are consistent with the Privileges or Immunities Clause, not simply wedge them into the Due Process Clause under the U.S. Supreme Court's self-admittedly underdetermined jurisprudence.

STATEMENT OF INTEREST

The Cato Institute is a nonpartisan public-policy research foundation—a "think tank"—dedicated to advancing individual liberty, free markets, and limited government. This case involves issues central to Cato's mission, including the protection of individual liberty under the Fourteenth Amendment.

ARGUMENT

I. The Court should consider all the liberty interests at stake.

The lower courts and the parties have centered their attention squarely on the liberty interests of the parents, Michels

and Lyons. Indeed, the parents base their challenge to Wisconsin's grandparent-visitation statute and the visitation order solely on alleged interference with *their* interest in the "care, custody and upbringing" of Ann. (*E.g.*, Appellants' Br. 10.)[1] The parents' interest, however, is not the only interest at stake: both Ann and her grandmother, Kelsey, have their own, separate interests, too. The Court should recognize and protect all the liberty interests that its ruling will necessarily affect.

First, this case implicates Ann's liberty interests. Children, like adults, "are protected by the Constitution and possess constitutional rights"—rights that do not "come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). Yet although children were at the center of the dispute in *Troxel v. Granville*, the plurality opinion in that case, on which the parents here primarily rely, offers only silence on the interests of children. *See* 530 U.S. 57 (2000) (plurality op.). Throughout the *Troxel* litigation, "[n]obody asked" the children what they wanted, and "nobody represented their interests . . . ." Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & Fam. Stud. 71, 108 (2006).

Like the children in *Troxel*, Ann is the subject of this dispute, and she will undoubtedly be affected the most by its outcome. But unlike in *Troxel*, Ann's interests here were

[1] The parents are asserting their own rights and are not acting in a trustee-like capacity asserting rights on Ann's behalf. *Cf. Troxel*, 530 U.S. at 93 n.2 (Scalia, J., dissenting).

represented by a guardian ad litem. (R.29; R.87 at 123:11–20.) The Court should keep Ann's interests, both directly and as represented by the guardian ad litem, in the foreground. It must ensure that Ann does not become a mere object, to be shuffled around both literally and figuratively, as if she were "so much chattel." *Troxel*, 530 U.S. at 89 (Stevens, J., dissenting).

Second, this case also implicates Kelsey's liberty interests as a grandparent. Substantive-due-process doctrine does not "cut[] off any protection of family rights at the first convenient, if arbitrary boundary . . . of the nuclear family." *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977); *accord Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting). Given their direct familial connection, their contemporary and historic importance in Western culture, and their frequent position "in fact[,] if not in law" as "part of the child's emotional family[,]" Lawrence, *supra*, at 113, grandparents share an interest in the upbringing of their grandchildren. To that end, visitation may protect Kelsey's interests by allowing her "to contribute to the child's well-being by providing a sense of continuity." *In re Opichka*, 2010 WI App 23, ¶ 22, 323 Wis. 2d 510, 780 N.W.2d 159.

Grandparent-visitation cases involve "multiple overlapping and competing prerogatives of various" parties: parents, children, and grandparents. *Troxel*, 530 U.S. at 86 & n.7 (Stevens, J., dissenting). Unlike termination-of-parental-rights cases and "[u]nlike the typical substantive due process scenario," Lawrence, *supra*, at 113 n.259, this case and others like it present a contest between multiple private parties that goes beyond a "a bipolar

struggle between the parents and the State," *Troxel*, 530 U.S. at 86 & n.7 (Stevens, J., dissenting). While the state generally has no business interfering with the private ordering of family life, when that private ordering cannot overcome conflict and achieve a balance of intergenerational interests, a family-court judge may very well be the appropriate referee. Here, the Court should consider the interests of all those involved, balancing the "governing right of the parent[s]" with the "interests of the dependent child." Lawrence, *supra*, at 73.

II. The Court should identify grounds for the parties' rights that are consistent with the original public meaning of the Fourteenth Amendment.

The parents ask this Court to rule that the visitation order, entered under the grandparent-visitation statute, infringed on their substantive-due-process rights. Relying principally on *Troxel*, they argue that "substantive due process requires a petitioning grandparent to show that not granting visitation would cause harm to the child." (Appellants' Br. 29.)

In *Troxel*, the U.S. Supreme Court scrutinized a "breathtakingly broad" statute that permitted "any person" at "any time" to petition for visitation rights. *Troxel*, 530 U.S. at 67. Limiting its holding to that statute, the Court expressly declined to pass on the question of whether "all nonparental visitation statutes" require a "showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73. The plurality declared only that courts must give "special weight" to a parent's visitation preferences. *Id.* at 69–70.

The Wisconsin statute at issue here is narrower than the *Troxel* statute: it permits only a subclass of grandparents to obtain visitation rights under certain conditions. Yet despite this narrower reach, and despite how *Troxel* did not require a showing of harm, the parents nonetheless ask this Court to require such a showing. (Appellants' Br. 29.) A ruling in favor of the parents, then, would expand *Troxel* and the rights it envisions. The parents insist these expanded rights can be found under the Fourteenth Amendment's Due Process Clause.

But locating the asserted rights under the Due Process Clause—in particular, the substantive-due-process doctrine—is not necessarily consistent with the original meaning of the Fourteenth Amendment. Instead, to the extent they exist, the parents' asserted rights, along with any rights protecting Ann's and Kelsey's liberty interests, can likely be found in other locations more consistent with original meaning. In deciding this case, the Court should thoroughly explore alternative grounds for the parties' rights.

A. The Fourteenth Amendment was enacted in the aftermath of the Civil War to stymie state governments from violating the civil liberties of freed slaves and white Republicans, to ensure the constitutionality of the Civil Rights Act of 1866, and to combat the notorious and discriminatory "Black Codes." *See* Philip Hamburger, *Privileges or Immunities*, 105 Nw. U.L. Rev. 61, 116–17 (2011). Section 1 of the amendment provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These three clauses are known as the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause, respectively.

The Privileges or Immunities Clause contains what should be the Fourteenth Amendment's primary mechanism for limiting state infringement of substantive rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 808 (2010) (Thomas, J., concurring in part and concurring in the judgment). Indeed, the clause is most appropriately read "as a guarantor of substantive rights against all state action." Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Liberty 334, 345 (2005).

Such a reading is consistent with original meaning. Before and during the Reconstruction Era, "the words *rights*, *liberties*, *privileges*, and *immunities*" were treated as synonymous and "used interchangeably." Michael Kent Curtis, *No State Shall Abridge* 171–73 (1986); *accord McDonald*, 561 U.S. at 813–18 (Thomas, J., concurring) (citing Blackstone, colonial legislative acts, antebellum judicial decisions, dictionaries, and other texts). The clause's framers modeled it after the Privileges and Immunities Clause of Article IV, *see Saenz v. Roe*, 526 U.S. 489, 502–03 n.15 (1999), which protects "privileges and immunities" that are "in their nature, fundamental" and that "belong, of right, to citizens of all free governments[,]" *Corfield v. Coryell*, 6 F. Cas.

546, 551 (C.C.E.D. Pa. 1823) (Washington, J., riding circuit). Article IV, in turn, traces its lineage back to the Articles of Confederation, *see* art. IV (1781), and to colonial charters, *see, e.g.*, Virginia Charter of 1606.

Rep. John Bingham, the primary drafter of the Fourteenth Amendment, understood the Privileges or Immunities Clause to protect substantive rights. Cong. Globe, 39th Cong., 1st Sess. 2542, 2765–66 (1866); *see McDonald*, 561 U.S. at 829–35 (Thomas, J., concurring). Other members of the 39th Congress shared that understanding. Senator John Sherman, for example, explained that the clause would protect "the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it,) of citizens of the United States," as found in American and English common law, the U.S. Constitution, state constitutions, and the Declaration of Independence. Cong. Globe, 42d Cong., 2d Sess. 844 (1872). In these sources, courts interpreting the Privileges or Immunities Clause would "find the fountain and reservoir of the rights of American as well as of English citizens." *Id.*

But just a few short years after ratification, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the U.S. Supreme Court gutted the Privileges or Immunities Clause. In *Slaughter-House*, a Louisiana law granted a private monopoly on the sale and slaughter of livestock in New Orleans. Independent butchers challenged the law, alleging that it interfered with their substantive right to exercise their trade and earn a living. The Court, in a divisive 5-4 ruling, upheld the law, concluding that

the Privileges or Immunities Clause protected only very limited rights of national citizenship, such as the right to use navigable rivers. *Id.* at 79–80. But the clause did not, according to the *Slaughter-House* majority, protect any rights of state citizenship, including the rights asserted by the butchers and most other rights. *Id.* at 78–82.

There is now an established cross-ideological scholarly consensus, and an emerging judicial recognition, that *Slaughter-House* "blatantly" misinterpreted the Privileges or Immunities Clause.[2] Alan Gura et al., *The Tell-Tale Privileges or Immunities Clause*, 2009 Cato Sup. Ct. Rev. 163, 181–84 (2009); *see also McDonald*, 561 U.S. at 805 (Thomas, J., concurring); Laurence H. Tribe, *American Constitutional Law* 1320–31 (3d ed. 2000); Curtis, *supra*; Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & Liberty 1096, 1098 (2005). "Virtually no serious modern scholar—left, right, or center—thinks [that *Slaughter-House*] is a plausible reading of the [Fourteenth] Amendment." Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 n.327 (2000). Not surprisingly, there is also relative consensus that interpreting the Privileges or Immunities

[2] Worst of all, *Slaughter-House*'s narrow interpretation of the Privileges or Immunities Clause, which directly contradicts that clause's original meaning, was "probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court." Charles Black Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* 55 (1997). *Slaughter-House* arguably allowed Jim Crow to reign in the South for nearly a century. *See McDonald*, 561 U.S. at 855–58 (Thomas, J., concurring) (citing *United States v. Cruikshank*, 92 U.S. 542 (1875)); Eric Foner, *A Short History of Reconstruction* 223–25 (1990).

Clause according to its original meaning would benefit Fourteenth Amendment jurisprudence.

To fill the void left by *Slaughter-House*, litigants and justices seeking to protect substantive individual rights turned to a "most curious place"—the Due Process Clause—as "an alternative fount of such rights," *McDonald*, 561 U.S. 742, 809 (Thomas, J., concurring), which ultimately lead to the substantive-due-process doctrine, *see, e.g.*, Akhil R. Amar, *The Bill of Rights* 209–10 (1998). Although the phrase "due process of law" was understood historically as including a limited substantive component—particularly in the "of law" part—"the redaction of the Privileges or Immunities Clause" and the corresponding use of "the Due Process Clause to textually justify the substantive scrutiny of laws" "wreak[] havoc on the coherence and original meaning of" the Fourteenth Amendment. Randy E. Barnett, *What's So Wicked About* Lochner*?*, 1 N.Y.U. J.L. & Liberty 325, 331 (2005).

Unfortunately but predictably, substantive due process has proven to be an inadequate substitute for the Privileges or Immunities Clause. *Id.* at 332–33; *see McDonald*, 561 U.S. at 812 (Thomas, J., concurring). It has "undermined the legitimacy of protecting the rights of individuals from violation by state governments" and, at the same time, "become a potent weapon against the practice of originalist constitutional interpretation." *Id.* Whatever its merits, substantive due process has been criticized by those across the ideological spectrum as inconsistent

at best and, at worst, an "atrocity." *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

B. Arguing that their asserted rights can be found under the Due Process Clause, the parents, following the lead of the *Troxel* plurality, rely on *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Yet at their core, *Meyer*, *Pierce*, and *Yoder* are not even about parental rights; they are about protecting individual liberty against state interference generally.

For one thing, these cases focus only superficially on the rights of parents *qua* parents in the way *Troxel* did. In *Meyer*, the plaintiff was not asserting rights as a parent, but rather as a schoolteacher—namely, the right to pursue a profession absent state interference. *Meyer*, 262 U.S. at 400–01. Neither side "mounted a parental rights argument in the written briefs[,]" and Meyer's own attorney and other contemporaries "characterized the case as providing a constitutional guarantee for the right to maintain private schools." Lawrence, *supra*, at 74–75, 111. The *Meyer* Court's opinion reiterates this education focus, homing in on how the challenged statute "interfere[d] with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401. "[T]he problem in *Meyer*," as indicated by the Court's own language, was "not state interference in the intimacies of home and family, but, rather the

state's attempt to limit the acquisition of knowledge and homogenize its populace." Lawrence, *supra*, at 77.

Pierce likewise rested on these common themes of knowledge and homogenization, with only a tertiary and background focus on any concept of parental rights. *See Pierce*, 268 U.S. at 534–35. So, too, was *Yoder* minimally occupied with any parental right to control a child's upbringing. *See Yoder*, 406 U.S. at 207–36.

What is more, substantive due process does not permeate the trio of cases. As for *Meyer* and *Pierce*, "had they been decided in recent times, [they] may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion." *See Troxel*, 530 U.S. at 95 (Kennedy, J., dissenting). *Yoder*, as the parents here concede, "involves the intersection of parental rights with the right to free exercise of religion." (Appellants' Br. 33 n.5.) And as Justice Thomas has indicated, the Privileges or Immunities Clause—not the Due Process Clause—may be the proper constitutional home for the rights protected in all three cases, as well as in *Troxel*. *See Troxel*, 530 U.S. at 80 (Thomas, J., dissenting).

C. Given the above discussion, the Court should identify alternative grounds for the parties' rights. Any decision that grounds rights in substantive due process, at least without first attempting to identify alternative grounds, perpetuates and compounds constitutional malapropisms. Rights grounded in substantive due process—and the judicial decisions announcing them—are viewed with suspicion and invite attack. Indeed, "the

use of the Due Process Clause" to do the work of the Privileges or Immunities Clause "has been vulnerable to historical claims of illegitimacy from its inception." Barnett, *supra*, at 332. When a constitutional doctrine is as maligned as substantive due process, there is ample reason to avoid relying on it to protect liberty interests, except when absolutely necessary. This is especially true here for two reasons.

First, while *Troxel* forms the foundation of the parents' claim to a right grounded in substantive due process, *Troxel* failed to produce a majority opinion; the justices splintered on both judgment and reasoning. Even the plurality expressly dodged defining the precise contours of any substantive parental right. *Troxel*, 530 U.S. at 73. Also, as explained above, the cases on which the *Troxel* plurality relied—*Meyer*, *Pierce*, and *Yoder*—do not contemplate a *Troxel*-like substantive-due-process parental right at all. *See supra* Part II.B.

Second, alternative grounds exist that are more consistent with the original meaning of the Fourteenth Amendment. As explained above, the Privileges or Immunities Clause was originally understood as the Fourteenth Amendment's primary mechanism for protecting substantive rights. *See supra* Part II.A. Other plausible grounds include the First Amendment's guarantee of freedom of association, the Wisconsin Constitution, and other constitutional, statutory, or common-law sources.

CONCLUSION

While *amicus* takes no position on which party should prevail, this Court should decide this case consistent with the original public meaning of the Fourteenth Amendment as set forth above.

Dated this 17th day of September, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 17th day of September, 2018.

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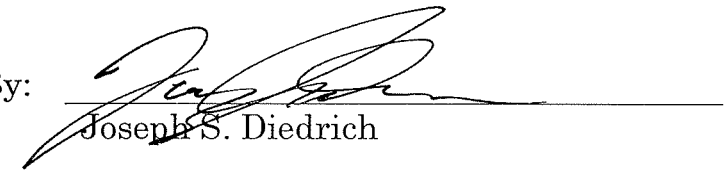
By: 
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Dated this 17th day of September, 2018.

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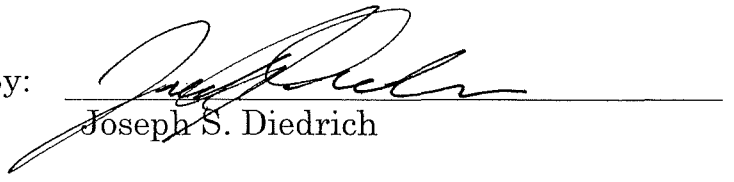
By: 
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