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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JENIFER TROXEL, ET VIR, Petitioners v. TOMMIE
GRANVILLE

CASE NO: 99-138

PLACE: Washington, D.C.

DATE: Wednesday, January 12, 2000

PAGES: 1-55

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CAPTION

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PAGES

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JENIFER TROXEL, ET VIR, :
4 Petitioners :
5 v. : No. 99-138
6 TOMMIE GRANVILLE :

7 - - - - -X
8 Washington, D.C.
9 Wednesday, January 12, 2000

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:18 a.m.

13 APPEARANCES:

14 MARK D. OLSON, ESQ., Seattle, Washington; on behalf of
15 the Petitioners.

16 CATHERINE W. SMITH, ESQ., Seattle, Washington; on behalf
17 of the Respondent.

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1 P R O C E E D I N G S

2 (10:18 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-138, Jenifer Troxel v. Tommie Granville.

5 Mr. Olson.

6 ORAL ARGUMENT OF MARK D. OLSON

7 ON BEHALF OF THE PETITIONERS

8 MR. OLSON: Mr. Chief Justice, may it please the
9 Court:

10 We present two questions today, and the advance
11 of theory for the resolution of the case before this
12 Court. The first question is, was the Washington State
13 supreme court correct when it held that a visitation order
14 to a person other than a parent may not be granted absent
15 a showing of physical or mental harm to the child, and the
16 other question is, should the Court at this time resolve
17 all of the constitutional questions that could be raised
18 by any other orders, other than the Troxel order before
19 this Court?

20 The answer to those questions are, we believe,
21 the court did not make the correct decision below
22 requiring a greater standard by a specific showing of
23 substantial harm to the child than is already required by
24 the best-interests-of-the-child standard, and we also ask
25 this Court to leave for another day the resolution of the

1 constitutional questions that may be raised by other
2 visitation orders not before the Court.

3 QUESTION: Mr. Olson, it's not clear to me just
4 what the Washington court included in the word harm. Can
5 harm be stress to the child because of the severance of a
6 substantial relationship? Is that harm? I -- it's not
7 clear to me how we even define the term.

8 MR. OLSON: The term harm is fuzzy. There --
9 that is a problem. Is it -- and I agree, is it a little
10 bit of harm? Is it a great deal of harm? Do we look for
11 bruises if visitation isn't ordered, or --

12 QUESTION: It surely must mean more than
13 physical harm, but what other things fall within it, do
14 you think?

15 MR. OLSON: Harm to the child. It is difficult
16 to put one's finger on what harm is. Best-interest-of-
17 the-child standard subsumes many factors that the court
18 considers.

19 QUESTION: Can you argue that best interest of
20 the child like, not being -- that the child is harmed if
21 his best interests are not being served, so that it's just
22 really the flip side?

23 MR. OLSON: Well, we believe that the rule of
24 the Washington supreme court requires a greater harm, a
25 more specific showing, although that term is fuzzy, as

1 Justice O'Connor points out, but in the best-interests-
2 of-the child standard, there is harm considered to the
3 child whether visitation is ordered or not ordered.

4 QUESTION: I always considered the supreme court
5 of Washington agreed with what you just said. I had
6 thought that the State statute said best interests of the
7 child, and the supreme court of Washington said that you
8 can't get a third party visitation rights as against the
9 parent unless you can show harm, which suggests that they
10 thought the two might -- were mutually exclusive.

11 MR. OLSON: That harm and the best interests --

12 QUESTION: That -- yes.

13 MR. OLSON: -- standard were exclusive?

14 QUESTION: That the best interests standard
15 would cover a much broader spectrum than the harm
16 standard.

17 MR. OLSON: If I understand the question
18 correctly, our concern is that the focus of the best
19 interests of the harm standard would over-emphasize that
20 and create a hurdle that would be greater, or higher, or
21 more difficult to prove and would, particularly in the
22 case that is before this Court, would effectively bar
23 visitation for the Troxels --

24 QUESTION: But Mr. Olson, isn't that some --

25 MR. OLSON: -- when it's very slight.

1 QUESTION: Mr. Olson, isn't that something for
2 the Washington supreme court to spell out piece by piece?
3 After all, it's not our job to say what, under a State
4 law, harm means, because that definition can come over
5 time, the way law generally develops, case by case.

6 MR. OLSON: And that is why the theory that we
7 advance to the Court is that the magnitude of the
8 intrusion be balanced against the constitutionally
9 required justification, and in this case we believe that
10 best interests of the child is sufficient for the order,
11 because the intrusion in our case is slight. It's just
12 25.5 hours a month with the grandparents, and we believe
13 that it is a State issue.

14 QUESTION: But you have to show, don't you, that
15 at least this visitation order is constitutionally
16 permissible? The supreme court of Washington I guess
17 struck down the entire statute, and the argument you make,
18 which I think has some force to it, is that you don't
19 lightly strike down an entire statute, and -- but you do
20 have, from your point of view to avoid that you have to
21 show that there's at least some order that could be issued
22 consistent with this statute which would not be
23 unconstitutional, and -- I think your problem, probably,
24 is to what extent can a court intervene in the case of
25 parents who are not harming the child to say that

1 outsiders such as grandparents can have a court-ordered
2 visitation right?

3 MR. OLSON: I'm not certain of the question to
4 me, Mr. Chief Justice. The State courts, as Justice
5 Ginsburg asked, does set forth the best-interests-of-the-
6 child standard that the trial court would then apply in
7 any given case.

8 The intrusion in our case, in the Troxel matter,
9 is very slight. There's no constitutional infringement
10 upon any religious belief, right to educate, or any other
11 matter. It is simply in the best interests of the child,
12 as was stipulated at the trial court by the experts and by
13 the mother.

14 QUESTION: But you do have a line of cases not
15 directly on point, but that cut the other way, I think.
16 That is, the parents, it's up to the parents to decide,
17 you know, not just who has custody, how the kids are going
18 to be brought up, who they're going to see.

19 MR. OLSON: Yes.

20 QUESTION: Does this mean that next a great aunt
21 can come in and say, well, you know, I want to take her to
22 the movies every Friday?

23 MR. OLSON: Well, the line of cases held that
24 any parental decision is not above government regulation,
25 but a parental decision would be subject -- I'm sorry.

1 State regulation would be subject to strict scrutiny of a
2 parental decision in the area of religion or First
3 Amendment, if I understand the question, but in this case
4 it is not.

5 QUESTION: But also health and safety. Isn't
6 that -- those cases say parents decide, but the State can
7 regulate to spare the child from harm.

8 MR. OLSON: That is true.

9 QUESTION: And you say the State can regulate
10 just whenever it's in the best interests of the child.
11 The parent says, no candy. The State says, oh, that's
12 unreasonable. Kids ought to have some candy.

13 MR. OLSON: Well, the magnitude of the intrusion
14 would be balanced against the --

15 QUESTION: Oh, it's very little intrusion. Give
16 the kid some candy once a week.

17 (Laughter.)

18 QUESTION: Alternate Fridays, or whatever. This
19 is an enormous intrusion? And you think the State can
20 tell parents because that's in the interests of the child,
21 according to the State, or according to one judge who sits
22 as the agent of the State and likes candy?

23 MR. OLSON: Well, our --

24 (Laughter.)

25 MR. OLSON: Our theory, Justice Scalia, is that

1 all those other hypotheticals would be left for the State
2 courts to work out as those instances arise, and --

3 QUESTION: But do you really think that the
4 State can have a statute as broad as this that says, any
5 person at any time can march in and ask a court in the
6 best interests of the child to order some kind of
7 visitation? I mean, this is a breathtakingly broad
8 provision, is it not, and it's very expensive for parents
9 to defend lawsuits if anybody can walk in at any time and
10 file a court action.

11 MR. OLSON: Regarding the expense, Your Honor,
12 there are two statutes in Washington that allow the court
13 to award attorneys' fees on the basis of need and ability
14 to pay, and that if there is any economic imbalance the
15 court can address that.

16 QUESTION: Mr. --

17 QUESTION: A need or an ability to pay, but I
18 mean, let's assume these people lay out a lot of money but
19 in fact, you know, they have it. It's just money that
20 would have gone to something else.

21 MR. OLSON: Well, Justice --

22 QUESTION: They're not impoverished. It's just
23 cost them \$100,000 to defend this case.

24 MR. OLSON: Justice --

25 QUESTION: Is there any remedy for that?

1 MR. OLSON: Yes. The attorneys' fees could be
2 reimbursed if there was -- if there was an imbalance, or
3 intransigence. There are a number of bases by which the
4 court could address any complaints regarding --

5 QUESTION: Well, let's get back to my question
6 of the breadth of this statute. Do you defend it, any
7 person, any time?

8 MR. OLSON: I believe, Your Honor, that the
9 best-interest-of-the-child standard is what controls, not
10 the any person language.

11 QUESTION: But wait a minute. That means that
12 some welfare caseworker can march into court and ask for
13 some order.

14 MR. OLSON: Your Honor, of course that's not the
15 record in this case, and --

16 QUESTION: Oh, but Mr. Olson, unless you are
17 prepared to accept something that broad, I don't
18 understand what your position is in this Court, because as
19 I understand it you are not here and you are not in the
20 courts of Washington claiming a substantive due process
21 right, exclusive of the statute, to have this visitation.
22 As I understand it, you are claiming a statutory right.

23 The courts of Washington have said that the
24 statute is too broad, and they have declared the entire
25 statute unconstitutional, and they have said, we're not

1 going to narrow or sever, and I presume that's their
2 business.

3 Therefore, it seems to me that, for you to get
4 relief in this Court, we would have to hold that in every
5 possible or reasonably possible application of that
6 statute it was constitutional, because unless we hold
7 that, Washington was perfectly proper in declaring the
8 statute unconstitutional, and if you, representing
9 grandparents, want to come into court and claim rights,
10 you've either got to get a new statute, or you've got to
11 claim a constitutional right of your own, which you're not
12 doing.

13 Am I missing something in the posture of the
14 case?

15 MR. OLSON: Well, the State court didn't strike
16 down the statute because it was too broad. What the State
17 court did was, it struck down the statute because it said
18 that there was a requirement of a substantial physical and
19 mental harm to the child.

20 QUESTION: Well, it mentioned that, but it also
21 mentioned the breadth of the statute. It said this
22 statute, in effect, gives third party rights to the world.
23 That's number 1, and number 2, it does so on the basis of
24 an improper standard.

25 MR. OLSON: I don't believe --

1 QUESTION: And it seems to me that unless we are
2 in a position to resurrect the statute, you really don't
3 have a claim to make under the law of Washington, and
4 you're not making an independent constitutional claim of
5 your own.

6 MR. OLSON: There are three responses I have,
7 Your Honor, and that is that the any person language
8 admits that family law is complex, and the nature of
9 families is so varied that it's impossible for us to --

10 QUESTION: Well, it may be complex, but let me
11 ask you this question. Do you believe that any person
12 walking in off the street, without any relationship by
13 blood or marriage to the child, may, as against the
14 parents' claim of the right to control the upbringing of
15 their children, get a court order based simply on a best-
16 interests-of-the-child standard? Do you believe that
17 anyone walking in off the street may do that, as against
18 the parents' constitutional claim?

19 MR. OLSON: Your Honor, the cases that we have
20 cited to the Court and in the appendix show that it is
21 normally deceased parent -- grandparents of deceased
22 parents --

23 QUESTION: That's not my question. The supreme
24 court of Washington read its statute as saying just what
25 I -- my question assumed. Anybody can make a claim under

1 the statute. Do you believe that anyone, as against the
2 parental claim of a constitutional right to control the
3 upbringing of their children, is -- may constitutionally
4 get a -- an order for visitation or some interference with
5 parental rights solely on a best-interests-of-the-child
6 standard?

7 MR. OLSON: The best-interests-of-the-child
8 standard does restrict who may petition, and the any
9 person language addresses those people who have
10 relationships with the child or who has some meaningful
11 reason --

12 QUESTION: Mr. Olson --

13 QUESTION: That's now what the supreme court of
14 Washington said.

15 QUESTION: Mr. Olson, I think I disagree with
16 Justice Souter as to the standard you have to meet, but I
17 think we're both focusing on the same kind of thing. My
18 understanding is that, unless you're talking about the
19 area of the First Amendment, if a statute is to be
20 stricken down on its face, as the supreme court of
21 Washington did here, you must -- the person supporting
22 that must show that there are no possible applications of
23 the statute that would be permissible.

24 So -- but whether Justice Souter is right that
25 you have to show that almost all applications would be

1 permissible, or whether I'm right that you have to show
2 just that an appli -- I'm still not persuaded that you
3 have shown even that the order in this case is -- avoids
4 constitutional difficulties.

5 You say that the intrusion is minimal, and there
6 are no religious or discriminatory implications. Is that
7 the substance of the constitutional test that you seek?

8 MR. OLSON: The only claim by the mother was
9 that it was her decision, and there were no other
10 constitutional issues raised by her at trial or anywhere
11 in the court.

12 QUESTION: Why isn't that enough of a
13 constitutional issue, that it is her decision? I --

14 MR. OLSON: Well, that would extend the line of
15 cases in Yoder to give constitutional weight to any
16 decision of a parent, in that they could go to school --

17 QUESTION: Such as whether the kind can eat
18 candy or not.

19 MR. OLSON: Well --

20 QUESTION: I really thought that was the
21 parents' call.

22 MR. OLSON: Whether the parents be able to go to
23 school and dictate what ideas or people who are
24 associated --

25 QUESTION: Yes, don't you think --

1 MR. OLSON: In Roberts --

2 QUESTION: You don't think?

3 MR. OLSON: I do not believe so.

4 QUESTION: You don't think. I see.

5 QUESTION: Suppose --

6 QUESTION: Where do you get the notion that the
7 best interests of the child is the standard somehow in the
8 common law world? We certainly use that where there's
9 been a divorce or separation, and you have to decide
10 between the two parents, but when it's not the parents
11 involved, can you give me any cases where -- it would be
12 in the best interests of a lot of children to take them
13 away from their parents and give them to somebody else,
14 but the parents have rights in the children.

15 MR. OLSON: Well, two questions there. The
16 common law question is in our footnote, I believe it's 45,
17 Roberts v. Ward from New Hampshire, and many other cases
18 held that it was common law to grant that visitation
19 right, and your other question was --

20 QUESTION: To grant visitation rights?

21 MR. OLSON: To a person other than a parent, to
22 a grandparent. There were common law cases cited --

23 QUESTION: No, but I -- you're talking about
24 best interests of the child as though that's the generally
25 well-accepted common law rule for what courts can do with

1 regard to children. They can do whatever is in the best
2 interests of the child. I don't -- I'm unaware that
3 that's our general rule at all.

4 Where there's a dispute between the parents,
5 that will be resolved in the best interests of the child,
6 but where it's a dispute between the parents and someone
7 else, you think common law courts just say, well, what's
8 in the best interest of the child? It seems to me they
9 say, well, what do the parents want? They don't want the
10 kid to eat candy, the kid doesn't eat candy.

11 MR. OLSON: Well, the courts do look at many
12 factors under the best-interest-of-the-child standard as
13 well as the fact that in some cases the parents themselves
14 are responsible for creating the relationships that now
15 the child requires, and the child does, we assert, have
16 some constitutional claim here, and the court should
17 balance all the interests involved, not just the parents.

18 QUESTION: Why?

19 QUESTION: May I ask this question --

20 QUESTION: The child does not belong the court.
21 The child belongs to the parents.

22 QUESTION: Is that a question, or --

23 MR. OLSON: It's the welfare of the children
24 that the State is interested in.

25 QUESTION: I don't mean to get into this

1 argument between the two of you. I don't know if there
2 was a question or not.

3 (Laughter.)

4 QUESTION: But I did have this question for you.
5 As I understand, one of the problems with this statute is
6 anybody's standing, but is it not true that there are a
7 lot of statutes out there that give grandparents standing,
8 and relatives, and I'd just like to ask you, what is the
9 standard that is applied in most of the statutes
10 throughout the country?

11 MR. OLSON: In 48 States, the standard is best
12 interests of the child and no substantial harm, physical
13 or mental, is required to be shown.

14 QUESTION: So that if we were to invalidate this
15 statute on the grounds suggested in the questioning, we'd
16 probably invalidate 48 statutes.

17 MR. OLSON: 48 States, that's right.

18 QUESTION: When you refer to the 48 statutes,
19 were you referring to the 48 statutes that give rights to
20 the whole world, or 48 statutes that give rights to
21 grandparents?

22 MR. OLSON: There are approximately four
23 statutes that include the provision, any person. The
24 other statutes do attempt to limit to siblings or step-
25 parents or grandparents. What our statute does is, it

1 admits that we are unable to foresee how relationships may
2 be generated between children and significant adults.

3 QUESTION: Tell me something about your case. I
4 don't want to hear about the law. I want to know
5 something about your case. All right. Now, suppose I
6 think the Constitution doesn't permit people to wander in
7 at random. Even if it's good for a child to learn the
8 accordion, an accordion player couldn't come in and say, I
9 want to visit once a year, even if the interference is
10 trivial, all right.

11 So I start with that, and I also think maybe you
12 could make out a case that yours isn't that case. You
13 have something special going for you, so that if it's
14 applied to you, maybe you could win.

15 Now, I don't want to hear about how minimal an
16 interference it is. It isn't much of an interference to
17 play the accordion once a year, okay. I want to hear
18 what's special about your relationship in your case that
19 could overcome some kind of special burden that might be
20 imposed before somebody can come in off the street and
21 start hauling mothers into court.

22 Is there anything in your situation that's
23 special and, if so, what?

24 MR. OLSON: The special nature involved in our
25 case is that the children's father, Brad Troxel, is

1 deceased. The children had a 2-year relationship with the
2 grandparents, staying in the grandparents' home every
3 other weekend, and there was a substantial relationship
4 from the ages of 1 and 3 until the action was filed and
5 the children were 3 and 5 years of age.

6 There is that relationship. There is the
7 requirement, we hope, that the memory of the children's
8 father will be preserved in the -- by the grandparents,
9 and that the growth of the children will be enhanced by
10 knowing the kinship in the family, where they come from,
11 and that is a very, very significant interest for the
12 State to have in terms of how our children develop and
13 what occurs with regard to their growth.

14 In terms of the harm question, Justice O'Connor,
15 when children are taken away, or where there's significant
16 grief or loss, a lot of time that pain goes deep within.
17 It will not resurface until the children are older, and
18 there is loss of adult relationships --

19 QUESTION: Well, what you're saying is that the
20 loss of a substantial relationship can constitute harm, in
21 your view. Now, we don't know whether the Washington
22 State court would deem that as a possible kind of harm, I
23 gather.

24 MR. OLSON: Well, they created a higher standard
25 of harm that will be then applied to grandparent

1 visitation cases, of which they are more numerous than
2 these stranger cases, which have not been shown to exist,
3 but the higher standard will be applied to cases where the
4 intrusion is slight.

5 QUESTION: Well, excuse me, I didn't find where
6 the Washington court ever defined harm. Would you show me
7 where it did?

8 MR. OLSON: I do not believe it did.

9 QUESTION: Okay.

10 MR. OLSON: I believe that the standard that
11 they used is not defined.

12 QUESTION: Well, so as I said, we don't know
13 what the State of Washington will do in interpreting the
14 concept of harm.

15 MR. OLSON: And that's why our theory is that we
16 leave for another day the difficult cases that the Court
17 is raising and resolve this case.

18 QUESTION: All right, but are you satisfied --
19 that is, suppose we were to say from your point of view
20 that of course you must show a substantial relationship in
21 the past, plus harm. Now, some harm and loss of a
22 substantial relationship could count as harm. If it were
23 that, then what happens to your case?

24 MR. OLSON: You mean, if that were the standard
25 to be --

1 QUESTION: We're setting a constitutional
2 standard. We're not running public relation -- domestic
3 relations law, so suppose the outside limit were, the
4 State's free to do this if it shows harm to the child,
5 that loss of a substantial relationship could count as
6 harm.

7 MR. OLSON: That could be a standard. We're not
8 asking the Court to adopt that standard for resolution of
9 this case, because the best-interests-of-the-child
10 standard was sufficient under our theory to resolve this
11 case.

12 QUESTION: If that were the constitutional
13 standard, what would happen to your case? Would you lose?

14 MR. OLSON: No. I believe that there is a
15 substantial relationship, and there would be evidence of
16 harm. However, the appellate court and the supreme court
17 never got to that question because we never developed it,
18 and at the trial court it was stipulated that it was in
19 the best interests of the children to visit their
20 grandparents. The only question before the trial court
21 was what was the duration of the harm.

22 QUESTION: Mr. Olson, may I ask you to go back
23 to the 48 States that you claim -- it wasn't my
24 understanding that those States simply say best interest,
25 period, and also it's not my reading of the Washington

1 supreme court decision that they passed on the
2 constitutionality of that other provision that does set
3 standards, that doesn't have just some broad best
4 interest, but doesn't set standards that can be applied by
5 judges.

6 MR. OLSON: Well, most of the States state that
7 the best interests of the child is the touchstone, and
8 that other factors may be considered, and it is the best-
9 interests-of-the-child standard including but not limited
10 to the following factors.

11 In family law cases, because they're so complex,
12 the facts and circumstances dictate the factors that we
13 consider in a trial, and I do not believe --

14 QUESTION: But is there any State legislature
15 that has said, just best interests without any guidance at
16 all about what comprises --

17 MR. OLSON: Some States set forth factors as
18 guidance.

19 QUESTION: How many are like Washington that
20 don't -- that say best interests, period, nothing else?

21 MR. OLSON: I would have to look closer at that.
22 Kentucky has an any person statute, as does Connecticut,
23 and Washington and California. As to whether or not there
24 are any standards or factors set forth in those statutes,
25 I'd have to look at that again.

1 QUESTION: Mr. Olson, let's assume that this
2 Court at least agreed with you to some extent and said
3 yes, given the special relationship that grandparents may
4 normally establish with their children, some heightened
5 standard less than the harm that might be necessary for
6 the State to move in would suffice to justify overcoming
7 the parents' constitutional claim of their rights to bring
8 up the children without interference. Let's assume that
9 we held that was the law.

10 Wouldn't you be faced with this, nonetheless.
11 The case would go back to the State of Washington, and the
12 Washington supreme court would say, well, we certainly
13 accept the U.S. Supreme Court's view of the limitations on
14 the parental Federal constitutional rights. We accept
15 that, of course.

16 However, we don't have a statute here any more.
17 The statute is unconstitutional. It's unconstitutional
18 regardless of its application to grandparents. It's
19 unconstitutional because, as we have already explained,
20 its great breadth and its low statutory standard with
21 respect to other third parties, and therefore what we've
22 got is a very interesting statement from the Supreme Court
23 on what the law is.

24 But you have come into court, grandparents, with
25 a statutory claim, and we have declared the statute

1 unconstitutional because of its many unconstitutional
2 applications regardless of its application to you.
3 Therefore, we can't give you any relief.

4 Would that happen if the case went back to
5 Washington, or wouldn't it?

6 MR. OLSON: If I understand your question that
7 would, I believe, be a facial attack on the statute that
8 shows that it --

9 QUESTION: Well, isn't the supreme court of
10 Washington entitled to decide how broad an attack on its
11 own statute it will allow?

12 MR. OLSON: It would need to apply the standard
13 that no case exists under which the statute --

14 QUESTION: Why does it have to apply that?
15 That's the standard that we apply, or it may be the
16 standard that we apply --

17 (Laughter.)

18 QUESTION: -- in Federal constitutional
19 challenges to Federal statutes, but if Washington as a
20 matter of State law wants to entertain broader challenges,
21 and if Washington, as a matter of State law, says we don't
22 have to narrow our statutes in order to try to save them,
23 isn't that, or are not each of those decisions perfectly
24 within the competence of the supreme court of Washington?

25 MR. OLSON: It may be, Your Honor. We would

1 argue again that --

2 QUESTION: But if those two decisions are within
3 the competence of the State of Washington, then we could
4 send this case back with a ruling on grandparents and
5 there still wouldn't be any Washington statute, and you'd
6 still lose in Washington, wouldn't you?

7 MR. OLSON: Well, that may be.

8 QUESTION: Yes.

9 MR. OLSON: I'd like to reserve the rest of my
10 time. Thank you.

11 QUESTION: Very well, Mr. Olson.

12 Ms. Smith, I hope you will address yourself to
13 the question that we've also addressed to Mr. Olson,
14 whether the -- what exactly was the visitation order in
15 this case? Was it one weekend a month?

16 ORAL ARGUMENT OF CATHERINE W. SMITH
17 ON BEHALF OF THE RESPONDENT

18 MS. SMITH: Yes, Your Honor.

19 QUESTION: Whether an order of one weekend a
20 month on the facts of this case violates the Federal
21 Constitution.

22 MS. SMITH: Yes, Mr. Chief Justice, and may it
23 please the Court, I will do so immediately.

24 I believe that this visitation order in this
25 case was unconstitutional. The order provided for one

25

1 weekend a month from 4:30 Saturday until 6:00 p.m. on
2 Sunday. It also provided for notification provisions
3 regarding the girls' activities to the grandparents, for
4 what amounted to a court-ordered birthday party on the
5 grandparents' birthdays, and it also provided how the
6 parties would address the children, or one of the
7 children, in which there was a dispute.

8 The order violated --

9 QUESTION: Did you say address, or dress?

10 MS. SMITH: Address.

11 QUESTION: Address.

12 MS. SMITH: Address. The --

13 QUESTION: You mean the name, the use of the
14 name?

15 MS. SMITH: Yes, that's true.

16 QUESTION: And a week in the summer, was it?

17 MS. SMITH: There was a week in the summer,
18 also.

19 The order violated the mother's rights to make
20 these decisions absent evidence that the children were
21 being harmed, and Justice O'Connor, in response to your
22 question about what constitutes harm, in fact the
23 Washington courts have been working on these issues for
24 many years. They have addressed harm in other
25 circumstances. In the case *In re Sumey*, which is in the

1 briefs, they talk about the fact that they protect the
2 physical and mental health of children.

3 This Court has also talked about the fact that
4 the State can only come in under circumstances in which
5 the health and safety of children is being jeopardized.

6 QUESTION: When you say this court, you mean the
7 supreme court of Washington?

8 MS. SMITH: No. I mean the Supreme --

9 QUESTION: This Court.

10 MS. SMITH: This Supreme Court, in Yoder, and in
11 Santosky both the majority opinion and Justice Rehnquist's
12 opinion in dissent talk about the fact that the State will
13 step in when harm to the child is being threatened. That
14 is, in fact, the proper standard under our Constitution.

15 QUESTION: Suppose the divorce --

16 QUESTION: Under that standard there would be no
17 relief for a grandparent even if the visitation order was
18 20 minutes every 6 months.

19 MS. SMITH: That's correct, Your Honor. That
20 decision --

21 QUESTION: Now, there are a number of statutes
22 around the country in different States that specifically
23 address the right of grandparents to seek visitation
24 orders, are there not?

25 MS. SMITH: Yes, there are.

1 QUESTION: How many States have that kind of
2 legislation?

3 MS. SMITH: I believe it's 38, but I'm not
4 exactly sure on the count.

5 QUESTION: So apparently, in your view, all of
6 those are unconstitutional?

7 MS. SMITH: No, Your Honor.

8 QUESTION: Out. Gone.

9 MS. SMITH: No.

10 QUESTION: Why?

11 MS. SMITH: Because first of all there may be
12 circumstances under which a grandparent visitation statute
13 could be enacted, and in many of those States --

14 QUESTION: Well, we have 38 of them. Now, as I
15 understand your view, most of those are unconstitutional.

16 MS. SMITH: No.

17 QUESTION: If they speak in terms of the right
18 of a grandparent to seek visitation based on best
19 interest, in any event.

20 MS. SMITH: If they rely on a strict best
21 interest standard, without creating a burden of proof and
22 a presumption that the parent is, in fact, acting in a
23 child's best interests, yes, I do believe those statutes
24 unconstitutionally impair a parent's right to make
25 decisions --

1 QUESTION: Yes, but what if --

2 MS. SMITH: -- about their child.

3 QUESTION: -- they acknowledge those
4 presumptions but do not have a requirement of showing
5 harm?

6 MS. SMITH: Excuse me, Your Honor. I didn't
7 hear the beginning of the question.

8 QUESTION: What if those statutes acknowledge
9 all those presumptions and say there's a presumption that
10 the parents are the final say on what goes on --

11 MS. SMITH: Uh-huh.

12 QUESTION: -- and the grandparent may not have
13 visitation rights unless the grandparent can prove that
14 absent visitation rights the child will be seriously
15 harmed?

16 MS. SMITH: I believe that those statutes
17 violate the constitutional rights of the parents. Yes, I
18 do.

19 QUESTION: Well, what do we do in -- I mean,
20 unhappy families are all different, and --

21 MS. SMITH: And so are happy ones -- yes.

22 QUESTION: -- what happens where there are
23 custody proceedings, there are very complex situations,
24 where children -- suppose you're already in court in a
25 domestic relations case and there's some complex

1 situation, has to do with a stepfather, cousins, no
2 relationships -- there are all -- and sometimes domestic
3 relations judges have to work out very, very detailed
4 orders in highly complex situations, and do you want to
5 say there, too, what we're doing is giving a
6 constitutional veto to a natural mother, where she's
7 already in court and it's one of these complex situations?
8 I mean --

9 MS. SMITH: Yes.

10 QUESTION: Yes?

11 MS. SMITH: Yes.

12 QUESTION: Well, what are we going to do to
13 circumstances where the mother has problems, where they've
14 been raised by foster families, where there are schooling
15 problems, where there's a search for stable relationships,
16 where the child's interest is what the judge is thinking
17 of, and sometimes he has to work out something that's
18 highly detailed. Why should the mother in that kind of
19 ongoing situation suddenly have a kind of veto?

20 MS. SMITH: Your Honor, in that circumstance I
21 believe the court would be able to find harm under the
22 circumstances that would allow the parent's decision to be
23 overridden.

24 The point is that the court has to have a level
25 at which they start making decisions, the State starts

1 making these decisions instead of the parent, and the
2 best-interest standard alone is insufficient. It's
3 particularly insufficient when it is characterized, as it
4 was in this statute, and it was characterized by this
5 Court, as simply the State saying what it thinks that the
6 best interest of the child is, as opposed to the parent.

7 QUESTION: Could you have answered Justice
8 Breyer by saying that where custody is in issue, best
9 interest then becomes the standard.

10 MS. SMITH: Well, I --

11 QUESTION: But where visitation is an issue, it
12 is not, or do you make that distinction?

13 MS. SMITH: Well, I do make the distinction, but
14 perhaps in a slightly different way. When custody is at
15 issue between parents, for instance, there is a best-
16 interest standard that should be applied between the
17 parents, because you've got a neutral playing field there.
18 You have two people who have --

19 QUESTION: Yes, but often these come up in
20 contexts where it isn't between two parents. There may be
21 one parent who's impaired through drug abuse or something
22 else, and you may have an aunt or a grandparent who's had
23 the child all along, for years. Now, what standard does
24 the Constitution demand in a custody situation?

25 MS. SMITH: The right to assert the fundamental

1 interest depends upon the relationship between the parent
2 and the child, or the person who is acting in the parent
3 relationship with the child.

4 This Court talked about the parameters of this
5 in Moore, for instance, in which the grandmother was
6 acting as the parent to the child. It is the intimate
7 family relationship between the parent and the child that
8 creates not only the right but the obligation to make
9 these decisions for children.

10 QUESTION: And are you saying that all we need
11 to decide here is that that right applies when custody is
12 conceded?

13 MS. SMITH: Yes. That's -- that is what we're
14 saying. We have a perfect --

15 QUESTION: You're a domestic relations -- are
16 you -- you know a lot about this area, I hope.

17 MS. SMITH: Yes.

18 QUESTION: Okay, good.

19 MS. SMITH: I hope so, too.

20 QUESTION: So are there -- look, if we get out
21 of the problem I raised in that way --

22 MS. SMITH: Uh-huh.

23 QUESTION: -- what is also lurking in the back
24 of my mind is not this case. I'm not thinking of this
25 case.

1 MS. SMITH: Uh-huh.

2 QUESTION: I'm worried about words that will
3 affect other cases. Now, are there other kinds of
4 proceedings where it's not exactly custody, but there's
5 this kind of complexity that's worrying me, where the
6 stability of the child -- you know, and you can't say
7 harm. The judge is out there writing a rather detailed
8 order, and he can't prove harm in respect to every word in
9 that detailed order. Are there other things we should be
10 writing into this that this case isn't?

11 MS. SMITH: I am not aware of another
12 circumstance in which this type of intrusion occurs, where
13 you have a third party coming into court and asking for
14 associational rights with the child, essentially.

15 Now, there may be circumstances under which
16 people want to have children do other things, but I
17 believe that the lower courts are perfectly capable of
18 looking at the differences between deciding whether a
19 parent is not acting in the best interests of the child
20 which I believe, Your Honor, is sort of -- I think it was
21 Justice Kennedy who said, this is sort of the flip side of
22 the harm analysis, and having a court independently
23 substitute its decision of what's in the best interests of
24 the child.

25 And the difference is this, and the reason it is

1 so important in domestic relations that this distinction
2 be made is that if you put the burden on someone to show
3 harm, as that will be defined and as it has been defined
4 in many cases in Washington -- and most particularly I
5 would ask the Court to look at the Littlefield case which
6 was decided 2 years ago in Washington and talked about
7 harm in a relocation and travel situation.

8 If you put the burden on an individual to look
9 at the parents' decision and see whether it is within the
10 range of acceptable decisions, that is a very different
11 thing than telling a court, as the courts were told in
12 these statutes, you decide what you think is in the best
13 interests of the child, and it's different, and it's
14 important for two different reasons.

15 The first is, when judges are making decisions,
16 when the State is making decisions in a best-interest
17 situation, it's very much different than the sorts of
18 decisions that most judges make under most other
19 circumstances, where they're deciding whether somebody
20 committed a crime or breached a contract.

21 QUESTION: When you get -- range that broadly,
22 Ms. Smith, I'm very much bothered by the fact that the
23 supreme court of Washington here struck down on Federal
24 constitutional grounds an entire statute, not simply
25 saying it couldn't apply in this case or that case, and I

1 think our constitutional rule for Federal purposes is that
2 to do that you have to show that no conceivable
3 circumstances could the statute be constitutionally
4 applied, and I take it you're taking that position.

5 MS. SMITH: That's correct.

6 QUESTION: But the fact that there are all sorts
7 of cases where it wouldn't be constitutional I don't think
8 helps you, unless you can show that there are no cases in
9 which it would be constitutional.

10 MS. SMITH: This statute does not provide a
11 constitutional rule of law for the determination of when a
12 visitation order is to be entered.

13 QUESTION: You're saying, even though they might
14 come up accidentally with a result that you could have
15 decided properly under a proper standard --

16 MS. SMITH: Yes.

17 QUESTION: -- the standard here, which is simply
18 the best interests of the child, is always wrong --

19 MS. SMITH: That's --

20 QUESTION: -- as applied in every case to which
21 this statute applies.

22 MS. SMITH: That's correct.

23 QUESTION: What about custody cases?

24 MS. SMITH: Well, in a custody case -- in a
25 custody case between a third party and a parent, this

1 standard would not be used in Washington, and it could not
2 be used, I do not believe.

3 QUESTION: Would it be used in a dispute between
4 the two parents in a divorce situation?

5 MS. SMITH: Well, the -- it would have been used
6 in Washington between 1974 and 1987. The Washington
7 legislature --

8 QUESTION: In a divorce situation do you think
9 it was constitutional?

10 MS. SMITH: Yes, because you've got two
11 individuals who have been acting as a parent to the child,
12 and they, between the two of those -- I mean, you've got
13 to have a tie-breaker at that point, if they're disputing,
14 but you don't need to have a tie-breaker under these
15 circumstances. We've already got a tie-breaker, and it is
16 the fact that the parent makes the decision unless it's
17 putting the child at risk, which --

18 QUESTION: Would the statute -- may I interrupt
19 you? Would the statute apply in a case in which the child
20 had been brought up by one single parent, let's say the
21 mother, who at all times during the child's upbringing was
22 living with her own mother and father, and a question then
23 arose as between, let's say, her mother, who had always
24 been with the child just as much as she had. Would the
25 statute apply in that case?

1 MS. SMITH: For custody or visitation? This
2 statute?

3 QUESTION: Yes.

4 MS. SMITH: Well, if the parent was making a
5 choice to live with the parent, with her parents --

6 QUESTION: Right.

7 MS. SMITH: Yes. I --

8 QUESTION: And then the day comes that she moves
9 out.

10 MS. SMITH: And then the day comes when she
11 decides to move out.

12 QUESTION: Yes.

13 MS. SMITH: Now, under a properly drafted
14 statute I certainly think that there might be
15 circumstances under which, if the individual was
16 completely cut off --

17 QUESTION: Excuse me, but before you get to
18 that, would the -- would this statute apply in that case?
19 I assumed it would, frankly?

20 MS. SMITH: It could.

21 QUESTION: The mother, after 10 years living
22 with the child with her own mother, the child's mother
23 takes the child and moves out.

24 MS. SMITH: Uh-huh.

25 QUESTION: Her own mother wants some visitation.

1 The statute would apply in that case, wouldn't it?

2 MS. SMITH: The statute would apply, but I don't
3 think it could be constitutionally applied, because it
4 doesn't provide a constitutional rule of law.

5 QUESTION: But earlier I thought you said that
6 the best-interest standard determined the appropriate
7 circumstances for a best-interest standard, which you
8 admit in some narrower range, turned not on the blood
9 relationship but between, in effect, the functional
10 relationship, whether or not there was the kind of
11 intimate association which is normally associated with
12 parents, and I would have thought that in my hypo there
13 would have been that extended intimate association, and
14 that therefore, in my hypo the best-interest standard, on
15 your own reasoning, would be constitutional.

16 MS. SMITH: The court makes a -- well, parents
17 may live with other individuals. That does not give a
18 parent-child relationship to those individuals with whom
19 they live. There's still one --

20 QUESTION: So that there is a blood component to
21 this.

22 MS. SMITH: Well, I don't think there
23 necessarily has to be. I don't think the court has to --

24 QUESTION: Well, what about my case, then, in
25 which the grandmother has had just as intimate a

1 relationship with the child as the child's own mother?

2 MS. SMITH: Your Honor, respectfully I would
3 suggest that they didn't have just as intimate a
4 relationship, because the decision --

5 QUESTION: You don't like the hypo.

6 (Laughter.)

7 MS. SMITH: No, it's not that I don't like the
8 hypo. It's just that I think that -- I mean, I don't know
9 exactly why these people were living together, but I
10 presume it was because the parent made the choice to live
11 with her parents.

12 QUESTION: Right.

13 MS. SMITH: And that was the choice that she
14 made for herself and her child.

15 QUESTION: Yes, and she went to work every day,
16 and she left the child with the grandmother. Is that a
17 sufficiently intimate relationship or not?

18 MS. SMITH: No, not -- the parent is making the
19 decision how the parent-child relationship is --

20 QUESTION: May I ask you --

21 MS. SMITH: -- and who the child is going to
22 associate with.

23 QUESTION: May I ask you to comment on a problem
24 that concerns me? I'm just really interested in your
25 answer. Take Justice Souter's hypothetical and assume

1 that -- we see in domestic relations fights sometimes
2 children are used by one spouse against the other as part
3 of the bargaining and so forth, and supposing you have a
4 situation in which the mother of the child gets into a
5 dispute with the grandmother that's totally unrelated to
6 the welfare of the child, but decides for arbitrary
7 reasons to deny visitation rights because it will further
8 her ability to pursue whatever the dispute is --

9 MS. SMITH: Uh-huh.

10 QUESTION: Arbitrary in the sense of best
11 interests of the child, but yet using the child as a
12 weapon in a dispute like that. I take it your standard
13 would say, total control in the mother?

14 MS. SMITH: Absent evidence of harm. Absent
15 some indication that the --

16 QUESTION: No evidence of harm, except the
17 grandmother just won't get to see the child she's been
18 living with for the last 20 years.

19 MS. SMITH: Under a properly --

20 QUESTION: Or 10 years. She'd be too old.

21 MS. SMITH: 20 years, I think the child --

22 QUESTION: Yes.

23 MS. SMITH: -- might be making the decision.

24 (Laughter.)

25 QUESTION: Yes. 10 years. Leave it at 10

1 years. But that is the consequence, that it's an absolute
2 veto unless the other side can prove harm to the child?

3 MS. SMITH: Yes.

4 QUESTION: And you would apply that, I suppose,
5 also to the case of the no-good black sheep husband who
6 has abandoned his wife and child, and then the wife dies,
7 and the husband suddenly reappears and decides what will
8 happen to the child, I take it?

9 MS. SMITH: No, I would not.

10 QUESTION: Why not?

11 MS. SMITH: Because I think it's both the
12 combination of -- well, this is the reason I said I'm not
13 sure the biological relationship is the truly relevant
14 one. It's the fact that the parent, by definition, has
15 the right and the obligation to make day-to-day decisions
16 for the child, and this is exactly the sort of day-to-day
17 decision that parents rather than the State should be
18 making, and you --

19 QUESTION: Well, but this is a parent. I mean,
20 this is the father. There's no doubt that he was the
21 biological father, and I suppose he would be entitled to
22 custody if he --

23 MS. SMITH: I think we're defining parent
24 differently. I'm defining parent in a way that
25 acknowledges the fact that a parent parents a child,

1 that --

2 QUESTION: You're saying there's got to be blood
3 and a history of intimate association in practice.

4 MS. SMITH: That's correct.

5 QUESTION: Does the statute require that? Bear
6 in mind that you're trying to sustain the burden of saying
7 that this statute is unconstitutional in all its
8 applications, but you've just said that it's certainly not
9 unconstitutional in the application where the parent who
10 is trying to determine the future behavior of the child is
11 this no-good black sheep father who hasn't been with the
12 child. Now, there's at least one situation where you
13 could apply the rule of this statute constitutionally,
14 right?

15 MS. SMITH: Well, the fact that the -- no. I
16 don't believe so, because the fact that the biological
17 parent, who has not acted as a parent to the child -- he
18 wouldn't have any standing under this statute.

19 QUESTION: You'd say the statute would be
20 irrelevant in that case.

21 MS. SMITH: Yes. Who's going to be --
22 somebody's taking care of the child, presumably.

23 QUESTION: You would say the statute was
24 irrelevant, but I don't have any reason to believe that
25 the supreme court of Washington would say it was

1 irrelevant. I mean, that's not -- what -- your concept of
2 parent as having the two factors does not seem to be the
3 concept of the statute. It certainly isn't defined that
4 way.

5 MS. SMITH: Well, the court had before it, and I
6 certainly don't think that they anticipated a situation --
7 they had before it three fit parents, in which there was
8 no question, and there's certainly no question in this
9 case that those parents were fully capable of making
10 decisions for the children, and that there was -- there
11 was nothing wrong with those decisions, except somebody
12 who had the filing fee amount disagreed with them.

13 QUESTION: Is there a statute left in Washington
14 now to cover visitation --

15 MS. SMITH: Yes.

16 QUESTION: -- and if so, what is it?

17 MS. SMITH: The statute that is now left in fact
18 requires that there be a court action pending.

19 QUESTION: Do we have that in the --

20 MS. SMITH: It is reproduced in the appendix to
21 the brief of the petitioner. It was not -- and it would
22 not have provided relief to the grandparents in this case,
23 or the petitioner in this case or in any of the cases that
24 were before the State supreme court because there was not
25 a custody action pending. It does --

1 QUESTION: Is that the normal, that a visitation
2 application can attend some other proceedings, divorce,
3 separation, custody, but can't be made at any time?

4 MS. SMITH: Well, I don't know if it's normal.
5 It's certainly the case in many jurisdictions that that is
6 a triggering mechanism, and certainly the intrusion under
7 circumstances like that is far less than it is in a
8 situation like this, where any person at any time can seek
9 visitation, because the parties are already in court at
10 that point. Somebody's going to be making a decision
11 concerning this.

12 And when the Washington legislature passed that
13 statute in 1996 they required not only that there be a
14 custody action pending, but that the individual who is
15 seeking visitation show a substantial relationship to the
16 child. They presumed that grandparents have such a
17 relationship, but again, they required that there be a
18 custody action pending, and it's the intrusion of coming
19 into court that is, in fact, one of the things about this
20 statute that is so pernicious.

21 You should not be placed in the situation that
22 my client was placed in of coming in and defending a
23 perfectly reasonable decision, because this started out as
24 a dispute about whether these grandparents, who were never
25 denied access, were going to see these children once a

1 month or every other weekend, which is what they were
2 seeking.

3 They wanted every other weekend overnight
4 visitation with two girls who at the time were less than 2
5 and 4, and no one should be brought into court for that
6 sort of dispute, and that's what the Washington supreme
7 court recognized in finding that the parents in the cases
8 before it had a statute unconstitutionally applied to
9 them, because there was no standard for either allowing
10 individuals to come into court, which individuals, when
11 they could come into court, or what had to be proven in
12 order for a visitation order, or any of the other little
13 micromanagement that goes on in these sorts of orders, to
14 be entered.

15 QUESTION: And there is an assumption that the
16 Washington supreme court was talking about a fit parent
17 who has custody?

18 MS. SMITH: That's correct, and that's what they
19 had before them, and in fact I think it's quite clear that
20 they thought they were applying this statute to these fact
21 situations.

22 QUESTION: Can I come back to my no-good black
23 sheep runaway --

24 MS. SMITH: Oh, sure.

25 QUESTION: -- runaway husband --

1 (Laughter.)

2 QUESTION: -- because I'm worried about that
3 being the case --

4 MS. SMITH: Yes.

5 QUESTION: -- where this statute might -- maybe
6 the answer to that case is that that husband would first
7 have to seek custody of the children, and custody would be
8 denied.

9 MS. SMITH: That -- he would be denied custody.

10 QUESTION: Okay.

11 MS. SMITH: I believe.

12 QUESTION: But if he were granted custody, then
13 you would say it would play out the same way your case
14 does?

15 MS. SMITH: Yes.

16 QUESTION: Okay.

17 MS. SMITH: Because we have a situation -- I
18 mean, the Constitution, as it's been characterized by this
19 Court, or interpreted by this Court, and as a matter of
20 the way we've operated our society, we have parents make
21 decisions about who children are going to visit with, what
22 candy they're going to eat, how much television they're
23 going to eat, and we don't take that decision away from
24 them. All those little decisions, the big decisions, all
25 the things that raise children --

1 QUESTION: All right, but now your own State of
2 Washington has adopted a new statute to fill the gap,
3 hasn't it?

4 MS. SMITH: Yes.

5 QUESTION: And again, it bases it on the best-
6 interests-of-the-child standard.

7 MS. SMITH: With a number of factors.

8 QUESTION: Yes, but under the rule that you
9 would have us adopt, that also is invalid.

10 MS. SMITH: I believe that the court -- and I
11 would encourage them to, and I may get the opportunity to,
12 to have them apply a harm standard. They did that in the
13 Littlefield case with regard to relocation.

14 QUESTION: They could easily have done it here,
15 but they simply refused to.

16 MS. SMITH: Well, I think what they recognized
17 is this, that they had a statute that allowed any person
18 at any time to seek visitation, and at least with regard
19 to that broad a statute, they believed that there had to
20 be a showing of harm, and I think that it's important to
21 recognize --

22 QUESTION: But under your view, if we were to
23 adopt it, this follow-up statute is also invalid --

24 MS. SMITH: I believe --

25 QUESTION: -- on its literal language of the

1 best-interest standard.

2 MS. SMITH: It would have to be interpreted by
3 the court. I believe that --

4 QUESTION: To mean something else?

5 MS. SMITH: No. I think that the court could
6 characterize the best-interest standard as providing an
7 appropriate protection for the parents' right, because --
8 if it required a showing that the parents' decision under
9 those circumstances was not in the best interest of the
10 child, that would be the equivalent of a showing of harm.

11 QUESTION: But if the supreme court of
12 Washington wouldn't construe this statute to require harm,
13 is there any reason to think they're going to construe the
14 follow-up?

15 MS. SMITH: Well, the statute has factors
16 involved in it. It also requires that there already be
17 the court intrusion. I don't know, and they haven't had
18 that case before them. They had to consider what they
19 were going to do in situations like this, where a third
20 party was seeking visitation absent such an intrusion
21 already occurring.

22 QUESTION: May I ask, in this case you appealed
23 to the appellate court and the State court. Did you
24 argue, in addition to arguing the statute was
25 unconstitutional, that the trial judge had engaged in too

1 much micromanaging?

2 MS. SMITH: Yes.

3 QUESTION: And of course, if they'd accepted
4 that argument, we wouldn't be here.

5 MS. SMITH: We wouldn't be here. If they'd
6 accepted my argument that they should apply what they'd
7 been doing for 20 years with the State, there had to be
8 another action pending.

9 QUESTION: Can you tell me, in a case something
10 like this, where the initial position of each side is
11 rejected, then the court makes some Solomon-like midway
12 compromise, in a case like that, would the parents --
13 assume younger parents faced with well-financed
14 grandparents -- ever be entitled to 100 percent of their
15 attorneys' fees, or do you have to be a prevailing party?
16 How does the attorneys' fees --

17 MS. SMITH: You know, I can tell -- I can only
18 tell you what happens in a situ -- in most of these
19 situations, and that is, in the course of the Solomonic
20 division, the courts usually don't award fees.

21 I can certainly represent that to you, and I can
22 also tell you that in the two other cases that were
23 pending before the State supreme court, that in the other
24 case in which I represented the parent, that the court
25 below -- because these decisions are made by the trial

1 courts, who have just had themselves reversed -- did not
2 award fees to a client who was in much worse financial
3 situation than the parents -- than the grandparents.

4 QUESTION: As I understand -- I understand the
5 dichotomy you draw between a harm-to-the-child standard
6 and a best-interests-of-the-child standard. I'm not so
7 sure about your fallback standard, which is, you think it
8 would be okay if you applied not a best-interests-of-the-
9 child standard, but a standard to the effect that the
10 parent who has custody is not acting in the best interests
11 of the child. You don't think that that's much different
12 from the judge deciding what is in the best interests of
13 the child?

14 MS. SMITH: I absolutely do, and I think Justice
15 Kennedy pointed out that it's really the flip side of
16 that. If you -- and this goes back to something I was
17 talking about earlier, which is the second reason the best
18 interest standard doesn't work, and that is that when you
19 tell the State or a court to make a determination of
20 whether a parent is not acting in a child's best interest,
21 the focus of the decision is much different than asking a
22 court --

23 QUESTION: Oh, I see.

24 MS. SMITH: -- what is in a child's best
25 interest.

1 QUESTION: I see. You don't mean that what the
2 parent has decided to do is not in the child's best
3 interest. You're applying a subjective standard?

4 MS. SMITH: No.

5 QUESTION: The court has to decide whether the
6 parent subjectively is trying to do what is best for the
7 child?

8 MS. SMITH: It's -- the court has to look at
9 whether the consequences of the parent's decision will be
10 to harm the child. In that circumstance, a parent would
11 not be acting in a child's best interest. It's the
12 difference between asking in this case --

13 QUESTION: Well, no, no. I mean, you could not
14 harm the child, but still not be acting in the child's
15 best interests.

16 MS. SMITH: Well, best interests I think has to
17 be defined in a way that you recognize that there are all
18 kinds of decisions that could be made about a child, and
19 we may disagree about what is in a -- I might think that
20 it's in the best interests of my child to go out for
21 football rather than to play the violin. The choice of
22 the outcome, as long as it's not harmful to the child, is
23 the parents, and if you're making decisions that go
24 towards that outcome, then somebody else shouldn't
25 substitute their decision.

1 If I think instead that it would be in the best
2 interests of my child to be in child pornography, then
3 somebody else can step in and say, that is not a decision
4 that can be in the child's best interest.

5 QUESTION: It's no different from harm, the way
6 you're describing --

7 MS. SMITH: It is. You're absolutely right, I
8 don't think it's any different from harm, and the reason
9 that it isn't is because it takes the focus away from the
10 State making the decision to whether the parent's decision
11 is within the range of acceptable decisions.

12 QUESTION: May I ask you one last question here
13 about what you urged the Washington court to do?

14 MS. SMITH: Yes.

15 QUESTION: Did you ask the court to find the
16 statute then being used constitutionally overbroad,
17 applying the Federal standard for overbreadth --

18 MS. SMITH: Well --

19 QUESTION: -- constitutional overbreadth?

20 MS. SMITH: The -- this argument that's being
21 made now that we -- there's a difference between --

22 QUESTION: Well, just answer my question.

23 MS. SMITH: I'm sorry. No. What I asked the
24 court to do -- first of all, I made an argument that they
25 should rely on our State constitution, which they didn't

1 address. Then I asked the court to construe the statute
2 narrowly so that it could be properly applied, and that
3 under the facts of these cases these people could not seek
4 the --

5 QUESTION: Do you think, then, that the
6 Washington supreme court applied a Federal constitutional
7 overbreadth standard in striking the entire statute?

8 MS. SMITH: The court thought that the statute
9 violated the Federal Constitution.

10 QUESTION: Thank you, Ms. Smith.

11 MS. SMITH: Thank you.

12 QUESTION: Mr. Olson, you have 2 minutes
13 remaining.

14 REBUTTAL ARGUMENT OF MARK D. OLSON

15 ON BEHALF OF THE PETITIONERS

16 MR. OLSON: Thank you, Mr. Chief Justice.

17 Justice Breyer, what I think is most important
18 about the special question that you asked is that the
19 father in this case, Brad Troxel, wanted the grandchildren
20 to know their grandparents, and the State can continue to
21 respect his views before he died, and Justice Souter --

22 QUESTION: But, of course, these children have a
23 father now. The mother's husband adopted --

24 MR. OLSON: It's a step-parent adoption, and 28
25 States permit visitation in step-parents adoption cases.

1 Justice Souter, your question, we don't read the
2 Washington opinion to establish a different standard for
3 facial invalidity, and no party argued for a different
4 standard in the State court, and Mr. Chief Justice --

5 QUESTION: They didn't say anything one way or
6 the other about the standard they were applying.

7 MR. OLSON: It was not discussed.

8 And Mr. Chief Justice, the best-interests-of-
9 the-child standard in the amended statute in Washington,
10 26.09.240, still is the basic best-interest standard that
11 exists in 48 States. It just says, include and consider
12 these factors, but you're not limited to it, because the
13 complex nature of State dissolution and family law cases
14 dictates the factors. We don't want to create an Internal
15 Revenue Code to try to figure out how to ferret out these
16 problems.

17 On the micromanagement, it's important to know
18 that, regarding the use of the name, Isabel, it was the
19 mother's request that the grandparents not call her Rose,
20 to which the grandparents conceded. That was put in the
21 order. All of the micromanagement issues were requested
22 by the parents. The grandparents conceded that, and that
23 was to make the parents feel better so that that would be
24 better for the children. The --

25 QUESTION: I just want to go back to earlier,

1 raising of the -- are you suggesting that the grandparents
2 accede to the rights that the dead father would have had,
3 even though we're dealing with an adoptive parent, not a
4 step-parent?

5 MR. OLSON: The problem with kinship, I believe,
6 is that can't ignore that the children had another parent,
7 and that we want to respect the rights of that parent.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.

9 MR. OLSON: Thank you.

10 CHIEF JUSTICE REHNQUIST: The case is submitted.

11 (Whereupon, at 11:18 a.m., the case in the
12 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JENIFER TROXEL, ET VIR, Petitioners v. TOMMIE GRANVILLE
CASE NO: 99-138

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BY Donna Marie Federico

(REPORTER)