THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

Case No. 2014-CP-16-0792
Appellate Case No. 2016-000840

State Farm Mutual Automobile
Insurance Company, ...Respondent,

v.

Beverly Goyeneche, David R. Gray, III, and
Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray),
individually and as Parent and Natural Guardian of S.G., ... Defendants,

Of whom
Beverly Goyeneche and Amanda Goyeneche are..... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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Index

Table of Authorities---------- ii

Certificate of Counsel---------- 1

Questions Presented---------- 1

Statement of Case ---------- 1

Arguments---------- 4

I. The Court of Appeals erred in finding Infant's injuries did not arise out of the ownership, maintenance, or use of Father's truck----------4

II. The Court of Appeals erred in finding Infant only had resident-relative status at Mother's house----------10

Conclusion ----------14

Table of Authorities

Cases

South Carolina State Court Cases

Auto-Owners Ins. Co. v. Horne, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003).....11

Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 157 S.E.2d 633(1967).....10

Canal Ins. Co. v. Ins. Co. of N. Am., 315 S.C. 1, 431 S.E.2d 577 (1993).....5,6, 7

Carraway v. Smith by S.C. Ins. Co., 321 S.C. 23, 467 S.E.2d 120 (Ct. App. 1995).....6,7

Hite v. Hartford Acc. & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (1986).....6, 10

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).....11

In re Doran, 129 S.C. 26, ___, 123 S.E. 501, 503 (1924).....12

Plaxco v. United States Fidelity & Guaranty Co., 252 S.C. 437, 166 S.E.2d 799 (1969).....6

State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998).....*passim*

State Farm Fire & Cas. Co. v. Breazell, 324 S.C. 228, .478 S.E.2d 831 (1996).....10

State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987).....5

Tomlinson v. Melton, 428 S.C. 607, __S.E.2d___ (Ct. App. 2019).....11

Wausau Underwriters Insurance Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992).....*passim*

Foreign Jurisdiction

Alexis v. State Farm, 696 N.W.2d 109 (2005).....8

Classified Ins. Corp. v. Vodinelich, 368 N.W.2d 91 (Minn. 1985).....7

Continental Western Insurance Co. v. Klug, 415 N.W.2d 876 (Minn. 1987).....5

Lincoln Gerald Insurance Co v. Aisha's Learning Center, 468 F.3d 857 (5th Cir. 2006).....7

NW Bank Minn., N.A. v. State Farm Mut. Auto. Ins. Co., 588 N.W.2d 743 (1999).....8

Statutes

S.C. Code Ann. § 15-3-40.....13

S.C. Code Ann § 15-3-700.....6

S.C. Code Ann. § 38-77-140.....5

S.C. Code Ann. § 63-3-530 (A)(42).....11

Certificate of Counsel

The Court of Appeals issued its opinion on December 18, 2019. (App. 1). Counsel for Petitioners Beverly Goyeneche ("Grandmother") and Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray) ("Mother") (collectively "Petitioners") certifies that the petition for rehearing was made on December 23, 2019 and denied on February 20, 2020. (App. 16, 18).

Questions Presented

S.G. ("Infant") died in an automobile from hyperthermia after David Gray ("Father") unknowingly left her in his truck for seven hours. At the time of her death, Infant was being taken to daycare by Father. Infant split time between her unmarried parents' homes—four days with one parent and three days with the other with alternating weeks. The questions presented are whether the Court of Appeals erred in finding (1) Father's act of leaving the vehicle broke a causal link between the use of the truck and Infant's death for purposes of insurance coverage, (2) Infant was not using the truck for transportation, and (3) Infant was not a resident-relative of both parents.

Statement of the Case

This tragic case involves serious coverage ramifications for any child in South Carolina being raised in two households. On the day of her death, thirteen-month-old Infant was staying with Father. That morning, Father got Infant ready for the day and placed her in her car seat to take to daycare. Father, however, forgot about Infant and drove straight to work and started his day at Carolina Printing Sports and Trophy. Around lunch time, Father left work and proceeded to Mother's home to retrieve items for Infant. Afterwards, he returned to work.

Around 5:00 p.m., Mother, went to pick up Infant from daycare, at which time she learned Infant was never dropped off. Mother called Father, who immediately realized Infant was still in

his truck. Father rushed to the sweltering truck and unbuckled Infant from her car seat. Infant was taken to the emergency room by EMS, but was pronounced dead shortly after from complications of hyperthermia.

State Farm Mutual Automobile Insurance Company issued four insurance policies relative to this matter.[1] These policies provided coverage for those "bodily injuries and property damage caused by an accident and arising out of ownership, maintenance or use of the insured automobile, and otherwise subject to the terms of the policy." (App.158-59). Mother presented a claim for loss under the liability and under-insured motorist (UIM) coverages under all four policies for Infant's death.

State Farm filed a declaratory judgment action to determine coverage. (App. 140). The parties stipulated the facts, but disputed Infant's residency. The circuit court granted declaratory relief for State Farm and denied Petitioners' request for a declaration of coverage. (App. 123, 136). The court held that Infant's death "did not arise out of the ownership, maintenance or use of a vehicle" so that the claims were excluded from coverage. In reaching this decision, the court relied on the three-part test set forth in *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998), which requires: (1) a causal connection between the vehicle and the injury; (2) that no act of independent significance breaks the causal link; and (3) the vehicle is being used for

[1] The policies include: (1) Policy number 4891-309-40—providing liability and UIM coverage of $ 25,000 per person, $ 50,000 per occurrence, and $ 25,000 for property damage for Father; (2) Policy number C483241E—providing liability and UIM coverage of $ 50,000 per person, $ 100,000 per occurrence, and $ 25,000 for property damages for Mother; (3) Policy number 10003667A—providing liability and UIM coverage of $ 50,000 per person, $ 100,000 per occurrence, and $ 25,000 for property damage for Grandmother; and (4) Policy number 1772085A—providing liability and UIM coverage of $ 50,000 per person, $ 100,000 per occurrence, and $ 25,000 for property damage for Grandmother.

transportation at the time of the injury/assault. In applying the test, the circuit court found that none of the elements could be satisfied because there was no causal connection between the vehicle and Infant's death, and even if there was, Father's "desertion" of Infant was an act of independent significance. (App.133). Moreover, the court determined that the vehicle was not being used for transportation at the time of the injury. (App.134.) The court also found the preponderance of the evidence established that Infant lived with Mother and Grandmother and was a "resident relative of only the mother's household" because Infant's time in Father's home was "brief and irregular." (App. 129, 135).

Petitioners made a timely post-trial motion, which the circuit court denied. Petitioners subsequently filed a notice of appeal. In briefing and at oral argument, Petitioners' counsel relied heavily on authority from other jurisdictions because our appellate courts have not addressed the circumstances presented here. In so doing, counsel directed the Court of Appeals to decisions that squarely addressed children being left in vehicles, as well as analogous circumstances from the Minnesota Supreme Court, from which the *Aytes* test was adopted. (App.118).

The Court of Appeals affirmed without addressing Minnesota's precedent. In addressing the three-part test, the Court of Appeals found that the circuit court erred in finding that there was no causal connection. The Court of Appeals held "Father's truck not only contributed to but played 'an essential and integral part' in her death." (App.9). However, the Court of Appeals found that "Father's leaving the child unattended in the truck for over seven hours was an act of independent significance that broke any causal connection between Father's truck and [Infant's] death." (App.10). Significantly, the Court of Appeals noted that no South Carolina appellate court has addressed the factual scenario presented by this case, and as such the Court of Appeals

relied on cases involving assailants exiting vehicles to form its opinion on an act of independent significance. (App.10). As to the third prong, the Court of Appeals held there was no coverage because the truck was not being used for transportation. (App. 10).

Additionally, the Court of Appeals held that Infant only had resident relative status with Mother. (App.13-14). While the Court of Appeals acknowledged that the "question of whether a person may be a resident relative of more than one household has not yet been addressed," it determined that Infant did not qualify for two residencies. (App.14). This decision was focused on four key facts: (1) the parents did not start observing split custody until Infant was nine months old—four months prior to her death, (2) Mother sent an "overnight bag whenever [Infant] stayed with him"—yet the Court failed to acknowledge that the bag was used for daycare; (3) Mother claimed Infant as a dependent, and (4) a Court emphasized distinction between Infant using a wooden crib at Mother's home and a Pack n' Play at Father's home. (App.14-15).

Arguments

I. The Court of Appeals erred in finding Infant's injuries did not arise out of the ownership, maintenance, or use of Father's truck.

Insurance coverage exists in this case. The Court of Appeals erred in finding that the injuries and damages do not arise out of the ownership, maintenance, or use of Father's truck. Instead of turning to the Minnesota Supreme Court, which established South Carolina's three-part test for coverage and has addressed analogous factual circumstances, the Court of Appeals relied on distinguishable South Carolina cases that arose from crimes and intentional acts of harm. In so doing, the Court of Appeals found that Father's act of exiting his truck broke the causal link and that his truck was not being used for transportation. Such findings are incongruent with the purpose of insurance and the present circumstance. Because this is an issue of first impression

with far reaching consequences, this Court should review this matter.

South Carolina requires automobile policies to insure against damages "arising out of the ownership, maintenance, or use of motor vehicles." *See* S.C. Code Ann. § 38-77-140 (mandating coverage for the benefit of the public). In *Wausau Underwriters Insurance Co. v. Howser*, 309 S.C. 269, 272, 422 S.E.2d 106, 108 (1992), this Court adopted the Minnesota Supreme Court's three-part test to determine if an event is "arising out of the ownership, maintenance, or use of mother vehicles" because Minnesota law "is consistent with South Carolina law."[2] *Id.* (relying on *Continental Western Insurance Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987), the court adopted Minnesota's three part test for coverage requiring: (1) a casual connection between the vehicle and the injury; (2) that no act of independent significance breaks the causal link; and (3) the vehicle is being used for transportation at the time of the assault). In adopting the *Klug* test, this Court noted that the legislative intent of section 38-77-140 of the South Carolina Code is to mandate coverage for the benefit of the public because "it encompasses those uses *foreseeable* to the parties to an automobile insurance policy." *Canal Ins. Co. v. Ins. Co. of N. Am.*, 315 S.C. 1, 4–5, 431 S.E.2d 577, 580 (1993) (emphasis added) (adopting a third element to the test by relying again on the Minnesota Supreme Court). In sum, public policy is entwined with the fundamental purpose of insurance coverage—to provide coverage to protect individuals when circumstances are foreseeable.

At the outset, there is no question that these circumstances are foreseeable, as recognized by the Court of Appeals. App. at 9. ("Significantly, our Legislature has recognized that the

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[2] This Court has repeatedly relied on the Minnesota Supreme Court in this area of law. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987) (adopting the Supreme Court of Minnesota's standard for meaningful offer for optional coverages).

intentional or unintentional act of leaving a child inside a locked vehicle is foreseeably identifiable with the normal use of a vehicle.").[3] Tellingly, foreseeability shapes the three-part test. *Canal Ins. Co.*, 315 S.C. at 4–5, 431 S.E.2d at 580 (discussing foreseeability as to the transportation element); *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745-46 (describing a causal connection as "foreseeably identified with the normal use of the vehicle"). Because the Court of Appeals found a causal connection, this case turns on the second and third elements. Turning first to the independent cause, our courts have found that an independent cause has to be wholly disassociated from, independent, and remote from the use of the vehicle. *Carraway v. Smith by S.C. Ins. Co.*, 321 S.C. 23, 26, 467 S.E.2d 120, 121 (Ct. App. 1995) (finding the defendant's "injuries were caused by an independent act wholly separate from the use of the vehicle when Smith exited the vehicle and was later shot outside the vehicle"); *Hite v. Hartford Acc. & Indem. Co.*, 288 S.C. 616, 621, 344 S.E.2d 173, 176 (1986) ("If the injury was directly caused by some independent or intervening cause wholly disassociated form, independent of or remote from the use of the automobile, the injury can't said to arise of its 'use.'"). In addressing an act of independent significance in *Howser*, the Court examined whether the purpose of the act was completed. *Howser*, 309 S.C. at 272, 422 S.E.2d at 108 (citing *Plaxco v. United States Fidelity & Guaranty Co.*, 252 S.C. 437, 166 S.E.2d 799 (1969)). It was only when an event exceeded the act's original purpose or intent that the causal connection was found to be broken. *Id.*

As to transportation, this Court has found the third element is satisfied if the injury or

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[3] *See* S.C. Code Ann § 15-3-700 ("A person is immune from civil liability for property damage result from his forcible entry into a motor vehicle for the purpose of removing a minor or vulnerable adult from the vehicle if the person has a reasonable good faith belief that forcible entry into the vehicle is necessary because the minor or vulnerable adult is in imminent danger of suffering harm.").

accident occurs when the motor vehicle is being used for traditional transportation purposes. In reaching this decision, the Court relied on legislative intent and foreseeability. In defining the meaning of "use" the Court again turned to the Minnesota Supreme Court, who found there was no coverage when an insured committed suicide in her vehicle in the garage and her children were accidentally asphyxiated in the home—unconnected to the vehicle. *Canal Ins. Co.*, 315 S.C. at 4–5, 431 S.E.2d at 580; *see also Classified Ins. Corp. v. Vodinelich*, 368 N.W.2d 91 (Minn. 1985). While a tragic circumstance, both Courts drew a distinction between a car being factually involved yet not being utilized for the foreseeable use of transportation at any point. *Id.*

Since this Court's adoption of the three-part test, South Carolina's cases have primarily addressed these elements within the context of criminal and intentional acts. *See e.g.*, *Aytes*, 332 S.C. at 35, 503 S.E.2d at 746 (noting that when Aytes drove a passenger to house intending to kill her and ultimately shot her in the foot, "[I]f there was a causal link, it was broken when the assailant exited the vehicle); *Carraway*, 321 S.C. at 26, 467 S.E.2d at 121 ("Smith exited the car and carried on a conversation with a third person for several minutes before the shooting occurred. Even if the use of the car and the shooting were connected, that link was broken by Smith's actions."); *Wausau Underwriters Ins.*, 309 S.C. at 269, 422 S.E.2d at 106 (addressing facts in which a passenger was injured by an unknown assailant shot at the vehicle). South Carolina's appellate courts have not addressed whether automobile insurance policies cover the factual scenario of this case. By equating a driver exiting a vehicle and ending up involved in a shooting to an Infant who never left the vehicle nor had the ability to leave, the Court of Appeals disregarded the fundamental basis of insurance coverage and the Legislature's intent to provide coverage in foreseeable circumstances.

The United State Court of Appeals for the Fifth Circuit, however, addressed the issue in *Lincoln Gerald Insurance Co. v. Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006). In *Lincoln General*, a van owned and operated by Aisha's Learning Center (ALC) transported a two-year-old child from her home to the daycare center. Upon arriving at ALC, the driver did not unload the child along with the other children. The child was trapped in the parked van for around seven hours while the temperature reached 95 degrees Fahrenheit. The child's mother sued ALC for the resulting injuries.

ALC had a commercial general liability (CGL) policy with Lincoln General that contained an exclusion for injuries "arising out of the ownership, maintenance, use or entrustment to others of any . . . auto." Lincoln General brought a declaratory judgment action to enforce the exclusion arguing the child's injuries arose from the "use" of ALC's van. The district court found for Lincoln General, holding the automobile exclusion precluded coverage under the policy.

The Fifth Circuit affirmed. The Court held the child's injuries "arose from the use of the ALC's van." First, the Court noted that the "injuries occurred while the van was being used for one of its inherent purposes: transportation of children to ALC." While the van was no longer in motion, "the purpose [of child's delivery to school] had not yet been fulfilled and was thus ongoing." Next, the accident was held to have "occurred within the van's natural territorial limits before the actual use—the transportation [of child] to ALC-terminated." Third, the Court held the vehicle "caused" the injury. Notably, the Court looked to the intent of the parties in evaluating coverage and explained that coverage is dependent not only on conduct, but intent.

The Fifth Circuit's reasoning parallels decisions from the Supreme Court of Minnesota, which has addressed similar circumstances utilizing South Carolina's identical three-part test.

See NW Bank Minn., N.A. v. State Farm Mut. Auto. Ins. Co., 588 N.W.2d 743 (1999); *Alexis v. State Farm*, 696 N.W.2d 109 (2005). In *NW Bank Minnesota, N.A.*, the court addressed whether coverage existed when a motor vehicle was being used for transportation purposes when its engine was accidentally left running in a garage attached to a home and the owners of the vehicle and home died for carbon monoxide poisoning. There was no dispute that owners left the car on by accident and the deaths were caused by carbon monoxide. The estate moved for summary judgment to collect on the policy and State Farm argued that because the owners were not actively using their vehicle at the time of their deaths, their deaths did not arise out of the use of a motor vehicle. The trial court found that the vehicle was being used for transportation purposes and the purpose had never ceased because the car was never turned off, i.e. the purpose had not ended. Moreover, the court explained, "[t]he fact that the decedents in the present case had reached their final destination does not change the fact that their injuries arose out of the use of a motor vehicle. Although the deaths in this case occurred inside the home rather than the vehicle, they were caused by a continuous, unbroken chain of events directly attributable to their State Farm insured car which was being used for transportation purposes."

The Minnesota Supreme Court found that when examining the facts through the three-part test that no case law supported a conclusion that "the use of a motor vehicle for transportation purposes must be contemporaneous with the ultimate injury suffered by the insured." In applying their facts, the Court held that the owners' injuries "resulted directly" from the failure to turn the engine off and that the accident occurred while one of the owners still occupied the vehicle. Thus, the accident arose out of the vehicle despite the owners exiting the vehicle. Moreover, the court noted, "there is nothing in the record to suggest any non-transportation purpose underlying any of

[the owner's] actions; he simply forgot to turn off the engine."

Here, the truck's purpose was to transport Infant to daycare, which was never completed when her injuries occurred. Neither Infant's injuries arose nor Father's exiting from his truck were "wholly disassociated from, independent of and remote" from that use. *Howser*, at 274, 422 S.E.2d 109; *Hite*, 288 S.C. at 621, 344 S.E.2d at 176. Instead, Infant's injuries arose from an ongoing act. For these reasons, this Court should reverse and find coverage exists.

II. The Court of Appeals erred in finding Infant only had resident-relative status at Mother's house.

Determining residency can be complicated, but it is not here. Petitioners are seeking coverage they purchased for the purpose of shielding their family from risk and uncertainty during a worst-case scenario. The circuit court's finding that that the Infant's time at Father's home was "brief and irregular" is unsupported by the facts, and the Court of Appeals' affirmance was an error of law. While the Court of Appeals readily admitted that the question of whether a child can have two residencies has yet to be addressed, it failed to appreciate the facts presented, including Infant's age and the parents' intent to share custody in the four months preceding Infant's death.

This Court has continually held that a resident relative is a "a resident of the same household is one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently." *Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 339, 157 S.E.2d 633, 636 (1967) (internal citation omitted); *see also State Farm Fire & Cas. Co. v. Breazell*, 324 S.C. 228, 231, 478 S.E.2d 831, 832 (1996) (stating residency is dependent on three factors: "(1) living under the same roof; (2) in a close, intimate and informal relationship, and (3) where the intended

duration of the relationship is likely to be substantial, where it is consistent with the informality of the relationship"). The spirit of this language has invoked key questions to determine residency like, "[d]oes the child regularly spend time in the household such that there is a continuing expectation of the child's periodic return that's regular enough for the house to be the child's home when the child is there, as opposed to a place of infrequent or irregular visits." *Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 66, 586 S.E.2d 865, 873 (Ct. App. 2003). While there is no single test for determining whether a child is a resident of a parent's household, courts have continued to look to "the facts and circumstances of each case in totality to determine the child's residency." *Id.*

In analyzing this matter, the Court of Appeals correctly noted that no appellate court has addressed whether a child may be a resident relative of more than one household. (App.14). While this is an issue of first impression, the Legislature's expressed intent to allow and encourage joint custody provides paramount guidance. *See* S.C. Code Ann. § 63-3-530 (A)(42) (Supp. 2018) (providing the family court jurisdiction "to order joint or divided custody where the court finds it is in the best interest of the child"). The Legislature's advancement of joint custody presupposes that a child will split time between two permanent, i.e. non-transient, homes. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."). Practically, the Legislature has expressly endorsed a family structure that garners an arrangement in which a child alternates between two homes with only one parent being allowed to claim a child for dependency. As the Honorable Stephanie McDonald noted in her concurrence in *Tomlinson v. Melton*, the law should conform to a family's actual circumstances and the "realities of family court practice," both of which are consistent with the General Assembly's grant of jurisdiction to the family court to award joint

custody. 428 S.C. 607 (Ct. App. 2019) (McDonald, J. concurring) (discussing how judicial language disfavoring awards of joint or divided custody is "incompatible with the realities of family court practice today" and "inconsistent" with the General Assembly's expressed language of section 63—3-530(A)(42) of the South Carolina Code). To suggest otherwise ignores the Legislature's intent to protect children in all circumstances. *See generally, In re Doran*, 129 S.C. 26, ___, 123 S.E. 501, 503 (1924) ("[T]he fundamental principle that the controlling consideration is the best interests of the child."); *see also* S.C. Code Ann. § 15-3-40 (qualifying a child under the age of eighteen as disabled).

Here, the only evidence is that Father and Mother acted as though they had joint custody. Father was fully involved in the child's life. He characterized the arrangement as one in which he had liberal visitation. In fact, the arrangement went further than a traditional split of time between two parents. Father explained that he was either at Mother's house or she was at his—they were always together with Infant.

Both parents were active participants in Infant's life. They both washed Infant's clothes. Both took Infant to the doctor. (App. 332). Infant had food, clothing, and other necessities at both houses. (App.330). While the Court of Appeals emphasized Mother packing a bag for Infant, such an act is not surprising given Infant's age. Moreover, the Court of Appeals ignored the testimony that explained that the bag was used for daycare. Additionally, the Court gave great weight to the differences between a wooden crib and a Pack n' Play. Focusing on the potential mobility of Infant's bed is misguided and places an unwarranted emphasis on a family's economic status. This family's limited finances were never concealed. The reason the parents did not live together was because they did not have the finances. (App.330).

If the Court remains true to the spirit of the test, the question rests with whether Infant's time in Father's home was transient. It was not. The evidence in this case demonstrates there was a familial relationship and there was an expectation that Infant would be with Father frequently and regularly. *See*, *Horne*, 356 S.C. at 66, 586 S.E.2d at 873.

This case has broad ramifications for families across this State. If left unaddressed, carriers will rely on this opinion to deny coverage for children living between two homes on the basis of only one parent being allowed to claim dependency and economic distinctions in parent's living conditions. Despite these parents' efforts to keep their family safe and insured, this case would allow the law to leave our most vulnerable citizens, our children, unprotected.

Conclusion

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should grant this petition and reverse the judgment below.

Respectfully submitted,

March 16, 2020

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Of whom
Beverly Goyeneche and Amanda Goyeneche are..... Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that on March 16, 2020, she served counsel for Respondents with the *Petition for Certiorari*, which has been updated to reflect the correct filing date, in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following below. Additionally, the *Appendix* was placed in the mail on March 13, 2020.

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