No.

In the Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), this Court concluded that Washington's Grandparent Visitation Statute unconstitutionally infringed a fit parent's federal constitutional right to direct the care and upbringing of his or her children. Left expressly unanswered by the plurality opinion in *Troxel*, *id.* at 73, the question presented in this case is:

Whether the Fourteenth Amendment's Due Process Clause is violated when a court orders grandparent visitation over a fit parent's objection, where the grandparent has not proved by clear and convincing evidence that such an order is necessary to prevent harm or potential harm to the child.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Pennsylvania Supreme Court (App., *infra*, 1a-52a) is reported at 904 A.2d 875 (2006). The decision of the Pennsylvania Superior Court (App., *infra*, 53a–64a) is reported at 851 A.2d 193 (2004). The decision and order of the Court of Common Pleas (App., *infra*, 65a-86a) are unreported.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on August 22, 2006. On November 13, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 20, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

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

Pennsylvania's statute governing state-court orders of partial child custody or child visitation to a deceased parent's own parents or grandparents, 23 Pa. C.S. § 5311, provides:

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

STATEMENT

Each of the fifty States allows grandparents to seek court-ordered visitation with their grandchildren and thereby obtain judicial review of even a fit parent's decision to deny or limit visitation. See App., *infra*, 87a-108a. State courts of last resort are deeply divided as to whether a fit parent's federal constitutional right to make decisions regarding the care, custody, and control of his or her child requires that a grandparent demonstrate actual or potential harm to the child before a court may order custody or visitation over the parent's objection.

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), seven Justices recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 68 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). Justice O'Connor's plurality opinion—joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer—concluded that the State of Washington's Grandparent Visitation Statute was unconstitutional as applied to override a fit mother's decision to limit her daughter's paternal grandparents to monthly visits with the child following the father's suicide. *Id.* at 60-61, 73. The plurality noted the "sweeping breadth" of the Washington

statute, *id.* at 73, and the failure of the Washington courts to accord "special weight" to the mother's decision and to apply "the traditional presumption that a fit parent will act in the best interest of his or her child," *id*. at 69. The plurality expressly left unanswered "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Id.* at 73.

Justice Souter concurred in the judgment. He reasoned that the Washington statute was facially unconstitutional because it authorized "'any person' at 'any time' to petition and receive visitation rights subject only to a free-ranging best-interests-of-the-child standard." *Troxel*, 530 U.S. at 76-77. Justice Thomas also concurred in the judgment, agreeing that "this Court's recognition of a fundamental right of parents to direct the upbringing of their child resolves this case." *Id.* at 80. Justice Thomas explained that strict scrutiny should apply to the custody order, concluding that "Washington lacks even a legitimate state interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties." *Ibid.*[1]

The federal constitutional question left unanswered by *Troxel* continues to divide the States. As detailed below

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[1] Justices Stevens, Scalia, and Kennedy dissented in separate opinions. Noting that the Washington Supreme Court had found the state statute facially unconstitutional, Justice Stevens would have remanded for further review on the ground that the statute could have a "plainly legitimate sweep" despite applying to "any person" petitioning at "any time" and not requiring a showing of actual or potential harm in every case. *Troxel*, 530 U.S. at 85. Justice Kennedy dissented along similar lines, writing that he would remand for further review the state court's facial invalidation of state law because the best-interests-of-the-child standard might be appropriate in some third-party visitation cases. *Id.* at 94. Justice Scalia argued that the right of parents to direct the upbringing of their children is an unenumerated right not enforceable by "[j]udicial vindication." *Id.* at 91-92.

(*infra* pp. 11-21), twelve States prohibit courts from ordering grandparent visitation absent a showing of actual or imminent emotional or physical harm to the health or welfare of the child, whereas eleven States permit court-ordered custody or visitation, over a fit parent's objection, without requiring such a showing. See also App., *infra*, 87a-110a.

That conflict has important implications for a fit parent's fundamental right to make childrearing decisions. In jurisdictions where the Due Process Clause is read to require a showing of harm, the parent-child relationship remains free from state interference unless a court is satisfied that intervention is necessary because "the parent's decision regarding visitation will cause the child to suffer real and substantial emotional harm." *Roth* v. *Weston*, 789 A.2d 431, 445 (Conn. 2002). In those States, "[t]he fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003).

In States where grandparents need not demonstrate any risk of harm to the child to gain court-ordered custody or visitation, a judge may override the parent's presumptively valid decision whenever the court disagrees with the parent's decision and concludes that additional contact with a grandparent would be in the child's "best interests." See, *e.g., Brandon L.* v. *Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (upholding a visitation order "in the best interest of the children and [that] will not substantially interfere with the parent-child relationship"). In stark contrast to the "harm to the child" standard, the "best interests" standard sets a relatively low and notoriously vague bar. See *Troxel*, 530 U.S. at 75 (Souter, J., concurring) (criticizing "a free-ranging best-interests-of-the-child standard"); *id* at 101 (Kennedy, J., dissenting) (noting criticism of the best interests standard as indeterminate).

In the decision below, the Pennsylvania Supreme Court did not require a showing of actual or potential harm to the child before ordering, over the fit parent's objection, that a grandparent was entitled to take overnight custody of a child for one weekend a month and one week each summer. App., *infra*, at 25a-26a. While recognizing that a number of its sister States hold that the Due Process Clause requires such a showing, *id.* at 22a-23a & n.21, the Pennsylvania Supreme Court noted that the *Troxel* Court "refused to determine" the question, *id.* at 22a, and therefore held that the federal Constitution did not require a grandparent to demonstrate that court-ordered partial custody is necessary to avoid harm to the child.

A. The Trial Court Proceedings

Kaelen Fausey, the only son of Shane and Stephanie Fausey, was born on October 5, 1994, and lived with both of his parents. Stephanie Fausey died of cancer on May 25, 2002, leaving petitioner, Shane Fausey, as Kaelen's sole parent and guardian. At trial, the parties stipulated to petitioner's fitness as a parent. R. 149a-150a.[2]

After Ms. Fausey's death, a dispute arose between petitioner and respondent, Kaelen's maternal grandmother, regarding the frequency and length of her visits with Kaelen. Respondent filed a petition for partial custody over Kaelen on February 28, 2003, in the Court of Common Pleas for Lycoming County, Pennsylvania. R. 1a. Petitioner opposed the petition, arguing that he had made an appropriate decision regarding the amount and nature of grandparent visitation to allow, and that it was not permissible for a court to override a fit parent's decision regarding the amount and nature of grandparent visitation to allow in the absence of any proof or

[2] References to the record excerpts reproduced in the Pennsylvania Supreme Court are designated by an "R."

allegation of actual or imminent physical or emotional harm to the child. See R. 5a-10a.

On April 10, 2003, following an off-the-record conference, a custody conference officer issued a temporary order granting respondent unsupervised partial custody of Kaelen for one weekend a month, one week during the summer, and two hours on Christmas Day. R. 4a-5a.[3] Petitioner objected to respondent's having overnight custody of Kaelen, and a trial date was set. R. 5a. Petitioner filed a petition to modify the temporary order, citing concerns about respondent's past alcohol abuse, history of household domestic violence, inadequate supervision of Kaelen, and her husband's medical history. R. 6a-7a. Relying on *Troxel*, petitioner also claimed that the temporary order violated his fundamental right to make childrearing decisions under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. R. 7a-8a.

In July 2003, the Court of Common Pleas held a trial. Petitioner testified that, while willing to agree to unsupervised visitation one day each month and two hours on Christmas (R. 40a-42a, 210a-211a), more extensive visitation—especially overnight—was not in Kaelen's best interest. Petitioner testified that, prior to her death, Kaelen's mother agreed that unsupervised, overnight visits with respondent were unacceptable. R. 178a. Petitioner explained to the court that his concerns regarding respondent's unsupervised, overnight visitation were based, in part, on past instances of domestic violence in respondent's home and concern about the level of supervision and care Kaelen received while with respondent.

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[3] Pennsylvania law distinguishes the term "partial custody" from the term "visitation." A party granted visitation may not remove the child from the parent's control, whereas a party granted custody can remove the child from the parent's control. As the Pennsylvania Supreme Court indicated, the Court in *Troxel* and most other States use the term "visitation" to refer to both kinds of court orders. App., *infra*, at 4 n.4

R. 42a-51a, 179a-181a. Respondent neither alleged nor proved at trial that Kaelen would suffer any physical or emotional harm if petitioner were allowed to decide, free from judicial interference, the amount and nature of grandparent visitation to allow.

On August 1, 2003, petitioner's objections notwithstanding, the court issued an order granting respondent visitation for one overnight weekend each month and one week each summer. App., *infra*, 85a-86a. The court found that respondent "met her burden of proof that it is in the child's best interest to have some time with the grandparent" and that court-ordered partial custody would be in Kaelen's best interests. R. 232a.

Petitioner appealed the trial court's order, again asserting that the order violated his fundamental right to raise his child without undue governmental interference, as protected by the Due Process Clause in accordance with *Troxel*. In an October 16, 2003, opinion explaining the basis for his order, the trial judge addressed petitioner's constitutional claims. App., *infra*, at 65a-84a. Noting that *Troxel* did not resolve what particular standards should apply to grandparent visitation statutes, *id.* at 75a, the trial court held that "Pennsylvania has a strong interest in protecting children like Kaelen from bad decisions made by parents," *id*. at 81a, and therefore the statute would survive judicial review even under a strict scrutiny analysis, *id*. at 78a-79a. The trial court found that the Pennsylvania statute "strikes a perfect balance between arbitrary interference with the rights of parents and the State's interest in promoting grandparent/grandchild contact." *Id*. at 81a. The statute survived strict scrutiny as applied in petitioner's case because respondent's showing of "the benefit of visitation" was sufficient to defeat the "presumption that a fit parent's decision is in the best interest of the child." *Ibid*.

B. The Pennsylvania Superior Court Decision

Petitioner timely appealed the trial court's order, continuing to argue that the visitation order unconstitutionally infringed his fundamental right to make childrearing decisions under the Fourteenth Amendment's Due Process Clause.[4] App., *infra*, 53a-55a. The Pennsylvania Superior Court applied strict scrutiny, *id*. at 56a, and held that petitioner's fundamental rights were adequately protected because respondent demonstrated that grandparent visitation "would be in Kaelen's best interest" and "would not interfere with the parent-child relationship," notwithstanding "the presumption that [petitioner's] decisions regarding Kaelen's visits with grandmother were in Kaelen's best interest." *Id.* at 63a. The court held that section 5311 did not violate petitioner's due process rights as applied by the trial court's custody order. *Id*. at 64a.

C. The Pennsylvania Supreme Court Decision

The Pennsylvania Supreme Court granted allocatur to determine the constitutionality of court-ordered grandparent visitation upon the death of the child's parent who is also the grandparent's child. App., *infra*, 1a. The court noted that this issue was one issue of first impression, having been left unanswered by *Troxel*. *Id*. at 8a (citing 530 U.S. at 73).

The court observed that the facts of *Troxel* were similar to those in this case—each involving the death of a parent and the surviving parent's decision to restrict visitation between

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[4] Petitioner also challenged the application of section 5311 on Equal Protection Clause grounds, arguing that the statute treated a surviving parent after the other parent's death differently than two living parents for grandparent visitation purposes without a sufficient governmental interest. App., *infra*, 55a. The Pennsylvania Superior Court rejected Petitioner's equal protection challenge, *id.* at 61a-62a, and Petitioner did not press that argument on appeal before the Pennsylvania Supreme Court, *id.* at 7a.

the child and a grandparent on the deceased parent's side. App., *infra*, 9a. The majority opinion characterized the *Troxel* plurality as focused on the "breathtakingly broad" statute at issue there and on the Washington courts' failure to presume that a fit parent acts in the best interests of the child. *Id*. at 10a. "[D]irectly relevant to the case" at bar, the Pennsylvania Supreme Court wrote, "the [*Troxel*] plurality refused to 'consider the primary constitutional question * * * whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.'" *Id*. at 10a-11a (quoting *Troxel*, 530 U.S. at 73).

Turning to that "primary constitutional question," the court recognized that "the right to make decisions concerning the care, custody, and control of one's children is one of the oldest fundamental rights protected by the Due Process Clause," App., *infra*, 16a-17a (citing *Troxel*, 530 U.S. at 67), and concluded that any state infringement of that right must serve a compelling state interest and be narrowly tailored to effectuate that interest, *id*. at 17a. Identifying a compelling state interest in protecting the health and emotional welfare of children, the court considered whether the application of section 5311 here was narrowly tailored to serve that interest. App., *infra*, 20a. The court acknowledged the deep divide among state courts of last resort as to whether the Due Process Clause requires a court to find harm or potential harm to the child before ordering grandparent visitation over a fit parent's objection. See *id*. at 22a-24a. "[W]hile some of our sister States have required a finding of harm," the court noted, "a number of courts have either declined to require third parties to demonstrate harm or have found that grandparents may satisfy a requirement of harm merely by showing that the child will be harmed by the termination of a beneficial relationship with his or her grandparents." *Ibid*.

The court held that the text of section 5311 "did not require a specific finding of harm" and that Pennsylvania

precedent "militate[d] against requiring grandparents to demonstrate harm as a condition precedent to a grant of visitation." App., *infra*, 24a. The court further concluded that section 5311 did not violate the federal Constitution as applied here, despite the fact that there neither was nor could be any finding that the denial of additional grandparent visitation had caused or threatened to cause emotional or physical harm to the health or welfare of the child. See *id.* at 25a-26a.

Justice Newman concurred, urging that "it is time to regard the best interests of the child as a fundamental and momentous right," App., *infra*, 26a, and that "[t]he fundamental rights of children to have their best interests considered prevails over the fundamental rights of parents to the care, custody, and control of their children," *id*. at 37a. Noting that "Great Britain has come to terms with the fundamental rights of children," *id*. at 38a, Justice Newman "advocate[d] that we finally legitimize the right of the child to have his or her best interests considered as a fundamental right," *ibid*.

Chief Justice Cappy dissented, arguing that section 5311 was unconstitutional as applied, because "unless a court finds that a fit parent's decisions regarding a child's contact with a grandparent [are] causing or will cause harm to the child, the state's interest in protecting the child is not implicated." App., *infra*, 50a. He would have held that "[t]he state simply has no compelling interest to interfere with a fit parent's fundamental right to make decisions regarding a child's contact with a grandparent simply because the grandparent, or anyone else, including a state court, thinks that a different decision is better or more desirable for the child." *Id*. at 51a (citing *Troxel*, 530 U.S. at 72-73). Chief Justice Cappy would have required respondent "to demonstrate, by clear and convincing evidence, that absent an order granting the grandparent custody and/or visitation, the child is being or will be harmed." *Id*. at 51a-52a.

* * *

This case turns on the question left unanswered in *Troxel*: whether, as a condition precedent to court-ordered visitation, the Fourteenth Amendment's Due Process Clause requires grandparents to show that a fit parent's denial or limit of visitation risks harm or potential harm to the child. Recognizing a deep split among state courts of last resort on this issue, Pennsylvania joined those States holding that a grandparent need not demonstrate harm.

REASONS FOR GRANTING THE PETITION

I. The States Are Deeply Divided As To Whether A Fit Parent's Fundamental Right Under the Due Process Clause Of The Fourteenth Amendment Requires That A Grandparent Seeking Court-Ordered Visitation Over The Parent's Objection Must Demonstrate That Visitation Is Necessary To Avoid Harm To The Child

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), a majority of this Court recognized that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *id.* at 65 (plurality opinion); see also *id.* at 77 (Souter, J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). A plurality of the Court in *Troxel* determined that the Washington Grandparent Visitation Statute was unconstitutional as applied where a court awarded visitation rights to a child's paternal grandparents over the fit mother's objection. *Id.* at 75.

Justice O'Connor, writing for the plurality, took issue with the Washington trial court's failure to accord "special weight" to the mother's "determination of her daughter's best interest," and the court's failure to apply "the traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel*, 530 U.S. at 69. Justice O'Connor emphasized that "the Due Process Clause does not permit a

State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73. Justice Souter and Justice Thomas wrote separate opinions concurring in the judgment. See *supra*, p. 3.

The States are deeply divided on the question expressly left unanswered by the *Troxel* plurality: "whether the Due Process Clause requires" that all grandparent visitation statutes must "include a showing of harm or potential harm as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73. Nine states courts of last resort have answered that question in the affirmative, and three more have established the same rule by statute in response to *Troxel*. See *infra*, pp. 12-17. Eleven States have reached the opposite conclusion. See *infra*, pp. 18-19.

A. Twelve States Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Twelve States prohibit court-ordered visitation over a fit parent's objection absent a showing that denial of visitation would result in actual or potential harm to the child. In nine of those jurisdictions, the highest court of the State has interpreted the Fourteenth Amendment's Due Process Clause to require harm as a threshold showing, without which court-ordered visitation is impermissible. *Linder* v. *Linder*, 72 S.W.3d 841 (Ark. 2002); *Roth* v. *Weston*, 789 A.2d 431 (Conn. 2002); *Brooks* v. *Parkerson*, 454 S.E.2d 769 (Ga. 1995); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Blixt* v. *Blixt*, 774 N.E.2d 1052 (Mass. 2002); *In re R.A.*, 891 A.2d 564 (N.H. 2005); *Moriarty* v. *Bradt*, 827 A.2d 203 (N.J. 2003); *Williams* v. *Williams*, 501 S.E.2d 417 (Va. 1998); *In re Parentage of C.A.M.A.*, 109 P.3d 405 (Wash.

2005).[5] At least three States, in response to *Troxel*, have imposed a harm-based standard by statute to remedy federal constitutional infirmities in their respective laws. See 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006); Mich. Comp. Laws § 722.27b(4)(b) (2006); Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006).

The highest courts in those states have held that any lesser standard—requiring, for example, that the grandparent demonstrate merely that visitation would be in the best interests of the child—would afford inadequate "special weight" to the fit parent's determination of what is best for the child. See, *e.g.*, *Howard*, 661 N.W.2d at 192 ("There is nothing in [the best interest standard] * * * that mandates the judge to give special weight to the parents' decision.").[6] Less

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[5] In at least four other States, including Maine, Mississippi, South Carolina, and Vermont, courts have declined to declare potential harm to the child to be the *sole* justification for state intervention, but they have held that only sufficiently "compelling" or "urgent" circumstances, such as harm to the child, will overcome the presumption in favor of the fit parent. *Rideout* v. *Riendeau*, 761 A.2d 291, 301 (Me. 2000) ("The natural right of a parent to the care and control of a child should be limited only for the most *urgent reasons*.") (quoting *Merchant* v. *Bussell*, 27 A.2d 816, 818 (Me. 1942)); *Stacy* v. *Ross*, 798 So. 2d 1275 (Miss. 2001) ("[F]orced, extensive, unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents."); *Camburn* v. *Smith*, 586 S.E.2d 565, 579 (S.C. 2003) ("The presumption that a fit parent's decision is in the best interest of the child may be overcome only by showing *compelling circumstances*, such as significant harm to the child, if visitation is not granted.") (emphasis added); *Glidden* v. *Conley*, 820 A.2d 197 (Vt. 2003) (holding that a mere "best interests" standard does not survive *Troxel* and requiring "evidence of compelling circumstances to justify judicial interference with the parent's visitation decision").

[6] The Iowa Supreme Court acknowledged that harm may result "[w]hen a grandparent has established a substantial relationship with a grandchild" and that emotional bond is severed, but held that the harm must be "beyond that derived from the loss of a helpful, beneficial

compelling circumstances, those courts have explained, cannot justify "state intrusion on the [fit] parent's fundamental right" to make independent childrearing decisions. *Linder*, 72 S.W.3d at 858; see also *Howard*, 661 N.W.2d at 188. The Connecticut Supreme Court, for example, determined that "the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody [of the child] * * * namely, that the child is neglected, uncared-for or dependent as those terms have been defined [by state statute]." *Roth*, 789 A.2d at 445 (internal quotation marks omitted). The Massachusetts Supreme Judicial Court similarly held that grandparents seeking visitation must "allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." *Blixt*, 774 N.E.2d at 1060.[7] The Virginia Supreme Court has even specified that harm to the "child's health or welfare" must be *actual* and not merely potential or likely. *Williams*, 501 S.E.2d at 418.

Those jurisdictions reject the notion that judicial intervention into a fit parent's childrearing decisions may be justified where a grandparent demonstrates merely that court-ordered visitation would be in the child's best interests. See, *e.g.*, *Howard*, 661 N.W.2d at 192 ("The best interest standard is a doctrine that embraces the interests of children, and we have

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influence of grandparents." *Howard*, 661 N.W.2d at 191. The court suggested that a "substantial relationship" would be that "akin to a parental relationship." *Ibid.*

[7] The Massachusetts court suggested that disturbing a "child's preexisting relationship with a nonbiological parent" might itself constitute harm, *Blixt* 774 N.E.2d at 1060, but state appellate courts have applied that holding to define more precisely the circumstances under which children are harmed, see, *e.g.*, *Dearborn* v. *Deausault*, 808 N.E.2d 1253, 1256 (Mass. Ct. App. 2004) (holding that a relationship in which a grandparent saw a child several times per month was "not the kind of relationship from which significant harm to the children may be inferred from disruption alone").

never interpreted it to protect the fundamental parenting interest or to provide a presumption for fit parents."). As the South Carolina Supreme Court reasoned: "The fact that a child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision." *Camburn*, 586 S.E.2d at 568. That is, proof that visitation would satisfy a judge's opinion of a child's "best interests" cannot overcome the "presumption that a fit parent's decision is in the best interest of the child." *Ibid.*

The New Jersey Supreme Court similarly held that a "best interests" standard fails to respect a parent's due process rights because "the avoidance of harm to the child" is "the only state interest warranting invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent." *Moriarty*, 827 A.2d at 222-223;[8] see also *C.A.M.A.*, 109 P.3d at 410 ("'[T]he standard of best interest of the child is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.'") (quoting *In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998)). In sum, those state high courts have determined that only proof that grandparent visitation is truly necessary to avoid harm—and not merely to incrementally benefit the child's wellbeing—adequately protects parents' fundamental rights from state intervention. See *Camburn*, 586 S.E.2d at 568.

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[8] The New Jersey Supreme Court acknowledged that "the termination of a long-standing relationship between the grandparents and the child, with expert testimony assessing the effect of those circumstances, could form the basis for a finding of harm." *Moriarty*, 827 A.2d at 224. State appellate courts have subsequently focused on the need for evidence of actual physical, mental, or emotional suffering and have interpreted the standard set forth in *Moriarty* to require more than the "loss of potentially happy memories." *Mizrahi* v. *Cannon*, 867 A.2d 490, 498 (N.J. Super. Ct. App. Div. 2005).

State legislatures also have read *Troxel* to require that grandparents prove that denial of visitation will result in harm to the child where a fit parent objects to visitation. The Texas Legislature amended the State's grandparent visitation statute to provide that courts may order visitation *only* where the grandparent "overcomes the presumption that a parent acts in the best interest of the parent's child by proving * * * that denial of possession of or access to the child would *significantly impair the child's physical health or emotional well-being*." Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006) (emphasis added); see also H. 79, Tex. B. Analysis, H.B. 261, Reg. Sess. (Tex. 2005) (explaining that the bill "[i]ncorporates the holding in *Troxel* v. *Granville*, 530 US 57 (2000)"); Tex. Att'y Gen. Op. No. GA-0260, 2004 WL 2326558, at *11 (Oct. 13, 2004) (recommending that, "to avoid an unconstitutional application of the [Texas grandparent visitation] statute" following *Troxel,* courts must require grandparents to prove that "denial of access by the grandparent would significantly impair the child's physical health or emotional wellbeing").

Likewise, the Illinois legislature amended its visitation statute in the wake of *Troxel* to require that grandparents demonstrate harm to the child before courts may order visitation rights over the decision of a fit parent. The House sponsor of the bill noted that the State's previous visitation statute "was too lenient" and had been invalidated in a series of decisions by the Illinois Supreme Court in light of *Troxel.*[9] Ill. H. Trans., H. 93-110, Reg. Sess., at 80 (2004). The new

[9] Immediately following *Troxel*, the Supreme Court of Illinois sustained an as-applied challenge to the statutory provision that allowed grandparents to petition for court-ordered visitation over the objection of both parents. *Lulay* v. *Lulay*, 739 N.E.2d 521 (2000). In 2002, it held those statutory provisions *facially* unconstitutional because they failed to incorporate a presumption that fit parents acted in the best interests of their children. *Wickham* v. *Byrne*, 769 N.E.2d 1 (2002).

statute was "written with [those] Supreme Court decision[s] in mind" and, accordingly, replaced the "best interest of the child" standard with a "harm to the child" standard. Ill. S. Trans., S. 93-109, Reg. Sess. (2004). The amended statute specifies that "[t]he burden is on the [grandparent] * * * to prove that the parent's actions and decisions regarding visitation times are *harmful to the child's mental, physical, or emotional health*." 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006) (emphasis added).

The Michigan legislature also adopted a grandparent visitation statute containing a harm-based standard, Mich. Comp. Laws § 722.27b(4)(b) (2006), after the Michigan Supreme Court held the previous statute unconstitutional in the wake of *Troxel*. See *DeRose* v. *DeRose*, 666 N.W.2d 636 (Mich. 2003). The new statute codifies *Troxel*'s "presumption that fit parents act in the best interests of their children" by requiring that a grandparent prove that a parent's decision to deny visitation creates "a substantial risk of harm to the child." Mich. S. Fiscal Agency B. Analysis, S. 92, Reg. Sess. (2005) (presenting the legislative history of the amended Child Custody Act).

B. Eleven States Do Not Require Grandparents Seeking Court-Ordered Visitation To Prove That Such Visitation Is Necessary To Avoid Harm To The Child

Pennsylvania joins the highest courts of ten other States that permit courts to order grandparent visitation even absent a judicial determination that visitation is necessary to avoid harm to the child. Those courts reject the proposition that the federal Due Process Clause precludes court-ordered visitation to grandparents unless the child has been, or is likely to be, harmed by the lack of visitation. Moreover, some of those courts have decided that placing the burden on the grandparent to prove that visitation would be beneficial to the child sufficiently accounts for the "special weight" that *Troxel*

requires be accorded to parental preferences. See, *e.g.*, *Evans* v. *McTaggart*, 88 P.3d 1078, 1089 (Alaska 2004) ("[The] special weight [that] must be given to a fit parent's determination as to the desirability of visitation with [grandparents] * * * can be accomplished by imposing on the [grandparent] the burden of proving that visitation by the [grandparent] is in the best interests of the child and by requiring that this be established by clear and convincing evidence.").

The highest courts in these States consider only whether visitation is in the "best interests" of the child. The courts typically make that determination by resorting to common-law or statutory multi-factor tests that do not require a showing of harm to the child. See *Evans*, 88 P.3d at 1096 ("best interests" standard sufficiently accounts for the "special weight" that must be given to fit parents' decisions); *In re Marriage of Harris*, 96 P.3d 141, 154 (Cal. 2004) (upholding a "best interest" standard in light of *Troxel*); *In re Adoption of C.A.*, 137 P.3d 318, 325 (Colo. 2006) (upholding a statutory "best interests" standard, because "*Troxel* did not require a standard of significant or substantial emotional harm to the child"); *Thomas* v. *Nichols-Jones*, 2006 Del. Lexis 515, *4-*5 (Del. 2006) (upholding application of best interests standard in light of *Troxel* where grandparent bears the burden of proof); *State* v. *Paillet*, 16 P.3d 962, 971 (Kan. 2001) (*Troxel* did not "call[] into question" a statutory standard permitting court-ordered visitation where there has been no finding of potential harm to the child); *Blakely* v. *Blakely*, 83 S.W.3d 537, 543 (Mo. 2002) (upholding a statutory "best interests" standard, because *Troxel* does not "require[] courts to find unconstitutional on its face any statute granting grandparents visitation in the absence of a finding that the lack of such visitation will cause the child harm"); *Hamit* v. *Hamit*, 715 N.W.2d 512, 528 (Neb. 2004) (the statutory "best interests" standard survives *Troxel*); *Harrold* v. *Collier*, 836 N.E.2d 1165, 1172 (Ohio 2005)

(upholding a multi-factor statutory "best interest" test and denying that *Troxel* requires a higher threshold showing); *Currey* v. *Currey*, 650 N.W.2d 273, 278-79 (S.D. 2002) (considering the effect of *Troxel* and applying a statutory "best interests" standard); *Brandon L.* v. *Moats*, 551 S.E.2d 674, 685 (W.Va. 2001) (upholding a statutory "best interests" standard in light of *Troxel*).

C. The Widespread Uncertainty Regarding The Circumstances Under Which A Court May Interfere With A Fit Parent's Constitutional Rights Requires This Court's Intervention

All fifty States have some kind of third-party visitation statute, and all continue to wrestle with the application of those statutes in light of *Troxel*. See App., *infra* at 87a-110a. The existing conflict shows no sign of abating, and "[t]he * * * years since *Troxel* have made abundantly clear that its narrow holding has done much to muddy the jurisprudential waters with regard to visitation." Meredith Ruston, "Splitting the Baby" in *Troxel v. Granville*, 14 J. Contemp. Legal Issues 347, 351 (2003). Indeed, in the wake of *Troxel*, twenty-eight state supreme courts have confronted whether the Fourteenth Amendment requires that those statutes incorporate a harm threshold. See App., *infra*, at 87a-101a.[10]

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[10] Of those States whose highest courts have not ruled since *Troxel* as to whether the Fourteenth Amendment mandates a harm requirement, two have pre-*Troxel* precedent requiring a showing of harm. Eight States have no published case law squarely addressing the federal constitutional question. In another nine States, intermediate appellate courts are the highest authority to rule. See *Dodd* v. *Burleson*, 932 So. 2d 912, 920 (Ala. Civ. App. 2005); *McGovern* v. *McGovern*, 33 P.3d 506, 511-512 (Ariz. Ct. App. 2001); *McCune* v. *Frey*, 783 N.E.2d 752, 756 (Ind. App. 2003); *Vibbert* v. *Vibbert*, 144 S.W.3d 292, 294-295 (Ky. Ct. App. 2004); *Galjour* v. *Harris*, 795 So. 2d 350, 358 (La. Ct. App. 2001); *Koshiko* v. *Hanning*, 897 A.2d 866, 882 (Md. Ct. Spec. App.) cert. granted, 900 A.2d 751 (tbl.) (Md. 2006); *Ridenour* v. *Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App. 1995); *In re Paternity of*

Several state courts have complained that *Troxel* failed to provide sufficient guidance regarding the scope of the "fundamental" rights at stake. The Oregon Supreme Court, for example, found it "difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the State or a nonparent must make before a court may interfere with a parent's custody or control of a child." *In re Marriage of O'Donnell-Lamont*, 91 P.3d 721, 730 & n.4 (Or. 2004) (citing *The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 219, 229 (2000) ("The plurality's failure to elaborate on the mechanics of the constitutional standard will leave judges, legislators, and individual litigants without adequate guidance.")). The Supreme Court of Michigan agreed, remarking that, post-*Troxel*, "federal constitutional law in this area is now not as predictable as it was before." *DeRose*, 666 N.W.2d at 643. It falls to this Court to provide much-needed predictability by issuing a clear directive to the States as to what the Constitution requires. Absent this Court's guidance, parents, children, and grandparents seeking visitation will continue to bear the expense and disruption of continued litigation.

Roger D.H., 641 N.W.2d 440, 445 (Wis. Ct. App. 2002). Without this Court's guidance, families in those States will be subject to the burden of further appellate litigation as the remaining state courts of last resort take up the unanswered question of *Troxel*. See App., *infra*, 99a-108a.

Three States have settled the matter on state constitutional grounds, finding that a parent's right to privacy under the state constitution independently requires a showing of harm. *Sullivan* v. *Sapp*, 866 So. 2d 28, 38 (Fla. 2004) (reading Fla. Const. art. 1, § 23 to prohibit "interven[tion] in parental decisionmaking absent significant harm to the child threatened by or resulting from those decisions"); *Neal* v. *Lee*, 14 P.3d 547, 550 (Okla. 2000) (holding that, while "after *Troxel*, it is unclear whether a showing of harm is necessary under the United States Constitution," harm remains a requirement under the Oklahoma Constitution); *Hawk* v. *Hawk*, 855 S.W.2d 573, 582 (Tenn. 1993) (Tenn. Const. art. 1, § 8 forbids interference with parental rights "[a]bsent some harm to the child"). See App., *infra*, 99a, 104a, 106a.

II. The Pennsylvania Supreme Court's Decision Fails To Safeguard Parents' Fundamental Liberty Interest In The Care And Upbringing Of Their Children

"[T]he interest of parents in the care, custody, and control of their children * * * is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65 (plurality opinion). That is because, as the Connecticut Supreme Court put it, "[t]he family entity is the core foundation of modern civilization." *Roth*, 789 A.2d at 447. The family, like the child, "is not a mere creature of the state." *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). Rather, the family is an institution whose integrity the State must respect not just as sound public policy, but as a matter of right. While the role of the extended family in most children's upbringing cannot be ignored, this Court has recognized the unique and fundamental nature of the parent-child nucleus as being at the core of our concept of "family." See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972) ("[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

This Court has long recognized "that a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, *absent a powerful countervailing interest*, protection." *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (emphasis added) (quoting *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972)). That powerful interest cannot be simply one court's estimation of a child's "best interest," a notoriously vague standard. See *Troxel*, 530 U.S. at 75 (Souter, J., concurring) (criticizing "a free-ranging best-interests-of-the-child standard"); *id* at 101 (Kennedy, J., dissenting) (noting criticism of the best interests standard as indeterminate); see also Principles of the Law of Family Dissolution § 2.02 cmt. c (2002) ("[The best interests test] has long been criticized for its indeterminacy. To apply the test,

courts must often choose between specific values and views about childrearing. * * * When the only guidance for the court is what best serves the child's interests, the court must rely on its own value judgments, or upon experts who have their own theories of what is good for children and what is effective parenting.").[11] The "best interests" baseline is more appropriate in mediating custody disputes between those whose existing rights to custody are of equal strength, such as divorcing parents. As the plurality recognized in *Troxel*:

> [S]o long as a parent *adequately cares for his or her children* (*i.e.*, is fit), there will normally be *no reason* for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

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[11] Indeed, the confusion among the States extends to the degree of proof necessary to meet the particular standard. Even some of those States that fail to impose a harm standard have instituted a higher burden to establish the child's best interests and implement the "special weight" required by *Troxel*. See, *e.g.*, *Leavitt* v. *Leavitt*, 132 P.3d 421, 426-427 (Idaho 2006) (requiring third parties to prove child's best interests by clear and convincing evidence); *Evans*, 88 P.3d at 1089 (same). But see, *e.g.*, *O'Donnell-Lamont*, 91 P.3d at 731 (applying a "preponderance of the evidence" standard in the best interests determination); *Brandon L.*, 551 S.E.2d at 685 (W. Va. 2001) (same). It is possible, of course, to adopt *both* a heightened burden of proof and a substantive standard requiring a showing of harm. See, *e.g.*, *In re R.A.*, 891 A.2d 564, 580 (N.H. 2005) (adopting a clear and convincing evidence standard); App., *infra*, 51a-52a (Cappy, C.J., dissenting).

In the instant case, the trial court found by a preponderance of the evidence that visitation by petitioners was in the child's best interest. App., *infra*, at 66a-67a; see also R. 228a-229a. Over petitioner's objection, the court below accepted the trial court's findings. See Pet. Br. 28-29; Pet. Reply Br. 7-8. In answering the substantive question of whether a showing of harm is constitutionally required, this Court can and should also provide the States with guidance regarding the burden of proof that is necessary to protect the constitutional right at issue.

Troxel, 530 U.S. at 68-69 (emphasis added).

Intrusion into this most intimate of spaces requires not merely a court's opinion that a child's situation is somehow suboptimal, but a specific and identifiable "showing [of] compelling circumstances, such as significant harm to the child, if visitation is not granted." *Camburn*, 586 S.E.2d at 568. The Pennsylvania Supreme Court's failure to require such a showing permits a court—typically a single judge—to abrogate a parent's fundamental right when it is of the opinion that the parent has made the wrong decision about the "best interests" of a child. As the Supreme Court of Wyoming put it, "[t]he constitutional protections afforded to parents are not reserved for those who are perfect." *In re Guardianship of MEO*, 138 P.3d 1145, 1159 (2006) (citing *Santovsky* v. *Kramer*, 455 U.S. 745, 753-754 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.")). The Pennsylvania Supreme Court's decision, however, enacts precisely such a standard of perfection—and the loss of a fundamental right is the penalty for missing the mark.

A harm requirement would also be consistent with this Court's determination of the scope of this fundamental right in other contexts. In *Pierce* v. *Society of Sisters*, this Court reasoned that "there [were] no peculiar circumstances or present emergencies which demand extraordinary measures" to deprive parents of the right to enroll their children in private schools whose activities were "not inherently harmful." 268 U.S. at 533. Similarly, in *Wisconsin* v. *Yoder*, this Court found it significant that it would cause no "harm to the physical or mental health of" Amish children to exempt them from the State's public educational requirements. 406 U.S. at 239.

Moreover, a standard that simply requires a grandparent to argue for a child's "best interests," without a threshold

showing of potential harm, would invite litigation—a process that is almost *never* in the best interests of the child. As at least five Justices in *Troxel* agreed, "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" *Troxel*, 530 U.S. at 75 (plurality opinion) (quoting *id.* at 101 (Kennedy, J., dissenting)).

Parties to a dispute over childrearing almost always feel they have the child's best interests in mind. A malleable "best interests" standard encourages any grandparents dissatisfied with the level of interaction they currently have with a child to file suit in the hope that the judge they draw will agree that the child's situation could be made better through mandatory visitation. See *Rideout* v. *Riendeau*, 761 A.2d 291, 296 n.5 (Me. 2000) ("Broad room for debate [under a subjective "best interests" standard] means a broad and unpredictable array of possible outcomes in any custody contest. That fact encourages prolonged and expensive litigation and 'strategic behaviors' of the parents, neither of which usually benefits children."). A standard that requires a finding of harm limits litigation to cases in which a court's intervention is truly necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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