In The Supreme Court of Pennsylvania

No. _____

CHERYL HILLER,

v.

SHANE FAUSEY,

Petitioner.

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at No. 1428 MDA 2003 dated May 25, 2004, Affirming the Order of the Court of Common Pleas of Lycoming County, Civil No. 03–20361 dated August 1, 2003

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I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The precedential opinion that the Superior Court of Pennsylvania issued on May 25, 2004 is attached hereto as Exhibit A.

The trial court's opinion, issued pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), is attached hereto as Exhibit B, and the trial court's order, which the Superior Court affirmed, is attached hereto as Exhibit C.

II. THE ORDER IN QUESTION

On May 25, 2004, the Superior Court of Pennsylvania issued a precedential opinion that concludes: "Order affirmed. Judge Lally–Green concurs in the result." *See* Exhibit A at 11.

III. QUESTIONS PRESENTED

1. Is Pennsylvania's grandparent visitation statute, 23 Pa. Cons. Stat. Ann. § 5311, unconstitutional in light of the U.S. Supreme Court's ruling in *Troxel* v. *Granville*, 530 U.S. 57 (2000), and the rulings of numerous other state courts of last resort that have, applying *Troxel*, declared similar statutes unconstitutional?

2. Does the trial court's order — which grants partial custody of a child to a third–party, non–parent over the parent's objections — violate petitioner's fundamental right to direct his child's upbringing and associations without interference by the State where it is undisputed that petitioner is a fit parent and where no evidence exists that the child will suffer any injury if the parent is allowed

to decide when, where, and how the child interacts with the third–party in question?

IV. STATEMENT OF THE CASE

Petitioner Shane Fausey is the natural father of Kaelen Fausey, a nine–year–old boy born October 5, 1994. Kaelen lived with both his mother, Stephanie Fausey, and his father until May 25, 2002, when Stephanie died of cancer. Thereafter, Kaelen has continued to live with his father, who has recently remarried. Shane Fausey is employed by the federal government as a correctional officer at the Allenwood Federal Correctional Institution at White Deer, Pennsylvania.

After Kaelen's mother died in May 2002, a dispute arose between Kaelen's maternal grandmother, Cheryl Hiller, and Kaelen's father, Shane Fausey, about how often and for what amount of time Kaelen would be permitted to visit with Ms. Hiller. Mr. Fausey was willing to allow Kaelen to visit with Ms. Hiller one day per month, but he was unwilling to agree to a more extensive schedule of visitation because of concerns that **[**

REDACTED

].

Dissatisfied with the amount of grandparent visitation that Kaelen's father would allow, Ms. Hiller filed a petition for partial custody and visitation rights pursuant to 23 Pa. Cons. Stat. Ann. § 5311 in the Court of Common Pleas of Lycoming County, Pennsylvania. Mr. Fausey argued in response that it would

impermissibly violate his substantive due process rights, recognized in *Troxel* v. *Granville*, 530 U.S. 57 (2000), for the trial court to override his decision as a fit parent in the absence of any evidence that Kaelen will suffer actual harm if Mr. Fausey is allowed to decide when, where, and how the child interacts with Ms. Hiller.

Notwithstanding the U.S. Supreme Court's ruling in *Troxel* and the rulings of numerous other state appellate courts which have held that it is unconstitutional for a court to override a sole surviving parent's decision about the appropriate amount of grandparent visitation in the absence of a finding either of parental unfitness or that the child will suffer actual harm, the trial court upheld the constitutionality of Pennsylvania's grandparent visitation statute and ordered substantially more visitation in favor of the grandmother than the child's sole surviving parent was voluntarily willing to allow. *See* Exhibit B.

Shane Fausey thereafter filed a timely appeal to the Superior Court of Pennsylvania, where he continued to argue that Pennsylvania's grandparent visitation statute, 23 Pa. Cons. Stat. Ann. § 5311, is unconstitutional as applied. Notwithstanding the U.S. Supreme Court's decision in *Troxel*, and numerous rulings from other state appellate courts finding analogous grandparent visitation statutes unconstitutional as applied in similar circumstances, a three–judge panel of the Superior Court on May 25, 2004 issued a ruling which held that Pennsylvania's grandparent visitation statute was not unconstitutional. *See* Exhibit A.

As a result of the Superior Court's ruling, Pennsylvania is one of only a very few States where a trial court can override a sole surviving parent's decision regarding the proper amount of grandparent visitation simply upon finding, by a preponderance of the evidence, that it would be in the child's best interests for more visitation to occur.

From the Superior Court's adverse ruling, Shane Fausey respectfully files this Petition for Allowance of Appeal. The scenario that gives rise to this appeal — a dispute between a sole surviving parent and the deceased parent's parent over the proper amount of grandparent visitation — regularly produces litigation both in Pennsylvania and throughout the Nation. Nevertheless, this Court has not yet examined the constitutionality of Pennsylvania's grandparent visitation statute, 23 Pa. Cons. Stat. Ann. § 5311, in the aftermath of the U.S. Supreme Court's ruling in *Troxel* and the rulings of numerous other state appellate courts (including many state courts of last resort) striking down as unconstitutional grandparent visitation statutes indistinguishable from Pennsylvania's.

This case presents the perfect vehicle to allow this Court to consider and resolve the constitutionality of Pennsylvania's grandparent visitation statute, and that questions presented herein are indisputably of urgent public importance not only to sole surviving parents such as petitioner Shane Fausey but also to grandparents such as respondent Cheryl Hiller. Accordingly, for the reasons set forth herein, Shane Fausey respectfully prays that this Petition for Allowance of Appeal be granted.

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

The questions presented in this Petition for Allowance of Appeal are clearly deserving of this Court's review. The Superior Court's ruling that Pennsylvania's grandparent visitation statute, 23 Pa. Cons. Stat. Ann. § 5311, was constitutionally applied to override the determination of a fit parent concerning how much contact a child should have with a grandparent not only conflicts with the U.S. Supreme Court's ruling in *Troxel* v. *Granville*, 530 U.S. 57 (2000), but the Superior Court's decision is also contrary to the overwhelming weight of appellate authority from state courts throughout the Nation that have applied *Troxel* on indistinguishable factual records.

In this case, the trial court overrode the wishes of the child's only surviving parent, petitioner Shane Fausey, concerning the amount and nature of grandparent visitation that was appropriate, and instead imposed a more extensive schedule of visitation that the trial court found, by a preponderance of the evidence, to be in the child's "best interests."

It is undisputed that Mr. Fausey is a fit parent, it is undisputed that Mr. Fausey is willing to permit his child to visit with the child's maternal grandmother on a schedule and terms that Mr. Fausey views to be appropriate, and it is undisputed that the child would not suffer any physical or emotional harm if visitation with the maternal grandmother were to occur on the schedule and terms that the child's father views as most appropriate.

Under the circumstances of this case, the trial court applied Pennsylvania's grandparent visitation statute, 23 Pa. Cons. Stat. Ann. § 5311, in a manner that violates Mr. Fausey's fundamental right to raise his child in the manner that he believes is best. Such a conclusion follows directly from the ruling of the Supreme Court of the United States in *Troxel* v. *Granville*, 530 U.S. 57 (2000). Relying on *Troxel*, numerous other state appellate courts have invalidated as unconstitutional grandparent partial custody and visitation orders of the sort challenged here.

During the more than four–year period since the Supreme Court of the United States ruled in *Troxel* that a trial court in the State of Washington impermissibly violated the substantive due process rights of a child's natural mother — that child's only surviving parent — when it granted visitation to the child's parental grandparents over the mother's objection, this Court has yet to consider whether a court order granting grandparent visitation in circumstances similar to those presented in *Troxel* can survive a substantive due process challenge. This case directly presents, and provides the perfect vehicle for resolving, that exceptionally important and regularly recurring question.

Accordingly, this Court should grant the Petition for Allowance of Appeal.

A. A trial court's order granting partial child custody to a grandparent over the objections of a sole surviving fit parent violates the parent's fundamental substantive due process right to raise a child in the manner that the parent deems best

In *Troxel* v *Granville*, 530 U.S. 57 (2000), the Supreme Court of the United States ruled that a trial court in the State of Washington impermissibly violated the

substantive due process rights of a child's natural mother — that child's only surviving parent — when it granted visitation to the child's parental grandparents over the mother's objection.

In *Troxel*, Tommie Granville (the mother) and Brad Troxel (the father) never married but had two daughters together. *See* 530 U.S. at 60. After the two separated in June 1991, Brad lived with his parents (the paternal grandparents of Brad's daughters), and Brad regularly brought his daughters to his parents' home for weekend visitation. *See id.*

In May 1993, Brad committed suicide. *See id.* Although Tommie Granville, the mother, allowed the paternal grandparents to see her daughters regularly in the months immediately following Brad's death, in October 1993 Tommie informed the Troxels that she wished to limit her daughters' visitation with them to one short visit per month. *See id.* at 60–61.

Several months later, the Troxels filed suit under Washington State's third–party visitation statute. *See id.* at 61. The Washington statute was especially broad in scope because it allowed "[a]ny person" to petition for third–party visitation (*see* Wash. Rev. Code § 26.10.160(3)), whereas Pennsylvania's statute only allows grandparents and great–grandparents to petition (*see* 23 Pa. Cons. Stat. Ann. § 5311). Yet that distinction is irrelevant, because the Supreme Court of the United States in *Troxel* struck down the Washington statute *as applied* on the facts of that case. *See* 530 U.S. at 73. The as–applied challenge in *Troxel* directly presented the

question whether a Washington trial court could allow grandparent visitation over the objections of a fit parent.

As the U.S. Supreme Court's opinion in *Troxel* explains:

> At trial, the Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay. In 1995, the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays.

Troxel, 530 U.S. at 61 (citations omitted).

The facts of *Troxel* and the facts of this case are identical in the following very important respects. First, both cases involved requests for grandparent visitation from the side of the child's family on which the parent had died. In both cases, the remaining parent was unquestionably fit to raise the child on his or her own. In both cases, the remaining parent did not propose to disallow all grandparent visitation, but did oppose the substantial amount of court–ordered visitation that the grandparents who took the case to court were seeking. And in both cases, the trial court refused to accord sufficient weight to the fit parent's determination concerning grandparent visitation; instead, in both instances the trial court substituted its view of what was in the child's best interest in place of the determination that the fit parent had made. *See id.* at 60–62.

The U.S. Supreme Court's ruling in *Troxel* did not produce a majority opinion, but a review of the separate opinions reveals that a majority unquestionably favored the same outcome for essentially the same reasons. Justice

Sandra Day O'Connor delivered the lead opinion in *Troxel*, and Chief Justice Rehnquist and Justices Ginsburg and Breyer joined in that ruling. Justice David H. Souter issued an opinion concurring in the judgment in which he explained that, in his view, the Washington State third–party visitation statute was facially invalid. *See id.* at 75–79. Finally, Justice Clarence Thomas issued an opinion concurring in the judgment in which he fully endorsed Justice O'Connor's reasoning but added that he would have specified that laws infringing on a parent's fundamental right to raise a child should be subject to strict scrutiny, whereas Justice O'Connor's plurality opinion did not address the proper standard of review issue. *See id.* at 80. Justice Thomas's opinion concurring in the judgment thus provides the crucial fifth vote in support of Justice O'Connor's approach and outcome.

Turning back to the substance of the Court's ruling in *Troxel*, Justice O'Connor's opinion explains that "The liberty interest at issue in this case — the 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." 530 U.S. at 65. Following a discussion of all the many earlier U.S. Supreme Court cases establishing that proposition of law, Justice O'Connor wrote: "In light of this extensive precedent, it cannot now be doubted 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 66.

With respect to the merits of the visitation order at issue in *Troxel*, Justice O'Connor wrote:

> Once the visitation petition is filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best–interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails.

Id. at 67.

In *Troxel*, the U.S. Supreme Court ruled for several reasons that the visitation order in question represented an unconstitutional infringement on the surviving parent's fundamental substantive due process right to raise a child. First, "the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." *Id.* at 68. Justice O'Connor's opinion proceeded to explain, "Accordingly, so 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." *Id.* at 68–69.

Second, Justice O'Connor noted that the Washington trial court "gave no special weight at all to Granville's determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption." *Id.* at 69. In *Troxel*, the trial court "placed on * * * the fit custodial

parent, the burden of *disproving* that visitation would be in the best interest of her daughters." *Id.*

Next, "[t]he decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interests of his or her child. In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters." *Id.* at 69–70 (citation omitted). Justice O'Connor's opinion went on to note:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Id. at 70.

In *Oliver* v. *Feldner*, 776 N.E.2d 499 (Ohio Ct. App. 2002), the Court of Appeals of Ohio, a State that neighbors Pennsylvania, engaged in a thorough examination of the U.S. Supreme Court's decision in *Troxel*. On the important question of what the U.S. Supreme Court meant when it used the term "special weight," the Ohio appellate court wrote:

> *Troxel* did not provide much guidance on how to evaluate a specific visitation order. Furthermore, *Troxel* did not define the "special weight" which the trial court must give to the parents' wishes. * * * It is clear from *Troxel* that a strict–scrutiny analysis must be applied to both the nonparental–visitation statute and to the method in which the statute is applied, but the court cautioned that "the constitutionality of any standard for awarding visitation turns on the

> specific manner in which the standard is applied and that the constitutional protections in this area are best 'elaborated with care.'"
>
> The "special weight" requirement gives the trial court an opportunity to determine that a compelling governmental interest is at stake. Even though the *Troxel* court did not define "special weight," previous Supreme Court decisions make it clear that **"special weight" is a very strong term signifying extreme deference**. The "special weight" requirement, as illuminated by these prior Supreme Court cases, means that the deference provided to the parent's wishes will be overcome only by some compelling government interest and overwhelmingly clear circumstances supporting that governmental interest.

Oliver, 776 N.E.2d at 507–09 (citations omitted; emphasis added). As here, the *Oliver* case involved a child with a deceased parent, and that deceased parent's parents had petitioned for and obtained court–ordered visitation over the surviving parent's objections. The Ohio appellate court reversed and ordered the entry of judgment in favor of the surviving parent, explaining that "Appellees present no compelling government interest for interfering with appellant's fundamental right to raise her daughter as she sees fit. There is nothing in the case at bar indicating that appellees' petition for visitation arose to prevent actual or potential harm to Laken," the child at issue in the *Oliver* case. *Id.* at 508.

Finally, in *Troxel*, as here, "there is no allegation that [the surviving parent] ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays." *Troxel*, 530 U.S. at 71.

Based on all of these considerations, which are identical to the facts and circumstances of this case, the U.S. Supreme Court reached the following decision: "[T]he combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on [the surviving parent's] fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id.* at 72. Justice O'Connor's opinion went on to note, "As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72–73.

Before concluding her opinion, Justice O'Connor noted with approval the statement in Justice Anthony M. Kennedy's dissent that "a domestic relations proceeding in and of itself can constitute state intervention that is 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. * * * If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future." *Id.* at 101 (Kennedy, J., dissenting) (cited with approval *id.* at 75 (plurality opinion)).

This Court need not look beyond the U.S. Supreme Court's decision in *Troxel* to conclude that the trial court's order in this case impermissibly violates Shane Fausey's fundamental due process right to determine the amount of contact his son should have with the boy's maternal grandmother. With the exception of the

language of the Washington State statute that permitted any third–party to petition for visitation, the facts and circumstances of *Troxel* are indistinguishable from the facts and circumstances presented here. And because *Troxel* was resolved as an *as–applied* constitutional challenge involving an order granting grandparent visitation over the objections of a fit parent, the fact that the Washington statute would have allowed others also to seek third–party visitation simply was not of significance to the outcome.

That the Supreme Court of the United States would grant review to consider whether a State's grandparent visitation law unlawfully infringes on the substantive due process rights of a sole surviving parent establishes beyond any doubt that this Petition for Allowance of Appeal presents questions that are especially deserving of this Court's review.

B. Rulings from numerous other state appellate courts demonstrate that this case is deserving of review and that the Superior Court's ruling unconstitutionally applied this Commonwealth's grandparent visitation statute

The trial court in this case relied on Pennsylvania's grandparent visitation statute in ordering the visitation that is the subject of this appeal. The statute is codified at 23 Pa. Cons. Stat. Ann. § 5311, and it provides in full:

> 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.

Here, the trial court failed to take into account the presumption that a fit parent acts in the best interests of his child, failed to accord any special weight to the parent's determination of his child's best interest, and overlooked that the father was voluntarily willing to allow his child to have contact with the maternal grandmother. Under these very same circumstances, as detailed in the preceding section of this brief, the Supreme Court of the United States in *Troxel* v. *Granville*, 530 U.S. 57 (2000), held that the State of Washington's grandparent visitation statute had been unconstitutionally applied to order grandparent visitation over the objection of the child's one surviving parent.

Appellate courts of many other States have issued rulings addressing these very same questions, and the overwhelming weight of such authority strongly supports the conclusion that Pennsylvania's grandparent visitation statute was unconstitutionally applied in this case.

***Alabama*:** In *R.S.C.* v. *J.B.C.*, 812 So. 2d 361 (Ala. Civ. App. 2001), Alabama's Court of Civil Appeals explained:

> The involuntary removal of a child from a parent and the forced placement of the child, even temporarily, in the exclusive custody and control of a third party go to the core of what is fundamental about the parents' right in the care, custody, and control of their children. While, under normal circumstances, it might be viewed as unnatural for a parent to deny any access whatsoever by a grandparent to a grandchild, it is by no means "unnatural" for a parent to make decisions as to whether and to what extent a child should be released to a grandparent's exclusive custody for overnight and other unsupervised visits. It is in this context that we consider the parental

> right herein at issue to be a fundamental "liberty" interest protected by the Fourteenth Amendment.

Id. at 367. The Alabama appellate court proceeded to hold that any infringement by a court on a parent's decision regarding third–party grandparent visitation is subject to strict scrutiny. *Id.* at 370. The court's opinion concluded:

> The fundamental right of a fit parent to decide the issue of unsupervised grandparental visitation, in the absence of harm or potential harm to the child if such visitation is not allowed, requires more respect for the parent's initial decision than is achieved by allowing a trial court to decide what is in the "best interests" of the child and then to substitute its decision for the parent's decision. To discard the parent's decision as to what is in his or her child's best interest merely because that decision is not the same as the one the state would make would be to deny the fundamental nature of the parent's right to make that decision in the first place. We therefore hold that § 30–3–4.1 [Alabama's grandparent visitation statute] is unconstitutional as applied in this case.

Id. at 372.

***Arkansas*:** In *Linder* v. *Linder*, 72 S.W.3d 841 (Ark. 2002), the Supreme Court of Arkansas held that State's grandparent visitation statute unconstitutional as applied in a case involving grandparents who were the parents of the child's deceased father. The court began by noting that strict scrutiny had to be applied to any infringement of a parent's fundamental right to govern with whom his or her child will associate. *See id.* at 855. The trial court in *Linder* had ruled that the surviving parent was fit in every respect but one, with the one area of unfitness being on the subject of whether to allow grandparent visitation. *See id.* at 857. Arkansas' highest court nevertheless ruled that the grandparent visitation statute

was unconstitutional as applied and directed the entry of judgment in favor of the parent. *See id.* at 860. That court explained:

> In short, we decline to hold that unfitness to decide visitation matters objectively equates to unfitness to parent sufficient to warrant state intrusion on the parent's fundamental right. Were we to decide otherwise, any custodial parent refusing visitation would be subject to a trial court's nonparental visitation order on the grounds that the parent was unfit to decide the matter. Such a conclusion would be at odds with the Supreme Court's decision in *Troxel*. There must be some other special factor such as harm to the child or custodial unfitness that justifies state interference.
>
> The appellees further contend that the instant case differs from *Troxel* in that here Lea Ann refused all grandparental visitation whereas in *Troxel* the parent was agreeable to some visitation. The trial court also mentioned that distinction. We disagree that this factual distinction represents a basis for rendering *Troxel* inapposite.

Id. at 858.

***California*:** In *Zasueta* v. *Zasueta*, 126 Cal. Rptr. 2d 245 (Cal. Ct. App. 2002), California's Court of Appeal held that applying that State's grandparent visitation statute to override the wishes of a fit parent who was willing to allow her child to have *no visitation whatsoever* with the parents of the child's deceased father, who had committed suicide, violated the mother's fundamental substantive due process rights. *See id.* at 252. In so ruling, the court cautioned judges not to "allow the heart to rule over the letter of the law." *Id.* at 246. Similar rulings can be found in *Herbst* v. *Swan*, 125 Cal. Rptr. 2d 836 (Cal. Ct. App. 2002) (holding the grandparent visitation statute unconstitutional as applied to grant visitation over the surviving parent's wishes following the death of the other parent); *Punsly* v. *Ho*,

105 Cal. Rptr. 2d 139 (Cal. Ct. App. 2001) (same); and *Kyle O.* v. *Donald R.*, 102 Cal. Rptr. 2d 476 (Cal. Ct. App. 2000) (same).

***Connecticut*:** In *Roth* v. *Weston*, 789 A.2d 431 (Conn. 2002), the Supreme Court of Connecticut examined a case in which a child's maternal grandmother sought court–ordered visitation/partial custody in the months after the child's mother had committed suicide. *See id.* at 434. The child's father had refused to permit any contact between the child and the maternal grandparents. *See id.* After recognizing that the State's grandparent visitation law was subject to strict scrutiny for infringing on a parent's fundamental rights, *see id.* at 437, 441, the court explained:

> The constitutional issue, however, is not whether children should have the benefit of relationships with persons other than their parents or whether a judge considers that a parent is acting capriciously. In light of the compelling interests at stake, the best interests of the child are secondary to the parents' rights. Otherwise, "[the best interest] standard delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute."
>
> The trial court is not better situated to determine the issue based upon *its* best judgment. As *Troxel* instructs, "the Due Process Clause does not permit a State to infringe on the fundamental rights of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Because parenting remains a protected fundamental right, the due process clause leaves little room for states to override a parent's decision even when that parent's decision is arbitrary and neither serves nor is motivated by the best interests of the child.

Id. at 443–44 (citations omitted). The Supreme Court of Connecticut therefore concluded that to be entitled to visitation over a fit parent's objection, a grandparent must establish "that the parent's decision regarding visitation will

cause the child to suffer real and substantial emotional harm * * * [and that] the petitioner has established a parent–like relationship with the child." *Id.* at 445; *see also id.* at 450. Connecticut's highest court ended up dismissing the visitation petition. It is clear that if Cheryl Hiller's lawsuit against Shane Fausey were pending in the State of Connecticut, it would likewise have been dismissed as insufficient on the pleadings, because Ms. Hiller had no parent–like relationship to Kaelen, and it has not been and cannot be established that the denial of visitation would cause Kaelen to suffer real and substantial emotional harm.

***Georgia*:** In *Brooks* v. *Parkerson*, 454 S.E.2d 769 (Ga.), *cert. denied*, 516 U.S. 942 (1995), the Supreme Court of Georgia correctly anticipated the U.S. Supreme Court's later ruling in *Troxel*. In *Brooks*, Georgia's highest court wrote:

> [E]ven assuming grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections on a showing that failing to do so would be harmful to the child. It is irrelevant, to this constitutional analysis, that it might, in many instances be "better" or "desirable" for a child to maintain contact with a grandparent. The statute in question is unconstitutional under both the state and federal constitutions because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized.

454 S.E.2d at 773–74.

***Illinois*:** In *Wickham* v. *Byrne*, 769 N.E.2d 1 (Ill. 2002), the Supreme Court of Illinois declared facially unconstitutional that State's grandparent visitation statute. The appeal involved two separate grandparent visitation orders that were entered in each instance over the objections of the sole surviving parent of the grandchild or grandchildren in question. *See id.* at 2–4. The statute at issue was

very similar to Pennsylvania's grandparent visitation statute, in that it allowed for grandparent visitation if the trial court found that to be in the child's best interest. *Id.* at 7–8. At the close of its opinion, the highest court of Illinois wrote:

> [O]ur holding does not disregard the value of a meaningful relationship between a grandparent and grandchild. In most cases, the relationship between a child and his or her grandparents is a nurturing, loving relationship that provides a vital connection to the family's history and roots. However, as with all human relationships, conflicts may arise between a child's parents and grandparents. In many cases, this conflict will concern disagreements about how a parent is raising his or her children. Yet, this human conflict has no place in the courtroom. This is true even where the intrusion is made in good conscience, such as the request for visitation to preserve the child's only connection to a deceased parent's family. Parents have the constitutionally protected latitude to raise their children as they decide, even if these decisions are perceived by some to be for arbitrary or wrong reasons. The presumption that parents act in their children's best interests prevents the court from second–guessing parents' visitation decisions. Moreover, a fit parent's constitutionally protected liberty interest to direct the care, custody, and control of his or her children mandates that parents — not judges — should be the ones to decide with whom their children will and will not associate.

Id. at 8.

***Iowa*:** In *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003), the Supreme Court of Iowa held facially unconstitutional a grandparent visitation statute that failed to require findings both of parental unfitness and actual harm to the child before imposing court–ordered visitation. As the court explained, "If grandparent visitation is to be compelled by the state, there must be a showing of harm to the child beyond that derived from the loss of the helpful, beneficial influence of grandparents." *Id.* at 191. And in *Lamberts* v. *Lillig*, 670 N.W.2d 129

(Iowa 2003), the Supreme Court of Iowa declared unconstitutional an additional aspect of Iowa's grandparent visitation statute.

***Kansas*:** In *State Dep't of Social and Rehabilitation Services* v. *Paillet*, 16 P.3d 962 (Kan. 2001), the Supreme Court of Kansas held unconstitutional as applied a Kansas statute pursuant to which a trial court granted grandparent visitation over the wishes of the child's only surviving parent.

***Kentucky*:** In *Scott* v. *Scott*, 80 S.W.3d 447 (Ky. Ct. App. 2002), the Court of Appeals of Kentucky held that "grandparent visitation may only be granted over the objection of an otherwise fit custodial parent if it is shown by clear and convincing evidence that harm to the child will result from a deprivation of visitation with the grandparent." *Id.* at 451. The court understood that holding to be compelled by *Troxel* and ruled that the trial court's award of grandparent visitation on a lesser showing represented an unconstitutional application of Kentucky's grandparent visitation statute. *See id.*

***Maryland*:** In *Brice* v. *Brice*, 754 A.2d 1132 (Md. Ct. Spec. App. 2000), the Court of Special Appeals of Maryland, another state that borders Pennsylvania, held unconstitutional as applied a grandparent visitation statute that a trial court had relied on in granting visitation to the paternal grandparents of a child whose father had died in an automobile accident.

***Massachusetts*:** In *Blixt* v. *Blixt*, 774 N.E.2d 1052 (Mass. 2002), *cert. denied*, 537 U.S. 1189 (2003), the Supreme Judicial Court of Massachusetts held that the only way its grandparent visitation law could be saved from unconstitutionality

would be for the court to construe the statute to require that the grandparent show that the failure to grant visitation would cause significant harm to the child. *See id.* at 1060. If that were the standard in Pennsylvania, then Cheryl Hiller's request for partial custody certainly would have been denied, because there has not been and cannot be any showing of significant harm in this case.

***Michigan*:** In *DeRose* v. *DeRose*, 666 N.W.2d 636 (Mich. 2003), the Supreme Court of Michigan held facially unconstitutional Michigan's grandparent visitation statute, which had allowed a trial court to order grandparent visitation in the best interests of the child even over the objection of a fit parent.

***New Jersey*:** In *Moriarty* v. *Bradt*, 827 A.2d 203 (N.J. 2003), *cert. denied*, 124 S. Ct. 1408 (2004), the Supreme Court of New Jersey ruled that the maternal grandparents of a child whose mother had killed herself by overdosing on drugs could not obtain more visitation than the child's father was willing to allow unless they could show by a preponderance of the evidence that the amount of visitation allowed by the father was so little that it would result in harm to the health or welfare of the child. *See id.* at 222. Again, on the record of this case, there is no evidence or finding that Kaelen would experience any such harm if Mr. Fausey was allowed to determine, as a fit parent acting in his child's best interest, the amount of visitation Kaelen's maternal grandmother was entitled to have.

***Ohio*:** In *Oliver* v. *Feldner*, 776 N.E.2d 499 (Ohio Ct. App. 2002), the Court of Appeals of Ohio, another State that borders Pennsylvania, held that Ohio's grandparent visitation statute was subject to strict scrutiny and that clear and

compelling evidence of actual or potential harm to the child is required to order grandparent visitation over the objection of the child's only surviving parent. *See id.* at 507–08.

***Oklahoma*:** In *Neal* v. *Lee*, 14 P.3d 547 (Okla. 2000), the Supreme Court of Oklahoma reversed a trial court's order that granted visitation to the paternal grandparents of a child whose father had died. The court's opinion concluded:

> The trial court erred in granting Karen Sue Neal grandparent visitation with Joshua, Whitney, and Hunter over the objection of their parents [the mother had remarried] absent a showing of harm. Here the "vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with this parental decision regarding who may see a child." Because there are no allegations of harm, the issue of the children's best interest was irrelevant and the district court had no authority to grant Karen Sue Neal visitation. Whether the district court, on advice of a family counselor, thought court ordered visitation was "better or more desirable for [the children] was not relevant."

Id. at 550–51 (citations omitted).

***South Carolina*:** In *Camburn* v. *Smith*, 586 S.E.2d 565 (S.C. 2003), the Supreme Court of South Carolina wrote in reversing an order that had allowed grandparent visitation over the objections of the child's lone available parent:

> 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. 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.
>
> In sum, parents and grandparents are not on an equal footing in a contest over visitation. Before visitation may be awarded over a parent's objection, one of two evidentiary hurdles must be met: the

> parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.

Id. at 568 (citations omitted). In *Camburn*, as here, those requirements from *Troxel* to override a fit parent's decision concerning the nature and extent of grandparent visitation have not been and cannot be established. Accordingly, the Supreme Court of South Carolina overturned the trial court's decision that had awarded, over a fit parent's objection, grandparent visitation.

***Texas*:** Finally, in *In re Pensom*, 126 S.W.3d 251 (Tex. Ct. App. 2003), the appellate court ruled that for a trial court to compel grandparent visitation over a sole surviving parent's objection, the grandparent must prove "either that the parent is not fit, or that denial of access by the grandparent would significantly impair the child's physical health or emotional well–being." *Id.* at 256 (footnote omitted).

* * *

The substantial body of caselaw reviewed above, including many rulings from States that border Pennsylvania and state courts of last resort, demonstrates both that the issues presented herein are unquestionably deserving of this Court's review and that the Superior Court's ruling is contrary to the vast weight of appellate precedent from throughout the Nation. This Court accordingly should grant review to determine whether Pennsylvania's grandparent visitation statute violates a sole surviving parent's substantive due process rights to decide when, where, and to what extent grandparent visitation occurs.

C. The Superior Court's ruling cannot withstand scrutiny, and this Court's recent grant of allowance of appeal in *K.B. II* v. *C.B.F.*, 842 A.2d 917 (Pa. 2004), demonstrates that the questions presented herein are especially deserving of review

The Superior Court of Pennsylvania, in rejecting Mr. Fausey's constitutional challenge to Pennsylvania's grandparent visitation statute, 23 Pa. Cons. Stat. Ann. § 5311, relied on two rationales that the Superior Court believed distinguished Pennsylvania's law from the law struck down as unconstitutional as applied in *Troxel*.

First, the Superior Court explained, Pennsylvania's grandparent visitation law limits the third–parties who can seek visitation to grandparents, while the Washington State law broadly gave standing to any third–party. *See* Exhibit A at 5–8. But that purported distinction is entirely unpersuasive, because *Troxel* involved an *as–applied* constitutional challenge involving grandparents who were seeking court–ordered visitation over the sole surviving parent's objection. An as–applied challenge only considers the statute as it is being applied in the given case, not as it might be applied in other hypothetical cases.

Second, the Superior Court theorized that Pennsylvania's grandparent visitation statute afforded "special weight" to the sole surviving parent's wishes by requiring a grandparent to prove by a preponderance of the evidence that additional visitation with the grandparent was in the best interests of the child. *See* Exhibit A at 5. Yet the Superior Court's rationale ignores that the only time the placement of the burden of proof in a case governed by the preponderance of the evidence standard is of consequence is if neither side introduces any evidence or if the

evidence favoring the opposing parties is in equipoise. *See Haygood* v. *Civil Service Comm'n*, 576 A.2d 1184, 1185 (Pa. Commw. Ct. 1990) (burden of proof is only significant if party fails to produce evidence constituting a prima facie case; once that is accomplished, burden of proof ceases to be relevant), *appeal dismissed as improvidently granted*, 529 Pa. 447, 605 A.2d 306 (1992); *Suravitz* v. *Prudential Ins. Co. of Am.*, 261 Pa. 390, 401, 104 A. 754, 757 (1918) (where the evidence is in equilibrium, the ruling must go against the party bearing the burden of proof). Accordingly, the Superior Court's belief that placing the preponderance of the evidence burden of proof on the grandparent gives a parent's contrary preference "special weight" is clearly in error.

Finally, the Superior Court's ruling in this case conflicts directly with language that another Superior Court panel employed in *K.B. II* v. *C.B.F.*, 833 A.2d 767 (Pa. Super Ct. 2003), *appeal granted in part*, 842 A.2d 917 (Pa. 2004). There, in the course of overturning a trial court's decision that, in reliance on 23 Pa. Cons. Stat. Ann. § 5313(b), had awarded full custody of a child to the paternal grandparents over the child's mother's objection, the Superior Court wrote:

> As the United States Supreme Court stated in *Troxel*, *supra*, where only court–ordered visitation, and not a change in full physical custody, was at stake:
>
> > [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.
>
> *Troxel*, 530 U.S. at 68–69 (citation omitted). The Court further cautioned that "the Due Process Clause does not permit a State to

> infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72–73.

Id. at 778 (citations omitted).

This Court's grant of allowance of appeal in *K.B. II* on the question "Whether grandparents have standing to seek custody under 23 Pa. Cons. Stat. Ann. § 5313(b) absent a finding that the child is substantially at risk, or that the parent is unfit, or that the child is dependent" establishes beyond peradventure that Mr. Fausey's petition for allowance of appeal, raising a distinct but quite similar question, should likewise be granted.

VI. CONCLUSION

For these reasons, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: June 24, 2004

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

Service by first class mail addressed as follows:

Janice Ramin Yaw, Esquire
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Attorney for Respondent

And, in accordance with the requirements of Pa. R. App. P. 521, I am this day also serving a true and correct copy of the foregoing document upon the Attorney General of Pennsylvania in the manner indicated below:

Service by first class mail addressed as follows:

Office of the Attorney General
Commonwealth of Pennsylvania
Litigation Section
15th Floor, Strawberry Square
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Dated: June 24, 2004

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