



## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE.....	1
STATEMENT OF FACTS .....	1
INTRODUCTION .....	1
ARGUMENT .....	3
The juvenile court’s order awarding visitation was invalid, as it violated the Mother’s Fourteenth Amendment rights.....	3
A.    Parents have a fundamental due process right to direct the upbringing of their children and the decisions of fit parents concerning their children must be presumed to be in the best interests of those children.....	3
B.    The juvenile court’s application of the statute and rule violated the Mother’s constitutional rights under <i>Troxel</i> . .....	6
C.    This Court’s decision in <i>Harrold v. Collier</i> does not compel a different result. ....	9
CONCLUSION.....	11
CERTIFICATE OF SERVICE .....	13

## TABLE OF AUTHORITIES

	<u>Page</u>
 <b><u>Cases</u></b>	
<i>Ex Parte E.R.G. and D.W.G.</i> , 73 So.3d 634 (2011).....	6
<i>Kinsey v. Bd. of Trustees of Police &amp; Firemen’s Disability &amp; Pension Fund of Ohio</i> , 49 Ohio St.3d 224, 551 N.E.2d 989 (1990) .....	2
<i>Harrold v. Collier</i> , 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165 .....	9, 10, 11
<i>In re Mullen</i> , 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302 .....	2
<i>In re LaPiana</i> , 8th Dist. Nos. 09AP-93691, 09AP-93692, 2010-Ohio-3606 .....	2
<i>Oliver v. Feldner</i> , 149 Ohio App.3d 114, 2002-Ohio-3209, 776 N.E.2d 49 (7th Dist.).....	5
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979).....	5
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944).....	4
<i>Rowell v. Smith</i> , 186 Ohio App.3d 717, 2010-Ohio-260, 930 N.E.2d 360 (10th Dist.) .....	8
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982) .....	7
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000) .....	<i>passim</i>
 <b><u>Statutes</u></b>	
R.C. 2151.23 .....	2, 6, 11
R.C. 3109.051 .....	9
R.C. 3109.11 .....	9
R.C. 3109.12 .....	9
Wash. Rev. Code § 26.10.160(3).....	4
 <b><u>Court Rules</u></b>	
Juv. R. 13 .....	2, 6, 11



## **INTEREST OF AMICI CURIAE**

Marlin and Jennifer Herrick are the adoptive father and the biological mother of a child who is the subject of an ongoing custody dispute similar to the dispute at issue in this case. As a result of their own experiences and of their familiarity with several other similar disputes, the Herricks have become extremely concerned that juvenile courts in this state, especially when reviewing petitions for nonparent custody and visitation, are consistently failing to provide the protections for parental rights which are required by the United States Constitution. This case presents the Court with the opportunity to resolve this significant problem by providing guidance to Ohio juvenile courts in the performance of their highest duty, which is to protect the constitutional rights of parents to direct the upbringing of their children without interference from the State. To that end, the Herricks respectfully submit this Brief Amici Curiae.

## **STATEMENT OF FACTS**

Amici Curiae adopt the Statement of Facts contained in Appellee Julie Smith's Brief.

## **INTRODUCTION**

Because the juvenile court lacked statutory jurisdiction to issue a visitation order in favor of Julie Rowell, the contempt order against Julie Smith, the child's Mother, is invalid. And because the contempt order was predicated upon the Mother's refusal to comply with the invalid visitation order, the contempt order is likewise invalid. Accordingly, the Tenth District Court of Appeals' decision should be affirmed.

From a technical standpoint, this case will likely be decided on this narrow issue alone.<sup>1</sup> But the case implicates far more than just a statutory jurisdictional issue. At its core, this case is about a parent's constitutionally-guaranteed right to be the exclusive decision-maker with respect to the care, custody, and control of her child, a right which the United States Supreme Court has characterized as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

And the case doesn't just concern the rights of one mother. Indeed, Julie Smith would readily acknowledge that it concerns the rights of all parents, and especially those similarly situated to her—parents like Marlin and Jennifer Herrick, and Siobhan LaPiana<sup>2</sup>, and even Kelly Mullen.<sup>3</sup> Like Julie, each of these parents has been the victim of an unlawful, arbitrary, and unconstitutional visitation order issued by an Ohio juvenile court under the purported authority of the statute and rule at issue in this case.<sup>4</sup>

To be sure, as a result of the serial misapplication of these provisions by the juvenile courts, and the utter failure of these courts to show even the slightest concern for the constitutional rights of parents, each of these parents has been forced to endure years of agonizing litigation at a cost of tens (if not hundreds) of thousands of dollars, all the while being compelled, under threat of incarceration by the State, to yield their God-given parental rights and authority to that very same State, which by its actions purports to know better than the parents what is in the best interests of their children.

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<sup>1</sup> See *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225, 551 N.E.2d 989 (1990) ("It is well-established that where a case can be resolved upon other grounds the constitutional question will not be determined").

<sup>2</sup> See *In re LaPiana*, 8th Dist. Nos. 09AP-93691, 09AP-93692, 2010-Ohio-3606.

<sup>3</sup> See *In re Mullen*, 129 Ohio St.3d 417, 2011-Ohio-3361, 953 N.E.2d 302.

<sup>4</sup> R.C. 2151.23 and Juv.R. 13.

It is to this particular issue—the disregard for the constitutional rights of parents by the juvenile court—which the Herricks give attention in this brief. If the Court concludes that the juvenile court had jurisdiction to issue the visitation order, then the unconstitutionality of that order serves as an alternative basis for its invalidity. And if the visitation order was invalid (regardless of the reason), the juvenile court’s order holding Julie Smith in contempt of court for refusing to relinquish her rights as a parent is likewise invalid, and the appellate court’s decision should be affirmed.

## ARGUMENT

### **The juvenile court’s order awarding visitation was invalid, as it violated the Mother’s Fourteenth Amendment rights.**

The statute and rule at issue in this case violate the Mother’s fundamental liberty interest to direct the upbringing of her daughter, as protected by the Fourteenth Amendment. On their face, the statute and rule contain none of the safeguards that are necessary for nonparent visitation statutes to comport with the Constitution. And even if the Court authoritatively construes the statute and rule to require juvenile courts to apply these constitutional safeguards (as it did in *Harrold v. Collier*, discussed *infra*), because the juvenile court did not apply them in granting visitation rights to Rowell, the visitation order is unconstitutional.

#### **A. Parents have a fundamental due process right to direct the upbringing of their children, and the decisions of fit parents concerning their children must be presumed to be in the best interests of those children.**

More than a decade ago in *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court reaffirmed a long and unbroken chain of precedent holding that parents have a constitutionally-protected liberty interest in making decisions concerning the care, custody, and management of their child. *Id.* at 65-66. Appealing to several of its earlier cases on parental

rights, the Court emphasized the cardinal principal “that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Id.* at 65-66, quoting *Prince v. Massachusetts*, 321 U.S. 158 (1944).

At issue in *Troxel* was a Washington statute which afforded any person the right to seek visitation rights in court at any time and under any circumstances. More specifically, the statute provided:

Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

*Id.* at 61, citing Wash. Rev. Code § 26.10.160(3).

The Court held that this “breathhtakingly broad” statute “effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent’s children to state-court review.” *Troxel*, 530 U.S. at 67. And once before the court, “a parent’s decision that visitation would not be in the child’s best interest is accorded no deference” or “presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hand of the judge,” and if the judge disagrees with the parent, “the judge’s view necessarily prevails.” *Id.* As a consequence, “in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge’s determination of the child’s best interests.” *Id.* (emphasis in original).

To avoid violating parents’ constitutional right to direct the upbringing of their children, the Court held that trial courts must presume that the decisions of fit parents are in the best interests of their children. *Id.* at 68. That is, they must accord “special weight” to those decisions.

*Id.* at 70.<sup>5</sup> The Court emphasized the importance of this presumption in the case, since the mother had neither been alleged by the grandparents, nor found by the court, to be unfit. Quoting from an earlier case involving parental rights, the Court noted:

Our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. ... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

*Id.* at 68, quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

It is evident from this portion of the Court's opinion that the decision in the case—that the Washington statute was unconstitutional as applied to the parent—was primarily based on the trial court's failure to apply the presumption that decisions made by fit parents are in the child's best interests and not subject to second-guessing by the State. *Id.* at 69. Indeed, in addressing the trial court's application of the Washington statute, the Court found no evidence in the trial court's "slender findings" that the court had accorded any special weight to the mother's determination of her child's best interests. Instead, the court gave special weight to its own determination that grandparent visitation was in the best interests of the child, a presumption which, according to the trial court, could only be rebutted if the mother could demonstrate some kind of harm that would result. In other words, the trial court had in effect reversed the burden of proof, "directly contraven[ing] the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69. Consequently, the Court held that the trial court had failed

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<sup>5</sup> "[E]ven though the *Troxel* court did not define 'special weight,' previous [United States] Supreme Court decisions make it clear that 'special weight' is a very strong term signifying extreme deference" (*i.e.*, a presumption) which can "be overcome only by some compelling governmental interest and overwhelmingly clear circumstances supporting that government interest." *Oliver v. Feldner*, 149 Ohio App.3d 114, 2002-Ohio-3209, 776 N.E.2d 499 (7th Dist.), at P59.

to provide adequate protection for the mother's fundamental right to make decisions concerning the rearing of her child and thus, as applied to her, the Washington visitation statute was unconstitutional. *Id.* at 71.

**B. The juvenile court's application of the statute and rule violated the Mother's constitutional rights under *Troxel*.**

The statute<sup>6</sup> and rule<sup>7</sup> applied by the juvenile court in this case are strikingly similar to the "breathhtakingly broad" Washington statute struck down in *Troxel*. Both on their face and as they have been applied by the juvenile courts of this State (and as Rowell advocates in her Brief), the statute and rule give to any nonparent in a custody action the right to petition a juvenile court for visitation of any child at any time, with no specified predicate event or condition and no limitation on the persons to whom visitation could be granted.

Indeed, given the absence of any limitations in the statute and rule, a juvenile court could grant visitation to not just one legal stranger (as it did in this case), but to any number of people who might purport to have an interest in the child's well-being. These could include, for example, Rowell's parents (and other relatives), her partners, her partners' parents (and other relatives), and the list goes on. Whether or not a juvenile court would ever go this far is beside the point. The point is that it is not a determination that the juvenile court should be making in

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<sup>6</sup> R.C. 2151.23(A)(2) states: "The juvenile court has exclusive original jurisdiction under the Revised Code \*\*\* to determine the custody of any child not a ward of another court of this state."

<sup>7</sup> Juv.R. 13 provides:

(A) Temporary disposition. Pending hearing on a complaint, the court may make such temporary orders concerning the custody or care of a child who is the subject of the complaint as the child's interest and welfare may require.

(B) Temporary orders. (1) Pending hearing on a complaint, the judge or magistrate may issue temporary orders with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest and welfare may require.

the first place, which is why the Supreme Court struck down the statute in *Troxel*. The mere fact that some person (whether relative, friend, or stranger, it matters not) has filed a complaint seeking custody of a child should not give the juvenile court (*i.e.*, the State) the authority to replace the parents as the exclusive decision-makers concerning their child.

Of greater concern, though, is the absence in the statute and rule of any requirement that the court even consider the parent's decision concerning visitation, let alone presume that that decision is in the child's best interests. As the Court in *Troxel* noted, absent this safeguard in the statute, there is nothing to prevent the trial court from substituting its own opinion concerning the child's best interests in place of the parent's. *Id.* at 67-68.

Unsurprisingly, that is exactly what happened in this case. Like the trial court in *Troxel*, the juvenile court awarded visitation to a nonparent without showing even the slightest deference to the Mother's own decision that visitation with a legal stranger was not in her child's best interests. As a presumptively fit parent, this was a decision the Mother was entitled to make exclusively on her own, without the assistance or input of the juvenile court.<sup>8</sup> After all, millions of Ohio parents routinely make these decisions every day concerning their children, without the help of the State. The mere fact that someone has filed a custody complaint should not, *ipso facto*, authorize the State to suddenly have a say in the matter (let alone the final say).

On the contrary, before the State may have a say in determining whether a decision by a parent is in the best interests of his or her child, the Constitution requires that a prior and independent finding of parental unfitness must be made. *Ex Parte E.R.G. and D.W.G.*, 73 So.3d

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<sup>8</sup> Likewise, the Guardian *ad Litem* appointed by the juvenile court should have had no say in the matter either, since her sole purpose is to look out for the best interests of the child. But looking out for the best interests of her daughter is the exclusive domain of the Mother, the juvenile court's appointment of a Guardian *ad Litem* was not only unnecessary, but unlawful, and only further exacerbated the court's violation of the Mother's constitutional rights.

634, 644 (2011), citing *Santosky v. Kramer*, 455 U.S. 745 (1982). If such a finding is made, the State then has a compelling interest to overrule the decisions of the unfit parent. *Id.*

In this case, there was no such finding, nor is there is any evidence that the juvenile court accorded any deference to the Mother's decision concerning visitation. Instead of presuming that the Mother's decision was in the best interest of her child, the court substituted its own decision. In *Troxel*, the Supreme Court found the trial court's findings too "slender" to justify an award of visitation. *Id.* at 72. But in this case, the juvenile court made no findings to support the visitation order at issue, and consequently, the order does not contain any indication that the constitutional safeguards were even considered, let alone applied.

And even if the juvenile court is given credit for the findings articulated in a previous visitation order (which was overturned by the Tenth District on procedural grounds<sup>9</sup>), it would only make matters worse. For in addition to being even more slender than those appearing in *Troxel*, the findings made in the previous order reveal precisely the same form of reasoning that the trial court in *Troxel* used, and which the Supreme Court repudiated. *Id.* at 69-70. That is, the findings were based entirely upon the juvenile court's unsupported opinion that 1) "where a child has been placed by his or her parent in a living situation wherein the child develops a relationship with a non-parent," visitation is "more likely than not" in the child's best interest and 2) the child suffered no "abuse or neglect at the hands of the nonparent."<sup>10</sup>

Just as the trial court in *Troxel* began with the presumption that visitation with grandparents would be in the child's best interests and granted visitation because the mother hadn't proven any harm in it, so in this case the juvenile court began with the presumption that visitation with a formerly cohabitating nonparent would be in the child's best interest, and

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<sup>9</sup> See *Rowell v. Smith*, 186 Ohio App.3d 717, 2010-Ohio-260, 930 N.E.2d 360 (10th Dist.).

<sup>10</sup> Decision and Judgment Entry (June 23, 2009), at 15-16.

granted the visitation because the Mother hadn't proven any harm in it. In neither case was special weight given to the parent's decision not to allow visitation, and thus in neither case were the parent's constitutional rights afforded sufficient protection.

**C. This Court's decision in *Harrold v. Collier* does not compel a different result.**

The position advocated in this brief is consistent with a previous decision by this Court concerning two nonparent visitation statutes. In *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, the Court rejected a parent's as-applied constitutional challenge to R.C. 3109.11 and R.C. 3109.12. These statutes narrowly limit the right of grandparents or other nonparent family members to petition for visitation in specific circumstances when a parent is deceased or when a child is born to an unwed mother and a legally acknowledged father. Additionally, the statutes both incorporate by reference R.C. 3109.051(D), which requires the juvenile court to consider several enumerated factors in determining the best interests of the child, including the "wishes and concerns of the child's parents, as expressed by them to the court." R.C. 3109.051(D)(15).

In evaluating the constitutionality of the statutes, the Court held that the statutes contained several limiting factors which distinguished them from the "breathtakingly broad" statute which was struck down in *Troxel*. *Harrold*, 107 Ohio St.3d at P41. The Court also held that the requirement to accord special weight to the parent's wishes and concerns (a requirement imposed not by the statute itself but rather by the Court's authoritative construction of the statute) likewise distinguished the Ohio statutes from the statutes struck down in *Troxel*. *Id.* at P12, P42. Finally, and most importantly, in evaluating whether the juvenile court had applied the proper standard in deference to the parent's constitutional rights, the Court found that the court had specifically weighed the father's opposition to visitation and, before determining that it was

in the child's best interest to grant the motion for grandparent visitation, had given "due deference" to the father's wishes and concerns. *Id.* at P45.

But the same cannot be said about the statute and rule at issue in this case, or their application by the juvenile court. Similar to the Washington statute, the statute and rule are void of the limitations which this Court considered relevant in *Harrold*, and they impose no requirement on the juvenile court to even consider the wishes and concerns of the parent, let alone to presume that the parent's decision is in the best interest of the child, as required under *Troxel*. Moreover, unlike the juvenile court in *Harrold*, the juvenile court in this case did not apply any of the limiting factors or constitutional safeguards in evaluating the request for visitation.

Of course, to point out that *Harrold* is distinguishable from this case is not necessarily to endorse the opinion. It is inadequate in several respects, and the Court should take the opportunity presented by this case to correct its shortcomings. Most notably, because the Court in *Harrold* was satisfied with the trial court having merely "weighed" the parent's "wishes and concerns," instead of requiring it to presume that the parent's decision regarding visitation was in the best interests of the child (*i.e.*, to accord special weight to the father's decision), it failed to properly apply *Troxel* to protect the parent's constitutional rights. Moreover, the opinion contains the mistaken proposition that a fit parent's wishes should not be placed before a child's best interests, and that the state has a compelling interest in protecting a child's best interest, over and against a parent's fundamental right to decide what is in his child's best interest. This assertion is clearly contrary to *Troxel*, which emphasized that "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. In other words, in the absence of a determination by clear and convincing evidence that a parent is unfit to care for his or her child (a determination that was not made in *Harrold*), the state has no interest—let alone a compelling interest—in protecting the child's interests by substituting its judgment in place of the parents.

While these several shortcomings are problematic, because the facts are clearly distinguishable from those in this case, *Harrold* does not compel reversal of the appellate court's decision in favor of the Mother.

### CONCLUSION

There is nothing in the record in this case to indicate that the juvenile court accorded special weight to the Mother's decision concerning visitation, as *Troxel* requires. Rather, there is every indication that the court placed the burden upon her to prove that visitation would result in some harm to her child and, satisfying itself that no harm would follow, merely substituted its own judgment for that of the Mother. This is precisely the kind of decision which was found by the Supreme Court in *Troxel* to have exceeded the bounds of the Due Process Clause.

Accordingly, the juvenile court's application of R.C. 2151.23(A) and Juvenile Rule 13(B)(1) in this case unconstitutionally infringed upon Smith's fundamental parental rights. The resulting award of visitation was therefore invalid and cannot serve as the basis for the court's order holding the Mother in contempt. The decision of the appellate court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief Amici Curiae was served by regular mail this 16<sup>th</sup> day of February, 2012, upon the following counsel of record:

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