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18-8864
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH B.,
Petitioner,

Supreme Court, U.S.
FILED

FEB - 1 2019

OFFICE OF THE CLERK

v.

STATE OF NEBRASKA ON BEHALF OF
B.H., A MINOR CHILD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA COURT OF APPEALS

CORRECTED PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibits a State from forbidding visitation between a noncustodial parent and his or her children due to incarceration?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the courts whose judgments is the subject of this petition is as follows:

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APPENDIX C: Order from the Nebraska Supreme denying Petition for Further Review, Nos. A-17-920, A-17-944 (Unpublished/filed November 6, 2018).

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The memorandum opinion and judgment on appeal from the Nebraska Court of Appeals appears at Appendix A to the petition and is unpublished. The opinions of the district court of Otoe County, Nebraska appears in the transcript and is unpublished (A-17-920/T221-29;T314-17).

***Please note, all citations to the transcript and bill of exceptions are made to the transcripts and bill of exceptions filed in No. A-17-920.

JURISDICTION

The order of the Nebraska Supreme Court denying petition for further review was issued on November 6, 2018. There was no extension of time to file this petition for writ of certiorari and this petition is timely filed by not later than February 4, 2019. The jurisdiction of this Court 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 will abridge the privileges or immunities of the 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."

Neb.Rev.Stat. § 42-364(2) provides that "In determining legal custody or physical custody, the court shall not give preference to either parent based on sex of the parent and, except as provided in section 43-2933, no presumption shall exist that either parent is more fit or suitable than the other. Custody shall be determined on the basis of the best interests of the child, as defined in the Parenting Act. Unless parental rights are terminated, both parents shall continue to have the rights stated in section 42-381."

Neb.Rev.Stat. § 42-364(6) provides, in pertinent part, that "Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction shall be commenced by filing a complaint to Modify. Modification of a parenting plan is governed by Parenting Act. Proceedings to modify parenting plan shall be commenced by filing a complaint to modify....Service of process and other procedure shall comply with the requirements for a dissolution action."

Neb.Rev.Stat. § 43-1802(2) provides, in pertinent part, that "Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial

relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship."

STATEMENT OF THE CASE

On April 23, 2012, the State of Nebraska filed a "Complaint to Establish Paternity and Support" against Petitioner Joseph J. Buttercase (hereinafter "Joseph") in the district court of Otoe County, Nebraska (hereinafter "the district court") for Case No. CI 12-105 (Supp.T1-4). The parties of this action submitted a "Stipulation" to the district court on October 17, 2012 concerning the State's pending Complaint (Supp.T10-15). On October 19, 2012, the district court entered an "Order for Support" based upon the stipulation of the parties (Supp.T16-22). The said Order provided that Joseph is the biological father of B.H. and is to pay support in accordance with the Nebraska Child Support Guidelines (Supp.T17, ¶1-T18, ¶2).

On January 24, 2017, Joseph filed a "Verified Complaint for Modification", pursuant to **Neb.Rev.Stat. § 42-364**, requesting the district court for an Order establishing his visitation rights with B.H. while he is incarcerated (T7-9). Joseph filed the said Complaint due to Respondent mother Charlotte H. (hereinafter "Charlotte") denying him visitation with B.H. *id.* On January 27, 2017, Charlotte filed a "Cross-Complaint to Modify Order" requesting the district court for an Order awarding her physical and legal custody of B.H. (T31-33). On May 3, 2017, Respondents Philip and Maria Buttercase (Joseph's parents, & hereinafter "Philip and Maria") filed a "Motion for Leave to Intervene" in the district court requesting to intervene in the proceedings (T82-83). On May 16, 2017, the district court did grant Philip and Maria leave to intervene (T88). On May 23, 2017, Philip and Maria filed a "Verified Counter Complaint for Modification" in the district court requesting an Order awarding them grandparent visitation with B.H. (T90-96). Philip and Maria filed the said Complaint due to Charlotte vindictively stopping their visitation with B.H.

because Joseph filed his Complaint to establish visitation. *id.*

On July 18, 2017, the matters concerning the parties pending Complaints proceeded for trial in the district court (B.O.E.42:13-131:25). The district court denied Joseph visitation with B.H. at the correctional facility in its August 2, 2017 Order and created Parenting Plan (Transcript)(T223,¶4, &T226, 10). The district court did, however, award Charlotte physical and legal custody of B.H. in its same August 2, 2017 Order and created Parenting Plan (T223,¶3). The said Order and Parenting Plan also awarded Philip and Maria grandparent visitation with B.H. every other week from Friday at 5:30 p.m. until Sunday at 5:00 p.m. (T225,¶8). This said visitation schedule was equivalent to the grandparent visitation that Philip and Maria were receiving from Charlotte prior to the filing of Joseph's Complaint (B.O.E.52:16-18;65:17-22, &84:6-10).

On August 14, 2017, Joseph filed a "Verified Motion for New Trial and Motion to Alter or Amend" requesting the district court to reconsider its Order by granting him visitation with B.H. at the correctional facility and for a new trial (T234-303). Thereafter, in further vindictiveness, Charlotte filed a "Motion to Reconsider" requesting the district court to reduce Philip and Maria's grandparent visitation schedule in half the amount they were receiving from her prior to the filing of Joseph's Complaint (T304-05). On August 22, 2017, a hearing was held in the district court concerning Joseph and Charlotte's pending post-trial motions (B.O.E.132:1-146:14). The district court denied Joseph's motions for new trial and to alter or amend in its newly entered August 24, 2017 Order but did, however, grant Charlotte's motion to reconsider (T314-16). This said newly entered August 2, 2017 Order amended the district court's previous August 2, 2017 Order by reducing Philip and

Maria's visitation schedule, and Joseph's telephone visitation schedule, with B.H. in half to every other weekend from Saturday at 5:30 p.m. until Sunday at 5:00 p.m. (T315, ¶4-T316, ¶3). This said new visitation schedule is not equivalent to the grandparent visitation that Philip and Maria were receiving from Charlotte prior to the filing of Joseph's Complaint (B.O.E.52:16-18;65:17-22, &84:6-10).

On August 29, 2017, Joseph timely filed his "Notice of Appeal" in the district court. Joseph also filed a "Motion for Leave to Proceed with Appeal in Forma Pauperis" in the district court (Appeal No. A-17-920)(T311-12). On August 29, 2017, the district court granted Joseph leave to proceed in forma pauperis. Philip and Maria also timely filed their "Notice of Appeal" in the district court and paid their docket fee in full for said appeal on September 5, 2017 (Appeal No. A-17-944).

The Nebraska Court of Appeals consolidated Joseph's appeal (A-17-920) and, Philip and Maria's appeal (A-17-944) on September 14, 2017 for briefing and disposition. In an unpublished memorandum opinion entered on July 3, 2018 for Nos. A-17-920, A-17-944, the Nebraska Court of Appeals affirmed the district court's denial of Joseph's visitation with B.H. at the correctional facility and, affirmed the district court's amended Order that reduced Philip and Maria's grandparent visitation in half (*State obo B.H. v. Joseph B.*, Nos. A-17-920, A-17-944; Appendix A). Joseph, Philip and Maria timely filed a "Motion for Rehearing" in the Nebraska Court of Appeals on July 12, 2018. The Nebraska Court of Appeals denied the motion for rehearing on August 23, 2018 (Appendix B).

On September 19, 2018, Joseph, Philip and Maria timely filed a "Petition for Further Review" in the Nebraska Supreme Court. The Nebraska Supreme Court

denied the Petition for Further Review on November 6, 2018 (Appendix C). Joseph filed a "Motion to Reconsider" (Rehearing) in the Nebraska Supreme Court on November 15, 2018. The Nebraska Supreme Court denied the Motion to Reconsider (Rehearing) on November 16, 2018 (Appendix D). The present petition for a writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNANSWERED QUESTION OF WHETHER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT PROHIBIT STATES FROM FORBIDDING VISITATION BETWEEN A NONCUSTODIAL PARENT AND HIS OR HER CHILDREN DUE TO INCARCERATION.

The private interests implicated in this case are of substantial importance to the public, at issue is the parent-child relationship. The facts of this case involves an unconstitutional infringement on Joseph's right to make decisions regarding the rearing of his daughter. The manner in which the district court for Otoe County and the Nebraska Court of Appeals disposed of Joseph's case, in failing to follow this Court's and Nebraska clearly established laws, implicates several constitutional concerns under the Fourteenth Amendment. The record is devoid of any evidence suggesting that denial of Joseph's visitation rights is in B.H.'s best interests. Charlotte presented no evidence in the form of expert testimony concerning B.H. visiting her father at the correctional facility, nor any expert testimony concerning the impact that said visits may have on her. The record does not dispute that Joseph's convictions are not due to any crimes against or mistreatment of B.H., Charlotte, nor any minors (T187, ¶¶1&3; T235, ¶3) (B.O.E. 89:18-91:7; 134:14-20).

"The mere fact of incarceration is not sufficient justification for the denial of the right of visitation even though the same may be effectively exercised only by visitation at the institution." *Casper v. Casper*, 198 Neb.

615, 617 n.1 (1977); **Bruce v. Bruce**, 11 Neb.App. 548, 551 (2003). Several other state courts have also held that visitation cannot be withheld due to incarceration. See, e.g., **MLB v. WRB**, 457 S.W.2d 465, 467 n.1 (Mo.App.1970); **Chadwick v. Chadwick**, 275 Mich. 226, 228 n.2 (Mich.1936). "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' **Caban v. Mohammed**, 441 U.S. 380, 392 (1979), his interest in personal contact with his child acquires substantial protection under the Due Process Clause." **Lehr v. Robertson**, 463 U.S. 248, 261 (1983).

In this case, the district court's erroneous finding that, "The best evidence of that impact is the opinion of the child's mother, who has cared for the child since birth.", does not prove that visitation at the correctional facility is detrimental or against B.H.'s best interests (T223, ¶1). There is no showing in the record to indicate that B.H.'s prior visitations with Joseph were harmful to her or that future visits would be harmful to her (T187, ¶3). There are no extraordinary circumstances in this case to support that Joseph alienated or attempted to alienate B.H. against Charlotte. Charlotte's true reason for denial of Joseph's visitation rights is "I raise her, I pay for everything." (B.O.E.73:6-13). "The rule is well established that right of access to one's children should not be denied unless the court is convinced such visitations are detrimental to the best interests of the minor child. In the absence of extraordinary circumstances, a parent should not be denied the rights of visitation." **Deacon v. Deacon**, 207 Neb. 193, 200 (1980), disapproved on other grounds; quoting **Syas v Syas**, 150 Neb. 533 (1948).

This Court has held that the Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government

interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), including parents' fundamental right to make decisions concerning the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "It is cardinal with us 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." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). This Court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected. *Quillion v. Walcott*, 434 U.S. 246, 255 (1978). "[I]t 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." *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

In this case, Joseph's parental rights have not been terminated, however, Charlotte enjoys constant custody and visitation with B.H. while Joseph has no visitation with B.H. at the correctional facility at all (T44, ¶2; T107, ¶3). Charlotte is abusing her custodial rights by forbidding Joseph visitation with B.H. and, the State is hindering his constitutional rights to make decisions as a parent concerning the care, custody and control of his daughter. "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

In this case, the Nebraska Court of Appeals concluded that the district

court set forth reasonable concerns for not ordering penitentiary visits for this young child, but did not preclude such visits in the future when the evidence establishes B.H. would not be adversely impacted by the visitation and circumstance of her father's incarceration (*State obo B.H. v. Joseph B.*, Nos. A-17-920, A-17-944; Appendix A, p.11, ¶2). And with virtually little legal analysis whatsoever, the Appellate Court stated:

Considering the best interests factors and relevant case law cited above, we cannot say that the district court abused its discretion by denying Joseph visitation at the correctional facility at this time.

State obo B.H. v. Joseph B., Nos. A-17-920, A-17-944; Appendix A, p.11.

In its August 2, 2017 entered Order and Parenting Plan, the district court effectively delegated its visitation authority to Charlotte. "Specifically, the child shall not visit the father at the correctional facility unless specifically agreed by the mother or allowed by an order of the court." (T224, ¶3). "Unless specifically agreed by the mother, the minor child shall not be allowed to visit the father at the correctional facility." (T226, ¶10). The district court unlawfully abdicated its duty by giving Charlotte the authority to deny Joseph visitation with B.H. at the correctional facility and, thereby, committed plain error.

In *Deacon v. Deacon*, 207 Neb. 193 (1980), disapproved on other grounds, the Nebraska Supreme Court reversed an order which granted a psychologist the authority to effectively determine visitation, concluding that such an order was an unlawful delegation of the trial courts duty that could result in the denial of proper visitation rights of the noncustodial parent. As authority for its conclusion, the Deacon court cited *Lautenschlager v. Lautenschlager*, 201 Neb. 741 (1978). In *Lautenschlager*, the Nebraska Supreme Court held:

The rule that custody and visitation of minor children shall be

determined on the basis of their best interests, long established in case law and now specified by statute, clearly envisions an independent inquiry by the court. The duty to exercise this responsibility cannot be superseded or forstalled by any agreements or stipulations by the parties.

201 Neb. at 743-44.

"[The custodial parent's] position that visitation rights should be at [her] discretion, as in [her] judgment shall be reasonable and proper for the best interests of the children, is erroneous and cannot be sustained." **Deacon**, 207 Neb. at 200. See also, **Ensrud v. Ensrud**, 230 Neb. 720 (1988)(disapproving district court order authorizing child custody officer to control custody and visitation rights of minor child); **In re Interest of Teela H.**, 3 Neb.App. 604 (1995)(order granting psychologist authority to determine time, manner, and extent of parental visitation was improper delegation of judicial authority).

The Nebraska Court of Appeals held in **Barth v. Barth**, 22 Neb.App. 241 (2014) that "the rational of the aforementioned cases applies with equal force when it is the custodial parent who is granted the authority to determine the visitation privileges of the noncustodial parent, because setting the time, manner, and extent of visitation is solely the duty of the court." **Id.**, 22 Neb. App. at 255. The **Barth** court found an abuse of discretion by the district court in allowing the father to determine whether the mother is entitled to overnight visits. This Court held that "[q]uestion of child's custody [or visitation determination] cannot be left to parent's discretion, especially where parents estrangement beclouds parental judgment with emotion and prejudice." **Ford v. Ford**, 371 U.S. 187, 193 n.6 (1962).

In this case, the district court gave Joseph no special weight whatsoever in the determination of B.H.'s best interests concerning grandparent visitation. More importantly, the district court applied the opposite presumption

by favoring only Charlotte's determinations (T304-05;T315¶4-T316,¶3). Philip and Maria were receiving grandparent visitation from Charlotte every other weekend from Friday afternoon until Sunday afternoon prior to Joseph filing his Complaint to establish visitation (T309-10)(B.O.E.143:18-23;145:2-146:5). Joseph was able to call his parents from the correctional facility on these three days to visit with B.H. (B.O.E. 44:21-45:8;52:20-53:3;66:13-22;84:6-85:5). After Joseph filed his Complaint, Charlotte vindictively reduced Joseph's visitation by reducing grandparent visitation until she just completely stopped all visitation (B.O.E.69:6-70:1).

This Court held that "[f]undamental liberty interest of natural parents in care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 n.1 (1982). The Nebraska Supreme Court concluded that when comparing Nebraska's statutes to the Washington statute in this Court's *Troxel v. Granville*, 530 U.S. 57 (2000), Nebraska's statutes are more narrowly drawn than the Washington statute and explicitly protect parental rights while taking the child's best interests into consideration." (emphasis added). *Hamit v. Hamit*, 271 Neb. 659, 677 (2006). In this case, the district court's amended August 24, 2017 entered Order does **not** protect Joseph's parental rights. The State, thereby, deprived Joseph of his substantial rights to make decisions concerning the rearing of B.H. and, further restricts his only means of telephone visitation.

In the aforementioned circumstances, the application of Neb.Rev.Stat. §§ 42-364 and 43-1802 are unconstitutional as applied to Joseph and any other similarly situated persons, because, given his parental rights, it violates his substantive due process and equal protection rights under the Fourteenth

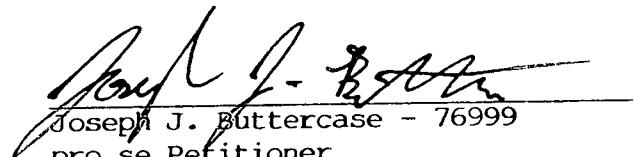
Amendment. The equal protection clause of the Fourteenth Amendment imposes upon a state the requirement that all similarly situated persons should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Generally, legislation or a court decision will be presumed to be valid if the disparate treatment of a class of citizens is rationally related to a legitimate state interest. See, *Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, strict scrutiny of State laws is required if a suspect class is involved or "When state laws impinge on personal rights protected by the Constitution." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

In this case, the district court's and the Nebraska Court of Appeals' decisions, regarding the denial of Joseph's visitation rights due to his incarceration and, total disregard to his determination concerning grandparent visitation, are inescapably contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The State courts have sanctioned such a high degree of departure from this Court's and Nebraska clearly established laws as to call for an exercise of this Court's discretionary and supervisory intervention powers. A writ of certiorari should issue in this case to protect the fairness and integrity of our judicial system for the United States of America.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: March 14, 2019