No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LUIS FRANCISCO

ELSA FRANCISCO-SOTO
Petitioners

v.

THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS, CAUSE NO. 18-0733

PARCHMAN LAW GROUP PLLC

Jon Parchman,
21 Waterway Ave., Suite 300
The Woodlands, Texas 77380
Telephone: (713) 518-1902
Facsimile: 1-(832) 442-5665
Counsel for Petitioners

QUESTION PRESENTED

In a State that provides appeals as a matter of right from adverse lower court decisions terminating parental rights, may the States, consistent with the due process and equal protection clauses of the Fourteenth Amendment, condition those appeals upon a parent's ability to pay appeal fees when the parents' income is half of the federal poverty level and may the State dismiss the appeal without proper notice?

Table of Contents

Index of Appendices

TABLE OF AUTHORITIES

Cases

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LUIS FRANCISCO

ELSA FRANCISCO-SOTO
Petitioner

v.

THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS, CAUSE NO. 18-0733

Petitioners Luis Francisco and Elsa Francisco-Soto, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Texas and the 9th Court of Appeals of State of Texas, **Case No. 18-0733** and **Case No. 09-18-00156-CV** respectively.

OPINION BELOW

The opinions of the 9th Court of Appeals, which was unpublished**,** was issued on July 25th, 2018, and August 30th, 2018 are attached as Appendix A and Appendix B. The Court of Appeals letter denying the Motion for Rehearing and En Banc Reconsideration is attached as Appendix C. The Texas Supreme Court's one-page order denying review is attached as Appendix D. The denial of the motion for rehearing in the Supreme Court of Texas is attached as Appendix E.

JURISDICTION

The Court of Appeals for the Ninth District of Texas - Beaumont filed its opinion on July 25th, 2018. The Texas Supreme Court denied a timely petition for discretionary review on December 12th, 2018 and denied a timely petition for rehearing on February 1, 2019. Appendix B . This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. Because this petition involves a challenge to the

uniform practice of the Supreme Court of Texas that do not take into consideration the federal poverty level into its consideration of indigency, this petition is being served on the Attorney General of Texas. See Rule 29.4(c) of the Rules of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which reads in relevant part as follows:

‘

Amendment XIV:

.... No state shall ... 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.

STATEMENT OF CASE

On March 28th, 2017, an Original Petition for Termination of the Parent Child Relationship was filed by the Department of Family and Protective Services. The case was placed in the East Texas Cluster Court. On March 12th. 2018 a jury trial began on the Department's Termination Petition with a judgment terminating the parental rights of the Petitioners Luis Francisco and Elsa Francisco- Soto signed on March 29th, 2018. On April 18th, 2018 the Petitioners timely filed a notice of appeal with the Court of Appeals – Ninth District at Beaumont.

The Petitioners filed their Statement of Inability to Afford Cost on Appeal on May 15th, 2018. Soon after on May 18th, 2018 Kathryn Davis, Associate Court Reporter, filed a Contest of Affidavit of Inability to Pay Costs under Rule 20.1 of the Texas Rules of Appellate Procedure. A hearing was held in front of Honorable Judge Jerry Winfree of the East Texas Cluster on June 5th, 2018. On June 13th, 2018 the order was signed ruling that that the Appellant's had an ability to pay costs.

On June 22nd, 2018 the Petitioners filed a Motion to Challenge the Trial Court's Order on Inability to Pay Costs. On July 16th, 2018, while the challenge

was pending with them, the Beaumont Court of Appeals sent a notice to the Petitioners that the appeal would be dismissed for want of prosecution if satisfactory proof of payment arrangements hasn't been made. The Petitioner's contacted the Beaumont Court of Appeals and explained that a challenge to the trial court's finding on indigency was pending, and were told to disregard the notice.

Following a challenge to trial court's order on inability to pay costs, the Beaumont Court of Appeals remanded this case to the trial court for it to make detailed finding that explain why the Petitioners could afford to pay costs, with a record containing the trial courts finding due to be filed with the Beaumont Court of Appeals by July 5th, 2018. On July 25th, 2018, following a supplemented order, the Beaumont Court of Appeals affirmed Judge Winfree's ruling in a per curiam opinion before Chief Justice McKeithen, Justice Kreger and Justice Horton.

After the Court of Appeals denial of the Petitioner's motion for rehearing, the Petitioners filed a Petition for Review to the Supreme Court of Texas on August 9th, 2018. The Petitioners also provided a courtesy copy to the Beaumont Court of Appeals, making the Court of Appeals aware that a review of their decision on indigency was pending. On August 30th, 2018 the Beaumont Court of Appeals, without notice, issued an opinion dismissing the appeal for want of

prosecution on the basis that payment arrangements hadn't been made, despite the pending Petition for Review with the Supreme Court of Texas. The Supreme Court denied the petition for review on December 12th, 2018 and denied the motion for rehearing on February 1, 2019.

REASONS FOR GRANTING THE PETITION

This case presents important questions of Federal constitutional law concerning the State's handling of parental-rights termination cases. Almost a century ago, this Court held that the Due Process Clause protects the right of parents to "establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Since then, this Court consistently has recognized the fundamental importance of the parent-child relationship—and viewed governmental intervention warily. See, e.g., *Stanley v. Illinois*, 405 U.S. 45,651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)*; Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

Even in cases yielding split opinions, this Court's justices find common ground in their agreement that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting). And justices who do not view parental

rights as constitutionally protected nevertheless concede their place among the "unalienable Rights" the Declaration of Independence posits are bestowed on all Americans by "their Creator." See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

The Due Process Clause includes 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); see also *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). The liberty interest at issue—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." *Troxel*, 530 U.S. at 65.

Due process ensures the "essential fairness of state-ordered proceedings anterior to adverse state action." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996)(citing *Ross v. Moffitt*, 417 U.S. 600, 609 (1974)). Under *Lassiter*, examination of due process in the termination arena turns principally on analysis of the risk that the utilized procedures will result in erroneous decisions. *Lassiter*, 452 U.S. at 27.

I. Parental Rights Are Fundamental Even for the Indigent

The decisions by the Beaumont Court of Appeals and the Texas Supreme Court which is leading to the termination decree being upheld conflict with the rationales of *M.L.B.* and *Lassiter*. Texas denied the Petitioner's appellate review because they could not afford a transcript despite the fact that the evidence on the record shows that the Petitioners had a combined annual income of merely $16,800.00. This cannot be acceptable where State action may "permanently deprive [them] of [their] freedom to associate with [their] child ....". *Lassiter v. Dep't of Soc. Services of Durham County, N. C.*, 452 U.S. 18, 59 (1981)(Stevens, J., dissenting).

In *Boddie v. Connecticut,* 401 U.S. 371 (1971), this Court extended much of the rationale of due process and equal protection with regard to appeals to civil cases involving fundamental rights. *Boddie* held that the due process clause does not permit a sixty dollar court costs fee to be imposed, as a condition for filing a civil court divorce petition , upon those who cannot afford it. As Justice Harlan's opinion for the Court in Boddie explained: "In Griffin it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process." *Bodie* at 382. Connecticut's $60 divorce filing fee does the same thing,

said the Court in Boddie, adding that " the rationale of Griffin covers this case." .*Id* at 382.

While *Griffin* was predicated both upon the due process and equal protection clauses, *Boddie* relied specifically upon the due process clause, holding that it is violated by the application to indigents of a monetary fee that prevents them from access to the courts in a matter involving a fundamental interest such as marriage:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relatio nshi p, ' 12 due process does prohibit a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

Bodie at 374. The Court in *Boddie* also explained that its decision was premised on the fact that resort to the courts was the only means by which people could seek lawful dissolution of their marriages. *Id*. at 376-377. Just as the resort to court of appeal is the only method in which parental rights can be terminated.

Indigents clearly have a right to access to existing appellate avenues even in situations where they do not have a right to appointed counsel. Indeed, the right of access to appellate courts through provision of a transcript to those who otherwise cannot afford it is far broader than any right to counsel. Compare, *Mayer v.*

Chicago (transcript must be provided to indigent seeking to appeal a misdemeanor conviction with no sentence of imprisonment and only a $500 fine) with S*cott v. Illinois*, 440 U.S. 367 (1979) (no right to counsel for a misdemeanor offense that does not lead to imprisonment), and *Long v. District Court of Joiva*, 385 U.S . 192 (1966) (transcript of habeas corpus hearing must be provided to indigent seeking to appeal denial of habeas relief) with *Murray v. Giaratano*, 481 U.S. 551 (1987) (no right to counsel on state habeas corpus review, even in death penalty cases).

The Petitioners demonstrated their indigence by showing their combined annual income was $16,800.00 which is almost half of the federal poverty rate of $30,170.00. Yet despite this being uncontested, the Beaumont Court of Appeals found that the Petitioners had sufficient income to pay for the record on appeal because they had $150.00 to spare each month after expenses. This is not unique to Beaumont Court of Appeals and is entirely based upon the system to determine indigence devised by the Supreme Court of Texas.

The current methodology for determining indigency with regards to obtaining a record is simply as follows: "Does the record as a whole show by a preponderance of the evidence that the applicant would be unable to pay the costs, or a part thereof, or give security therefor, if he really wanted to and made a good-faith effort to do so?" *Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684,

686 (Tex. 2008) This test takes no consideration of the federal poverty level, no consideration of the actual income of the parties, and leads to the absurd result of a party whose annual income is half of the federal poverty rate is somehow not indigent because they have some small measure of money to spare..

This Court has found that "the 'specific dictates of due process' by examining the 'distinct factors' that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair." *Turner v. Rogers*, 564 U.S. 431, 444–45, (2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, (1976) (considering fairness of an administrative proceeding)). Those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement [s]." *Mathews* at 335. See also *Lassiter*, 452 U.S., at 27–31 (applying the Mathews framework).

Following the *Eldrige* factors, the risk of the erroneous deprivation of the Petitioners fundamental right to the care and custody of their children far outweighs any countervailing interest of the State in not providing better

safeguards in the determination of indigency with regards to the provision of a record on appeal.

II. Proper Notice is Necessary in Fundamental Liberty Interest Cases

The Beaumont Court of Appeals further compounded its error on the decision on indigency by dismissing the appeal without notice on August 30th, 2018. That holding is contrary to this Court's precedent requiring notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). As this Court explained, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id. at 315. No indication was made by the Court of Appeals that the case was facing dismissal, absent a notice from July 16, 2018 which the Petitioners were informed to disregard, and which was made while that very court was making a determination on affirming indigency.

The right to a hearing is meaningless without notice. In *Mullane* this Court gave thorough consideration to the problem of adequate notice under the Due

Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. This court has recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown. *Walker v. City of Hutchinson, Kan.*, 352 U.S. 112, 115–16, (1956)

As was emphasized in *Mullane*, the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard. *Schroeder v. City of New York*, 371 U.S. 208, 212(1962). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, (1914). And the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," *Mullane*, supra, at 314. *Greene v. Lindsey*, 456 U.S. 444, 449, (1982)

The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, this Court has looked to the realities of the cases before them: In determining the constitutionality of a procedure established by the

State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283 (1925).

In *Tulsa Professional Collection Services, Inc. v. Pope*, this Court found the Due Process Clause requires that "consideration should be given to the practicalities of the situation and the effect that requiring actual notice may have on important state interests. " *Tulsa Prof'l Collection Services, Inc. v. Pope*, 485 U.S. 478, 489 (1988). The *Tulsa* decision involved a nonclaim statute that required potential creditors to a probate proceeding to present to the executor within two months of the publication of the notice of the commencement proceedings. The Appellants in *Tulsa* were creditors who had a property interest protected by the Due Process Clause, and satisfying creditors' substantial, practical need for actual notice in the probate setting is not so cumbersome or impracticable as to unduly burden the State's undeniably legitimate interest in the expeditious resolution of the proceedings, since mail service is … inexpensive, efficient and reasonably calculated to provide actual notice." *Id at* 478–79.

Applying the logic of the *Tulsa* decision to this case, the Beaumont Court of Appeals should have attempted to give actual notice to the Petitioners about the potential dismissal for want of prosecution of the case. As this case was being

reviewed, remanded and sent up and down between the Beaumont Court of Appeals, the trial court and the Supreme Court of Texas, the July 16th, 2018 notice was insufficient to give the Petitioners notice of the potential dismissal. First, the notice of dismissal was sent during the pendency of the review of the Trial Court's decision of indigency by the Beaumont Court of Appeals. A notice of potential dismissal for lack of payment for record did not make sense since the Petitioners were awaiting a ruling on indigency on that very issue.

Additionally, the Beaumont Court of Appeals informed the Petitioners to disregard that very notice. With the confusion between the Court of Appeals and the Petitioners as regards to dismissal, it would not have been burdensome to the Court of Appeals to provide a new notice to the Petitioners indicating that the appeal was on the verge of getting dismissed. This would not have been burdensome to the Court and would have potentially protected the Petitioners relationship with their children, an "an interest far more precious than any property right." *Santosky* at 758–59.

CONCLUSION

The Texas intrusion on the Petitioner's fundamental rights cannot survive any heightened level of equal protection and due process scrutiny. The Petitioners' right to their children's care, custody, and companionship is a central right that "warrants deference and, absent a powerful countervailing interest, protection." *Stanley*, 405 U.S. at 651. This is especially true in the termination context, because termination "work[s] a unique kind of deprivation." *Lassiter*, 452 U.S. at 27. Texas would need a mighty justification for burdening such an immense individual right.

For the foregoing reasons, Petitioners request that this Court grant the petition for certiorari.

Dated: June 18, 2019

Respectfully submitted,

PARCHMAN LAW GROUP PLLC

Jon Parchman,
21 Waterway Ave., Suite 300
The Woodlands, Texas 77380
Telephone: (713) 518-1902
Facsimile: 1-(832) 442-5665
Counsel for Petitioners