

JAN 21 2020

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19-8774

No. _____

IN THE
Supreme Court of the United States

BENJAMIN JOSEPH GUTIÉRREZ,
Petitioner,

v.

TEXAS HEALTH AND HUMAN SERVICES
COMMISSION,
Respondent.

*On Petition for Writ of Certiorari to the
Supreme Court of the State of Texas*

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA). ACA was legislation that sought to significantly address matters concerning health care, including the expansion of Medicaid. Respective provisions of ACA were implemented in January 2014.

Federal Regulations were developed in the following years for assessing various criteria, including 42 C.F.R. §435.603 that applies to Children's Medicaid eligibility. Among the criteria of importance here are the two terms "household" and "non-custodial parent." In the absence of a Court order, the ACA's regulations largely rely upon the understanding of these terms that were developed by the Internal Revenue Service decades prior to joint custody becoming the default in many states.

Additionally, as this Court denotes in *Troxel v. Granville* contemporary demographics make the compositions of families vary greatly and a heightened protection exists against governmental interferences of parental liberty interests including care, custody, and control of children. Therein, this Court at length addresses 75 years of U.S. Supreme Court decisions replete with supporting parental rights. Additionally, in *U.S. v. Windsor*, this Court

makes it clear as it cites a litany of other cases that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”

Here, respondent was provided the governing final order holding joint custody of the child for which Children’s Medicaid was sought. In contravention to the controlling custody order, Texas Health and Human Services Commission has refused to recognize petitioner as a lawful custodial parent and cites ACA’s general regulations determine custody and not petitioner’s final custody order, and thereby consequently denies Children’s Medicaid Services.

Accordingly:

Is it reasonable for a government agency to utilize a joint conservator’s court ordered periods of possession of a child to determine that parent is not “custodial parent” thereby infringing and depriving the parent of Constitutionally protected fundamental rights already adjudicated?

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OPINIONS BELOW

This petition for a writ of certiorari to review the judgment of the Supreme Court of Texas where petition for review and related motion for rehearing were denied in case no. 18-1135. *See Appendix A.*

Texas' Third Court of Appeals in case no. 03-16-00748-CV issued an memorandum opinion on June 14, 2018 that reversed the trial court. *See Appendix B.*

The Honorable Judge Karen Crump presiding in the 353rd District Court of Texas in cause no. D-1-GN-14005445 reversed the Texas Health of Human Services Commission administrative decisions that denied petitioner Children's Medicaid services. *See Appendix C.*

JURISDICTION

The Supreme Court of Texas denied the petition for review on June 14, 2019 without opinion; and denied motion for rehearing on August 23, 2019. On November 26, 2019, Justice Alito extended the time to file a petition for certiorari until January 20, 2020; Office of the Clerk then twice directed corrections be made and documents resubmitted: currently providing sixty days from April 1, 2020. This Court has jurisdiction under 28 U.S.C. §1257.

STATUTES AND REGULATIONS INVOLVED

Title 42 of Code of Federal Regulations § 435.603, Application of modified adjusted gross income (MAGI), provides:

(f) Household—

(1) Basic rule for taxpayers not claimed as a tax dependent. In the case of an individual who expects to file a tax return for the taxable year in which an initial determination or renewal of eligibility is being made, and who does not expect to be claimed as a tax dependent by another taxpayer, the household consists of the taxpayer and, subject to paragraph (f)(5) of this section, all persons whom such individual expects to claim as a tax dependent.

(2) Basic rule for individuals claimed as a tax dependent. In the case of an individual who expects to be claimed as a tax dependent by another taxpayer for the taxable year in which an initial determination or renewal of eligibility is being made, the household is the household of the taxpayer claiming such individual as a tax dependent, except that the household must be determined in accordance with paragraph (f)(3) of this section in the case of—

- (i) Individuals other than a spouse or child who expect to be claimed as a tax dependent by another taxpayer; and
- (ii) Individuals under the age specified by the State under paragraph (f)(3)(iv) of this section who expect to be claimed by one parent as a tax dependent and are living with both parents but whose parents do not expect to file a joint tax return; and
- (iii) Individuals under the age specified by the State under paragraph (f)(3)(iv) of this section who expect to be claimed as a tax dependent by a non-custodial parent. For purposes of this section—
 - (A) A court order or binding separation, divorce, or custody agreement establishing physical custody controls;

or

- (B) If there is no such order or agreement or in the event of a shared custody agreement, the custodial parent is the parent with whom the child spends most nights.

Title 5 of Texas' Family Code enumerates various rights regarding parents and related conservatorships of children including:

§153.072 directs “The court may limit the rights and duties of a parent appointed a conservator if the court makes a written finding that the limitation is in the best interest of the child;”

§153.131(b) states “it is a rebuttable presumption that the appointment of the parents of a child as joint managing conservatorship is in the best interests of the child;”

§153.135 further states “Joint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint conservators;” and

§151.001(a) clarifies “a parent of a child has the following right[] and dut[y]... the right to... designate the residence of the child.

STATEMENT OF THE CASE

A final custody order entered on February 6, 2012 ordered that petitioner here, Benjamin Joseph Gutiérrez, was a joint managing conservator of A.N.G. and if eligible Gutiérrez was “to perform all acts necessary to the enrollment [and]... thereafter to continue Medicaid benefits for A.N.G.”

Gutiérrez following the directions of the final order applied for and received Children’s Medicaid

benefits for A.N.G. prior to 2014. Then in 2014 when Gutiérrez sought to renew services Texas Health and Human Services Commission (THHSC) demanded Gutiérrez provide information not previously requested. THHSC denied services asserting Gutiérrez was not a custodial parent of A.N.G. citing THHSC's a portion of their policy handbook derived from 42 C.F.R. § 435.603. *See* App. D. Gutiérrez denoted that THHSC's own policy is to refer to an custody order and provided THHSC a copy of the final order and relevant law from Texas' jurisprudence and this Court regarding parental rights and joint custody.

After exhausting administrative proceedings, Gutiérrez sought judicial review in the matter. In the briefing stage and at trial, Gutiérrez again brought to the attention of the Court the relevant existing final order, associated jurisprudence concerning parental rights, and legislative purpose of the ACA. The trial Court reversed the administrative findings and remanded THHSC to provided Children's Medicaid Services accordingly. *See* App. C.

Texas' Third Court of Appeals heard THHSC's appeal and in a memorandum opinion in case no. 03-16-00748-CV reversed the trial court's judgment. *See* App. B. Therein the Court stated "[i]n construing the exception to require some form of physical custody,

[T]HHSC relies on federal rule 435.603, which provides that 'for the purposes of this section... in the event of a shared custody agreement, the custodial parent is the parent with the child spends the most nights.' 42 C.F.R. §435.603(f)(2)(iii). *See* App. B at 8 (ellipses are from original text). The Court concluded by holding it was reasonable for THHSC to require a consideration of actual physical custody of the child. *Id.*, at 10. Gutiérrez ensured that his brief from the trial court was present for the Court of Appeal's consideration and in the motion for rehearing provided notice to the Court that their ellipses in the §435.603(f)(2)(iii) quote omitted the very portion that mandatorily directed that a custody order controls for determining a child's custody. Accordingly, the federal regulation itself did not seek to preempt state law in regards to domestic relations, instead it upheld the very jurisprudence expounded by this Court in *U.S. v. Windsor* that allocates the primary authority of domestic relations to the States. Therefore, it would be unreasonable for an agency to circumvent a Constitutionally protected and adjudicated custody order when the agency's own regulations allocate determination of custody to existing orders.

Texas Supreme Court denied Gutiérrez' petition for review and motion for rehearing, thereby providing the jurisdictional grounds for this Court to assist in clarifying the allocation of authority to

States in regards to parental rights, including misunderstood notions of custody that often conflate physical custody and legal custody.

REASONS FOR GRANTING THE WRIT

As this Court has indicated throughout its esteemed jurisprudence one of the most fundamental rights is parenting. Parenting has been included in the province of domestic relations that has been allocated to States.

Accordingly, most states' jurisprudence have evolved towards the presumption that joint custody is in the best interests of children. However, many federal and state agencies utilize antiquated understandings of custody that consider only one parent to be a "custodial parent" and the other simply have "visitation rights."

The matters herein provide this Court an opportunity to address the important issues concerning federal law in regard to its implications on parental rights that have been allocated to States. If codified regulations such as title 42 are permitted to determine custody of children even in matters where there is an adjudicated order, then the related agencies are circumventing Constitutionally protected due process of fundamental rights.

Moreover, if State legislatures have mandated that custody orders to be entered with Children's best interests in mind, then agency policies and regulations that are in contravention to a custody order are also in contravention to children's best interests.

The New Jersey Supreme Court eloquently explained the two types of custody in 1981, when they stated:

Properly analyzed, joint custody is comprised of two elements legal custody and physical custody. Under a joint custody arrangement legal custody the legal authority and responsibility for making "major" decisions regarding the child's welfare is shared at all times by both parents. Physical custody, the logistical arrangement whereby the parents share the companionship of the child and are responsible for "minor" day-to-day decisions, may be alternated in accordance with the needs of the parties and the children.

Beck v. Beck, 432 A.2d 63, 65-66 (NJ 1981). Herein, below THHSC utilizes Gutiérrez' court ordered periods of possession of his child to infringe and deprive Gutiérrez of his legal rights to that same child and determine Gutiérrez is not a "custodial parent"

when in the governing custody order clearly holds otherwise.

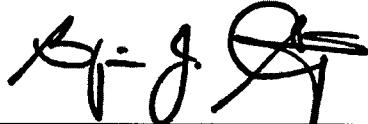
CONCLUSION

The facts in these matters are simple and widely applicable to other parents across the United States whose custody rights are being determined by federal and state agencies, in contravention to existing custody orders and contemporary jurisprudence.

Petitioner herein followed the directives an adjudicated custody order that found joint conservatorship of the A.N.G. and enrollment in Children's Medicaid if eligible to be in the child's best interests. Despite Texas' legislature denoting joint conservatorships do not require equal periods of possession, THHSC utilizes Gutiérrez' (and likely many other parents) court ordered periods of possession to determine Gutiérrez is not a "custodial parent" thereby infringing and depriving Gutiérrez of his Constitutionally protected fundamental parental rights.

Accordingly, this Court should grant certiorari.

Respectfully submitted,



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