

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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KATHRYN STRAYHORN,

*Petitioner,*

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

*Respondent.*

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**On Petition for Writ of Certiorari to the  
Supreme Court of Appeals**

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**PETITION FOR WRIT OF CERTIORARI**

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June 28, 2021

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## **QUESTIONS PRESENTED FOR REVIEW**

Q. Whether a due process violation under the 14<sup>th</sup> Amendment exists when a State Supreme Court refuses to permit the docketing of a late notice of appeal filed under relevant rules allowing for enlargement of any court timeframe for good cause (W.Va. Rule of Appellate Procedure 39) where the same is requested because Petitioner was never notified that the relevant pleadings had been adjudicated and where Petitioner was not provided adequate notice or an opportunity to be heard at said adjudication.



## **LIST OF PARTIES**

Appellant:

1. Kathryn Strayhorn

Appellee:

1. West Virginia Department of Health and Human Resources

## **CORPORATE DISCLOSURE STATEMENT**

There are no corporations which are parties to this matter.

## **STATEMENT OF RELATED PROCEEDINGS**

Circuit Court of Nicholas County, West Virginia

*In Re J.S.*, 17 J.A. 130 (July 22, 2020)

West Virginia Supreme Court of Appeals

*In Re J.S.*, No. 20-0914 (January 28, 2021)



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## **DECISIONS BELOW**

The matter was first heard in the Circuit Court of Nicholas County, West Virginia per a Petition filed on November 14, 2017 under case number CC-34-2017-JA-130 (App. 2). On April 11, 2018, the Respondent Mother's parental rights were terminated. On February 8, 2019, the Respondent Father's parental rights were terminated. On July 22, 2020, Petitioners Motion for Placement and Adoption was denied. (App. 6). On November 19, 2020 Petitioner filed a Notice of Appeal to the West Virginia Supreme Court of Appeals together with a Motion to File Out of Time. On January 28, 2021, the Court denied Petitioner's motion to file out of time, returned the \$200 docketing fee, and refused to docket the appeal. This Petition for Writ of Certiorari follows.

## **BASIS OF JURISDICTION**

- i. The date of the Judgment sought to be reviewed is January 28, 2020 (App. 1).
- ii. The judgment sought to be reviewed, handed down on January 28, 2020, is within 150 days of the date of filing the instant Petition for Certiorari, which therefore complies with the United State's Supreme Court's timeframe for filing pursuant to its March 19, 2020 Administrative Order extending the time to file petitions for certiorari from 90 to 150 days.
- iii. Jurisdiction is proper because Petitioner's right to due process under the U.S. Constitution has been violated by the state of West Virginia through West Virginia Courts' refusal to allow Petitioner her right of appeal.



## **STATUTORY AND CONSTITUTIONAL PROVISIONS AT ISSUE**

1. U.S. Constitution, 5<sup>th</sup> Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
2. U.S. Constitution, 14<sup>th</sup> Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
3. West Virginia Rule of Appellate Procedure 2. 'Suspension of Rules': In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these Rules in a



particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These Rules shall be construed to allow the Supreme Court to do substantial justice.

4. West Virginia Rule of Appellate Procedure 39(b). ‘Computation and extension of time’: The Court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time.

### **STATEMENT OF THE CASE**

Petitioner is the grandmother of the Infant, J.S., who attempted to obtain placement of said infant upon the termination of parental rights for the infant’s parents. On July 21, 2020, a final contested evidentiary placement hearing was held regarding the placement of Petitioner’s grandson, the infant J.S., pursuant to Petitioner’s motion for placement and adoption. Said Order was entered into the record on July 22, 2020. (App. 26)

The Court’s order overrode the established grandparent preference for placement on the basis that Petitioner’s ICPC request with New York was denied as a result of renovations that Petitioner was doing on her home and that “waiting for any renovations to be complete and then waiting for another home study to be completed through ICPC would unreasonably delay permanency in this case.” Final Order, ¶ 13. The Court also found that “even if the grandmother’s home study was approved, it would not be in the best interest of the child to be placed or adopted there.” *Id.* at ¶ 29.



At the time of said hearing, Petitioner was not present, but appeared through her counsel, Mr. J. Mingo Winters. Petitioner avers that Mr. Winters had informed her that there was a hearing on that day, but he did not specify that it was the final evidentiary hearing on her motion for placement. He told her that he would call her to conference her into the hearing at the appropriate time, but no such call ever came. Instead, Petitioner waited by her phone for over 3 hours, and never received a call from Mr. Winters. See Petitioner's Motion to Reincorporate (App. 20).

After said July 21<sup>st</sup> hearing, Petitioner Strayhorn attempted to contact Mr. Winter's office multiple times in an attempt to obtain information about the status of her case, to no avail. Petitioner never received a return call, text, or email of any kind from her counsel informing her that the Court had denied her motion for placement. In fact, Petitioner has never had any contact with Mr. Winters since the day of the July 21, 2020 hearing, despite her repeated calls to his office.

Because Petitioner was not made aware of the Court's ruling, she had no idea that her appeal time frame had begun to run. As such, the timeframe for appeal elapsed without Petitioner being made aware of her right to appeal nor being able to have her appeal timely docketed before the West Virginia Supreme Court of Appeals.

Petitioner, after not hearing from her attorney, hired undersigned counsel in October of 2020, who diligently set out to determine the status of the case. It was only through the course of undersigned's investigation that Petitioner was first made aware of the Court's July 21, 2020 Order denying her placement of J.S.



Petitioner first attempted to move the Circuit Court to reincorporate its July 2020 final order into a new Order to start Petitioner's timeframe anew, but the Circuit Court denied said motion, stating that "the Court does not find Grandmother's explanation on why she failed to appear at the hearing credible." See Petitioner's *Order Denying Motion to Reincorporate*, (App. 50) ¶ 26. The Court made this finding despite the fact that there was no dispute put forth as to the fact that Petitioner had not been contacted or informed by Mr. Winters of the Court's ruling.

Petitioner then filed a motion before the West Virginia Supreme Court of Appeals for leave to file its appeal out of time ("Motion for Leave") (App. 26) under Rules 2 and 39 of the West Virginia Rules of Appellate Procedure. Rule 2 provides that "in the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these Rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. These Rules shall be construed to allow the Supreme Court to do substantial justice." Rule 39(b) provides that "The Court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time."

In filing its Motion for Leave and Notice of Appeal, Petitioner requested a transcript of prior proceedings to present to the West Virginia Supreme Court, as is required for per W.Va. Supreme Court rules. In response, the Nicholas County



Circuit Court issued an Order on November 20, 2020 denying Petitioner’s request. Incredibly, the Order states that “The individual seeking the evidentiary hearing transcript was never a party to this matter and thus, is not entitled to a copy of the hearing transcript.” (App. 48). This was claimed despite the fact that the Court’s previously issued Order Denying Motion to Reincorporate and Motion for a Stay explicitly notes, at ¶ that Petitioner was the “paternal grandmother and Intervenor,” whose “motion for placement was filed June 3, 2019.” (App. 50).

## **ARGUMENT**

The 14<sup>th</sup> Amendment to the United States Constitution provides that “no State shall deprive any person of life, liberty, or property without due process of law.” The U.S. Constitution’s Fifth Amendment contains an identical clause as well.

The U.S. Supreme Court has held that a property right exists wherever a benefit or entitlement is conferred either by law, policy, or contractual agreement. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Supreme Court held that “property interests... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Supreme Court found that a professor maintained a property interest in his employment even without a contractual or statutory right because the “existing rules and understandings”. West Virginia courts have applied these principles to find property rights for numerous classes of individuals as to the circumstances of



their employment or their right to a license to engage in a given activity. *See Jordan v. Roberts*, 161 W.Va. 750, 246 S.E.2d 259 (1978) (holding that a drivers license confers a property right and requires due process before suspension); *See also State ex rel. Ellis v. Kelly*, 145 W.Va. 70, 112 S.E.2d 641 (1960) (holding that a licensed car dealer is entitled to due process before cancellation of said license; *Hubel v. W. Va. Racing Commission*, 376 F.Supp. 1 (S.D.W.Va.1974) (holding that a horse trainers license may not be suspended or revoked with due process); *State ex rel. Weaver v. Dostert*, 171 W.Va. 461, 300 S.E.2d 102 (W. Va. 1983) (holding that a bail bondsmen is entitled to due process as to his bail bonding privileges).

Similarly, the state of West Virginia has established, by statute, a legal preference for grandparents in the placement of children. W.Va. Code § 49-4-101 states as follows:

*For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it **shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.***

The West Virginia Supreme Court held that this statute “contemplates that placement with grandparents is presumptively in the best interests of the child and may be overcome only where the record is reviewed in its entirety establishes that



such placement is not in the best interests of the child.” *Napolean S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801, 808 (2005).

Additionally, the West Virginia Supreme Court has derived a state constitutional right to appeal from its state constitution's due process clause, W. VA. CONST. art. III, § 10, and from W. VA. CONST. art. III, § 17, which provides: "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay." See *Rhodes v. Leverette*, 239 S.E.2d 136, 139 (W. Va. 1977) (indigent criminal defendant has a right to appeal conviction); *State ex rel. Johnson v. McKenzie*, 226 S.E.2d 721, 724 (W. Va. 1976) (constitutional due process requires that a convicted defendant be furnished a transcript pursuant to the right of appeal); *State ex rel. Bratcher v. Cooke*, 188 S.E.2d 769, 770 (W. Va. 1972) (denial of an appeal by convicted defendant violates due process clauses of the state and federal constitutions, rendering the sentence void and unenforceable).

As such, West Virginia law both establishes grandparent preference as a property right and further provides a right of appeal as part of the due process associated with that right.

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power. *Marchant v. Pennsylvania R.R.*, 153 U.S. 380, 386 (1894). Exactly what procedures are needed to satisfy due process, however, will vary



depending on the circumstances and subject matter involved. The U.S. Supreme Court in *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884), described due process as follows:

*Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.*

(emphasis added) See also *Hurtado v. California*, 110 U.S. 516, 537 (1884).

More recently, the U.S. Supreme Court has stated that the required elements of due process are those that “minimize substantively unfair or mistaken deprivations” by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). At an absolute minimum, due process requires (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950). “The fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency and afford them an opportunity to



present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, Petitioner was deprived both of proper notice of her hearing and of the right to be heard at trial. She was provided with no formal notice of the when the placement hearing would be, and was deprived of any notice that her request for placement had been denied. As such, she was further deprived of her notice that her appeal timeframe had begun to run and, because the West Virginia Supreme Court refused to allow them to docket their appeal under rules designed to accommodate just such a good cause reason for late filing, they have further been deprived of her appellate rights *en toto*.

While, in fairness, it can be argued that it was her counsel, and not the State, who deprived her of said notice by failing to apprise her of the nature of the hearing and failing to contact her thereafter, Petitioner submitted pleadings before both the Nicholas County Circuit Court as well as the Supreme Court notifying them of the issue and imploring them to either re-incorporate and reissue its decision to preserve Petitioner’s timeframe for filing her notice of appeal (in the case of Nicholas County Circuit Court) or allow for the docketing of a late notice of appeal (in the case of the West Virginia Supreme Court) as permitted under the Rule of the West Virginia Supreme Court of Appeals. In all cases, Petitioner’s request was denied. One might naturally suggest that Petitioner’s remedy lies in a malpractice suit against her prior counsel – but such a suit has only the potential to return money damages, and has no ability to put this child back into placement with his



grandmother. As such, without access to the Court's for adjudication of her Appeal – Petitioner has no meaningful redress for what has happened to her. As such, Petitioner's predicament begs a fundamental question of justice: what is the purpose for exceptions such as W.Va. Rule of Appellate Procedure 2 (allowing for the suspension of any rule) and 39(b) (allowing extension of time), if not to provide redress to litigants who, through no fault of their own, have been deprived of their appellate rights in matter for which there is no other avenue for meaningful redress? Petitioner would respectfully submit that a situation such as this amounts to the essence of a “substantively unfair or mistaken deprivations,” per *Fuentes*, supra, and that a denial of a request to proceed under W.Va. Rule of Appellate Procedure 39 represents a denial of the “minimum” necessary to avoid such unfair or mistaken deprivations.

## CONCLUSION

Fundamentally, this case is about a grandmother who denied participation in the hearing adjudicating the permanent placement of her grandchild and was further denied any right to appeal the DHHR's decision to place her young grandchild in the care of a foster family instead of in the care of his own family. As such, the Court should understand such a determination as one of the utmost significance, both in a legal and a personal sense.

Additionally, the case offers this Court a tremendous opportunity to elucidate what must happen when a litigant demonstrates that they have been deprived of notice – and thereby also an opportunity to be heard – on an issue of Constitutional



significance. This case offers the Court an opportunity to send out a mandate to all states that, where good cause (such as here) exists to extend timeframes, and where doing so is the only means by which a litigant's due process rights can be saved, such action is mandatory. The interests of justice, quite simply, compel that it be so.

Respectfully Submitted,

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