21-1588

ORIGINAL

No. _____

In The

Supreme Court of the United States

SUSAN SPELL, M.D.,

Petitioner,

v.

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division 2

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does a trial court violate the requirements of the Equal Protection clause of the Fourteenth Amendment when it bases a permanent child custody order on a racially discriminatory theory, holding that treatment that would be abusive if perpetrated against white children is not abusive, and even beneficial, when applied to black children? (*See M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599 (1982); *Nordlinger v. Hahn*, 505 U.S. 1, 112, S. Ct. 2326, 120 L. Ed. 2d 1 (1992).)

2) Does a state appellate court violate the requirements of the Due Process clause of the Fourteenth Amendment by wrongly denying a petition for a writ of error *coram vobis*, where newly available evidence demonstrates that a custody ruling was based on a racially discriminatory theory and was, in addition, procured through fraud and/or mistake? (*See Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).)

PARTIES

Petitioner, SUSAN SPELL (hereafter "Petitioner" or "Mother"), was the defendant in child custody and child neglect proceedings commenced in the Superior Court for the State of California, County of Los Angeles, Juvenile Division, Case No: DK 02119, by Respondent, LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Child custody issues concerned the parties' minor children: N.E., L.E., S.E. and Z.E.

Respondent, LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES (hereafter "Respondent" or "DCFS"), was the plaintiff in the state court proceeding described above concerning the minor children.

LIST OF PROCEEDINGS

Child Dependency Proceeding: Superior Court of California, Los Angeles County (Juvenile Division), *Matter of N.E.*, Case No. DK02119. Judgment entered: May 11, 2016

Disposition Proceeding: Superior Court of California, Los Angeles County (Juvenile Division), *Matter of N.E.*, Case No. DK02119. Judgment entered: July 7, 2016

Appeal of the above: Court of Appeal of the State of California, Second Appellate District (Division 2), *In re N.E.*, Docket No. B267084. Judgment entered: September 5, 2017 (remittitur, November 15, 2017)

LIST OF PROCEEDINGS – Continued

Original Proceeding seeking a writ or error coram vobis: Court of Appeal of the State of California, Second Appellate District (Division 2), *In re N.E.*, Docket No. B315936. Judgment entered: November 5, 2021

Petition for Review (of above decision), Supreme Court of California, *In re N.E.*, Docket No. 5271813. Judgment entered: January 19, 2022

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner respectfully seeks a writ of certiorari to review the refusal of the state courts of California to rectify an award of child custody based on unconstitutional racial discrimination, and also based upon misrepresentations to the state courts that deprived Petitioner of due process of law.

Because the extent of the injustice involved was not evident from the trial record and was not, therefore, litigated on appeal, Petitioner raised these issues by way of a petition for a writ of error *coram vobis* before California's Court of Appeal. However, that court denied the writ – without so much as issuing an opinion – and California's Supreme Court refused to hear the case.

Now only this Court can vindicate Petitioner's right to a child custody ruling untainted by unconstitutional discrimination and a denial of procedural rights.

This Court's intervention is required for two reasons. First, the use of a racially discriminatory theory to award child custody violates basic principles of constitutional law.

Second, Petitioner's right to due process of law was also violated when a California appellate court, in an erroneous ruling upheld by California's Supreme Court, denied Petitioner relief from state court rulings

that were precipitated by important misrepresentations and/or mistakes during the trial of the matter.

These critically important issues of law require this Court's intervention. Few personal liberty interests are as basic as the right to the companionship of one's children, which Petitioner has been denied due to the constitutional errors set forth here; and few civil rights are as fundamental as the right to be free of racial discrimination. This case has urgent implications for both.

It should be stressed here that Petitioner does not seek a federal court order altering child custody. She seeks from this Court an order requiring the vacatur of orders that were based upon illegal discrimination and civil rights abuses. This is clearly within proper federal jurisdiction. *See Ankenbrandt v. Richards*, 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 458 (1992).

OPINIONS BELOW

The Supreme Court of California denied Petitioner's petition for review without issuing an opinion. (Pet. App. 1a.) The Court of Appeal, State of California, County of Los Angeles, Second Appellate District likewise denied Petitioner's petition for a writ of error *coram vobis* (or, in the alternative, relief from judgment) without opinion. (Pet. App. 2a.) Earlier, the same appellate court issued a Decision and Order affirming the trial court's rulings, including the award of child custody that is at the center of the instant petition.

(Pet. App. 3a-14a.) Those trial court rulings were issued by the Superior Court of California, Los Angeles County, Juvenile Division: the dispositional ruling (Pet. App. 15a-22a), which was preceded by the dependency ruling in the same court (Pet. App. 23a-40a.)

JURISDICTION

The Supreme Court of the State of California entered its order on January 19, 2022, denying Petitioner's timely petition for review in that court of the decision of the Court of Appeal, State of California, Second Appellate District, issued on November 5, 2021. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), which provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.

As shown below, in this case both the Equal Protection and the Due Process clauses of the Fourteenth Amendment to the U.S. Constitution, as well as 42 U.S.C. § 1983, were "specially set up or claimed" by Petitioner in the state courts, including the Supreme Court of California.

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth at Pet. App. 41a-44a. They consist of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. The Facts

1. The most thorough exposition of the facts contained in the underlying trial record – one that is, however, consistently slanted against Petitioner – is found in the Decision and Order of Superior Court, dated May 11, 2016. (Pet. App. 23a-40a.) However, the facts most critical to this petition were not set forth in the trial record. Those key facts are summarized below.

2. Petitioner is the mother of the parties' four minor children.[1] During divorce litigation, allegations of child abuse or neglect surfaced against both parents. Ultimately, however, the trial court, by order dated July 7, 2016, awarded legal custody of all the minor children – and physical custody of all but one of them – to their father (hereafter, "Brian") rather than to Petitioner. The stated reasons for the court's ruling turned, in significant part, on two assumptions: first, that Brian was the biological father of the children, and therefore that it was wrong for Petitioner to

[1] The eldest of the children has since reached the age of majority.

suggest otherwise to the children; and second, that there was no Domestic Violence Restraining Order ("DVRO") against Brian at the time of the custody ruling. However, as detailed below, Brian was not the biological father of the children, and there was a DVRO in place against him at the relevant time.

Use of a Racially Discriminatory Theory

3. During a hearing in June 2021 before Superior Court (sitting as Family Court in Petitioner's post-divorce litigation), Petitioner attempted to raise an issue that was not evident from the trial record: that the custody award to Brian – who had admittedly spanked the children – also turned on a racially discriminatory theory espoused by a forensic expert who had recommended that all of Petitioner's children be placed in Brian's sole custody – exactly as the court did in its orders of May 11 and July 7, 2016. (Pet. App. 71a-84a.)

4. At the above-named court hearing in June 2021, Petitioner pointed out – without contradiction on the record from any party – that the expert, Dr. Albert Gibbs, had distinguished between spanking white children and spanking African-American children, suggesting that spanking African-Americans was not abusive and that they (unlike other children) appeared to benefit from it. Petitioner's children are African-American. (Pet. App. 72a-84a.)

5. Since the trial court's May 11, 2016 ruling (hereafter, the "Dependency Ruling") and its July 7, 2016 custody disposition (hereafter, the "Custody Ruling")

had effectively adopted Dr. Gibbs' theory by disregarding Brian's physical treatment of the children and placing all but one of Mother's minor children in Brian's physical custody, Petitioner argued – and her witness's testimony confirmed – that the Dependency Ruling (and the Custody Ruling based on it) could not be relied upon as a matter of law. (*Id.*)

Restraining Orders

6. Central to the trial court's rulings and findings – later affirmed by the Court of Appeal – was the claim of the Los Angeles County Department of Children and Family Services (hereafter, "DCFS") that Petitioner had attempted to alienate the minor children involved in the action from Brian. DCFS attempted to prove this, in significant part, from Petitioner's alleged hesitation to allow the children to be alone with Brian during visits. (Pet. App. 27a.) Superior Court upheld this allegation. (Pet. App. 31a, 34a.)

7. Petitioner's reason for this was the existence of restraining orders protecting her – and the children, as well as Christopher VonSchlobohm (hereafter, "Chris"), Petitioner's husband – from Brian's domestic violence. However, this defense was rejected out of hand by Superior Court based on false representations by Brian's attorney that any such restraining order either did not exist or had been vacated. (Pet. App. 45a-46a.) Thus, Petitioner was not able to defend herself with critical information as to this allegation.

8. In later Family Court litigation, however, the presiding judge affirmed on the record that such restraining orders did in fact exist between October 2013 and November 2016. (Pet. App. 47a-55a.)

Wrongful Assumption of Brian's Paternity

9. When the underlying matter was being tried, Brian wrongly claimed to be the natural father of all four children. (Pet. App. 60a, line 3.) This false claim was accepted without question by the trial court; the Custody Ruling contains an explicit finding that Brian is "the legal parent" of all the children. (Pet. App. 22a.)

10. Throughout the litigation, Petitioner maintained that all four children resulted from her in-vitro fertilization (NF) from a sperm donor of a man other than Brian before marriage. The trial court, however, ignored this.

11. Furthermore, DCFS insisted to the trial court that when Petitioner told the children the truth – namely, that their biological father was a donor, not Brian – she was lying to them and encouraging them to lie. (Pet. App. 61a-64a.) This claim was used, in turn, to support Superior Court's finding that Petitioner had emotionally abused the children.

12. Yet Petitioner was correct. Brian was, not in fact, the natural father of the children. All four of Mother's children were conceived as a result of NF with a different man; indeed, a paternity action was

filed in early 2020 in order to prove this. (Pet. App. 51a-55a.) And these facts, like the judge's statement affirming the existence of a DVRO against Brian, were not available to Petitioner when the matter was before Superior Court or during the appeal of the matter to the Court of Appeal. Hence Petitioner's filing of a petition for a writ of error *coram vobis* (or, in the alternative, for relief from judgment), the denial of which is challenged in the instant Petition.

B. Proceedings Below

1. After the trial court proceedings described above, Petitioner appealed the trial court's orders to California's Court of Appeal, Second Appellate District (Division 2), which affirmed the Dependency Ruling and the Custody Ruling by Decision and Order dated September 5, 2017 (with remittitur issued on November 15, 2017). (Pet. App. 3a-14a.) As noted above, issues Petitioner would later raise by way of a petition for a writ of error coram vobis were not evident from the trial record.

2. Petitioner later filed a petition for a writ of error *coram vobis* – or, in the alternative, a motion for relief from judgment – with California's Court of Appeal, Second Appellate District (Division 2), the same court that had affirmed the trial court's rulings. In her motion papers, Petitioner specifically asserted that her rights to due process of law and to equal protection under the Fourteenth Amendment to the U.S. Constitution had been violated. Petitioner explicitly raised the

issues raised herein: that the trial court had rested its rulings, in significant part, on a racially discriminatory theory; and that the rulings had been issued as the result of fraud and/or mistake, thus denying Petitioner's right to due process of law. Petitioner also argued that the violations of her rights were not evident from the original trial record and that, therefore, they were properly raised in a petition for a writ of error.

3. In her petition, Petitioner also pointed out that the trial court had specifically refused to review the Custody Ruling and Dependency Ruling, even when presented with evidence that they were based on racial discrimination. (*See* Pet. App. 72a-84a.)

4. The Court of Appeal, Second Appellate District (Division 2) denied Petitioner's application, without opinion, by order dated November 5, 2021. (Pet. App. 2a.)

5. Petitioner then timely petitioned California's Supreme Court for review of the Court of Appeal's decision denying her petition for a writ of error *coram vobis.* The California Supreme Court denied the petition for review, without opinion, by order dated January 19, 2022. (Pet. App. 1a.)

REASONS FOR GRANTING THE WRIT

I. THE CUSTODY RULINGS UPHELD BY THE STATE COURTS WERE BASED ON RACIAL DISCRIMINATION, THUS VIOLATING PETITIONER'S RIGHT TO EQUAL PROTECTION

This Court's intervention is essential to vindicate a fundamental principle: that a parent's interest in the custody of her minor children is constitutionally protected; and that, in consequence, a parent may not be deprived of such in a matter than violates the provisions of the Fourteenth Amendment.

That principle is as old as *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). Nine years later, this Court could state unequivocally that its

> decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one.

Lassiter v. Dept. of Social Services, 452 U.S. 18, 27, 101 S. Ct. 2153, 2159-60, 68 L. Ed. 2d 640 (1981), *rehearing denied, quoting Stanley v. Illinois, supra*, 405 U.S. at 651, 92 S. Ct. at 1212. *See also Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 139495, 71 L. Ed. 2d 599

(1982) (a parent has a "fundamental" liberty interest in the care, custody and management of his or her child.)

Because of each parent's "commanding" and "fundamental" interest in maintaining the "care, custody and management of his or her children," this Court has stressed that the state may never deprive a parent of child custody without an appropriate court hearing at which the requirements of the Fourteenth Amendment are met. *Stanley v. Illinois, supra.* This principle has been scrupulously applied by federal courts around the country. *See, e.g., Mabe v. San Bernardino County Dept. of Public Social Services*, 237 F.3d 1101, 1107 (9th Cir. 2001) ("The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies"); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 200-01 (6th Cir. 1987) (a mother's "interest in the physical custody of her children [cannot] be terminated without compliance with the requirements of due process"); *Young v. County of Fulton*, 999 F. Supp. 282, 286 (N.D.N.Y. 1998), *aff'd*, 160 F.3d 899 (2d Cir. 1998) ("a mother enjoys a constitutionally protected liberty interest in the custody of her children, affording a pre-deprivation hearing pursuant to due process of law"); *accord, Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987).

Among the requirements of the Fourteenth Amendment relevant to child custody, is the absolute rule that racial discrimination, just as the Court has stressed that parents may not be deprived of child custody without a properly conducted court hearing, it has

emphasized that racial discrimination has no place in matters involving "marriage, family life, and the upbringing of children." *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). This case represents the violation of that principle, and therefore requires action by this Court.

A. Racial Discrimination in Child Custody Matters Violates the Fourteenth Amendment

Racial discrimination cannot be tolerated in any matters involving the courts. Indeed, the courts "apply a strict scrutiny standard" to disparate treatment in legal matters that "discriminates against a suspect class or infringes upon a fundamental right." *See Rodriguez v. Cook*, 169 F.3d 1176, 1179 (9th Cir. 1998), *citing Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992) and *Madrid v. Gomez*, 150 F.3d 1030, 1040 (9th Cir. 1998).

The discrimination in this case did both, clearly violating Fourteenth Amendment standards. Race is clearly one of the suspect classes in which discrimination must pass constitutional muster under strict scrutiny. *U.S. v. Dumas*, 64 F.3d 1427, 1431 (9th Cir. 1995), *citing Wayte v. U.S.*, 470 U.S. 598, 609, 105 S. Ct. 1524, 1532, 84 L. Ed. 2d 547 (1985). Further, such discrimination that interferes with the parent-child relationship violates a fundamental right. "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked

as 'of basic importance in our society'"; accordingly, discrimination in respect of these matters "demands the close consideration the Court has long required when a family association so undeniably important is at stake." *M.L.B. v. S.L.J., supra*, 519 U.S. at 117, *citing Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) *and Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (raising children).

The reliance of the trial court on a racially discriminatory theory – and the refusal of the state appellate courts to correct the error – thus support this Court's intervention.

B. The State Courts Have Refused to Correct the Racial Discrimination Involved in this Case

As shown above, the trial court was presented with the unopposed "expert" testimony of Dr. Albert Gibbs, who opined that Brian's spanking of Petitioner's children – although it would be considered abusive conduct if carried out against white children – was not abusive, because the children were African-American. (Pet. App. 72a-84a.) Dr. Gibbs' recommendation that Brian receive full custody of the children was duly followed by the trial court. (Pet. App. 23a-40a; 15a-23a.) The Court of Appeal affirmed the rulings below without addressing the issue of racial discrimination, since the rulings contained in the trial record did not reflect

the extent to which they relied on Dr. Gibbs' discriminatory theory. (*See* Pet. App. 3a-14a.)

Although Petitioner offered evidence of the discriminatory basis of those rulings in a subsequent trial hearing, the trial judge refused to consider the matter, arguing that he was "bound by those orders" and that Superior Court was "not able, under the law, to change the Dependency Court orders" even if they were "based on racial discrimination." In other words, in the absence of this Court's intervention, the trial court's racially discriminatory rulings are effectively non-reviewable.

Yet those rulings plainly violated the terms of the Fourteenth Amendment and thus require reversal on constitutional grounds.

Even if Dr. Gibbs had not explicitly discriminated against African-Americans in claiming that spanking is abusive only to white children (and he did), the principle on which he based his report would violate the Equal Protection clause because the "justification" he offered for it – statistical evidence that African-American children benefit from spanking – only underscored the racially discriminatory nature of the distinction he drew. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." *Hernandez v. New York*, 500 U.S. 352, 363, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), *quoting Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 2048-49, 48 L. Ed. 2d 597

(1976). Dr. Gibbs' reliance on data that purportedly make spanking less abusive to children of African-American descent obviously bears more heavily on black children than others, thus implicating a discriminatory principle even in the methods used by the expert on whom the trial court evidently relied.

It follows that the custody rulings upheld in the state courts of California in this matter – rulings which are now closed to state court review – are unconstitutional and should be overturned by this Court.

II. THE STATE COURTS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY WRONGLY DENYING A WRIT OF ERROR *CORAM VOBIS*

As shown above, Petitioner attempted to rectify the legal errors contained in the state court rulings by way of a petition for a writ of error *coram vobis.* The wrongful denial of that petition has due process implications for this Court as well.

Federal courts have emphasized that "due process" cannot be reconciled with procedures that invite erroneous custody rulings – as in this statement of the Sixth Circuit Court of Appeals, relying on a holding of this Court:

> [S]tate termination or alteration of parental rights requires procedural safeguards under the Due Process Clause in order to insure "the accuracy and [justice] of the decision" . . . and *in order to avoid "the risk that a parent will be*

> *erroneously deprived of his or her child.*" . . . [I]n child custody proceedings, the Due Process Clause requires a balancing of "the private interests at stake, the government's interest, *and the risk that the procedures used will lead to erroneous decisions.*"

U.S. v. Popovich, 276 F.3d 808, 814 (6th Cir. 2002), *quoting Lassiter v. Dept. of Social Services, supra*, 452 U.S. at 27, 28 [emphasis added]. *See also City of Los Angeles v. David*, 538 U.S. 715, 716-17, 123 S. Ct. 1895, 1896, 155 L. Ed. 2d 946 (2003), *citing Mathews v. Eldridge*, 424 U.S. 319, 333, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (reversal for a due process violation involves consideration of "the private interest that will be affected by the official action" and "the risk of an erroneous deprivation of such interest through the procedures used").

Petitioner in this matter was deprived of a fundamental interest – her interest in the care and custody of her children – by procedures that were flawed in ways that were certain to result in injustice, and did so result. The state courts' refusal to review the trial court's rulings guaranteed injustice on two separate fronts. First (as demonstrated above) it left in place child custody rulings based on racial discrimination. Second, it allowed rulings to stand that were fundamentally flawed by fraud and/or mistake. This Court's intervention is required to address the violations of Petitioner's right to due process of law under the Fourteenth Amendment.

A. A Writ of Error *Coram Vobis* Was the Proper Procedural Vehicle to Correct the Relevant Errors

First, it should be noted that since the Court of Appeal gave no reasons for denying Petitioner's application for a writ of error *coram vobis*, this Court need not respect its use of discretion. *See In re Pipinos*, 33 Cal. 3d 189, 201, 187 Cal. Rptr. 730 (1982).

Second, as shown herein, Petitioner was amply entitled to the writ.

The writ of error *coram nobis* is well recognized in California law as a vehicle for correcting errors that are not evident from the record of the case. *See, e.g., In re Azurin*, 87 Cal. App. 4th 20, 104 Cal. Rptr. 2d 284 (2001). Its twin doctrine, that of error *coram vobis*, is identical except that it applies – as here – when an application is submitted to a higher court to correct errors committed in the lower court whose rulings were affirmed by the higher court on appeal.

The writ of error *coram nobis* is intended to achieve justice when "errors of the most fundamental character" have occurred. *U.S. v. Morgan*, 346 U.S. 502, 511-12, 74 S. Ct. 247, 252-43, 98 L. Ed. 248 (1954); *U.S. v. Mayer*, 235 U.S. 55, 69, 35 S. Ct. 16, 19, 59 L. Ed. 129 (1914). It is a remedy intend to correct "errors which result in a complete miscarriage of justice." *U.S. v. Marcello*, 876 F.2d 1147, 1154 (5th Cir. 1989). Though the Court of Appeal failed to acknowledge it, that is precisely the posture of the instant matter.

The general requirements for the writ are set out in *People v. Castaneda*, 37 Cal. App. 4th 1612, 1618-19, 44 Cal. Rptr. 2d 666 (1995): "(1) [T]he petitioner has shown that some fact existed which, without fault of his own, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment; (2) the petitioner has shown that the newly discovered evidence does not go to the merits of the issues tried; and (3) the petitioner has shown that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ."

As shown in detail below, Petitioner met all the legal requirements for the granting of a writ of error *coram vobis*. Thus, the state courts' failure to grant the writ violated her right to due process of law.

This requires the intervention of this Court. As the Court has affirmed, a "structural error" in the handling of litigation – one that deprives a litigant of a basic procedural right – may never be deemed a "harmless error" and requires reversal under any circumstances. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). The error in this case was undoubtedly "structural" – since it involved the wrongful denial of a writ of error – and it touched one of the most fundamental of liberty interests, that of child custody.

B. Racial Discrimination Caused the Challenged Rulings But Was Not Evident from the Record

The wrong to Petitioner caused by the trial court's reliance on a racially discriminatory theory has been discussed above. This issue was explicitly raised in Petitioner's petition for a writ of error *coram vobis* from California's Court of Appeal, Second Appellate District. However, that court summarily denied the petition. (Pet. App. 2a.) Thereafter, California's Supreme Court just as brusquely denied Petitioner's application for a review of that ruling. (Pet. App. 1a.)

The state courts' refusal to acknowledge the legal error, in the form of a racially discriminatory child custody ruling, involved a wrongful denial of the writ of error Petitioner had requested, because – as shown above – the writ of error *coram vobis* was the correct procedural vehicle to correct an error that, as in this case, was not evident from the record on appeal. This denial thus denied Petitioner due process of law and requires review by this Court to implement the requirements of the Fourteenth Amendment.

C. Fraud and/or Mistake Played a Key Role in the Challenged Rulings, But Was Not Evident from the Record

Just as the evidence of the effect of racial discrimination on the underlying custody orders could not be seen in the original record on appeal, evidence of key factual errors committed by the trial court – abetted

by misrepresentations by Brian and his counsel – was also not to be seen in that record, further supporting Petitioner's application for a writ of error.

This included evidence that, throughout the relevant period, Petitioner had referred accurately and honestly to an existing restraining order that was issued because of Brian's domestic violence. (*See* Pet. App. 65a-70a.) This supported Petitioner's application for two reasons.

First, the Dependency Ruling consistently assumed that Petitioner was in the wrong to fear contact between Brian and the children at a time when (as later evidence, presented with Petitioner's application, proved) her conduct was supported by valid orders. Knowledge of the newly available evidence would necessarily have changed the court's negative assessment of her conduct; consequently, Petitioner's application for review by way of a writ of error *coram vobis* was wrongly denied. *See S.Y. v. Superior Court*, 29 Cal. App. 5th 324, 337, 240 Cal. Rptr. 3d 137, 148 (App. 4 Dist., Div. 1, 2018) (the issue of a mother having withheld a child from her husband "was relevant to determining if awarding custody to [the husband] would be detrimental to [the child's] best interest").

Second, the Dependency Ruling specifically mentioned – and rejected – Petitioner's contention that DCFS's social workers were biased against her. (Pet. App. 27a.) However, new evidence supported Petitioner's argument. Thus, the state courts should have

granted Petitioner's application in order to review the new evidence.

Under California law, a court order involving custody or visitation of minor children must take into account the existence of a restraining order involving domestic or family violence by one of the parties. *See Rybolt v. Riley*, 20 Cal. App. 5th 864, 878, 229 Cal. Rptr. 3d 576, 587 (App. 3 Dist., 2018). Indeed, a court in one relevant case found that "Protective Orders that are in conflict with a Juvenile Court order take precedence over the Juvenile Court order." *In re B.S.*, 172 Cal. App. 4th 183, 191, 90 Cal. Rptr. 3d 810 (App. 4 Dist., Div. 2, 2009). In any event, the paramount factors for custody of the child are the child's health, safety, and welfare. *Keith R. v. Superior Court*, 174 Cal. App. 4th 1047, 1055, 96 Cal. Rptr. 3d 298 (App. 4 Dist., Div. 3, 2009). Petitioner would have been grievously neglectful of her children's safety and welfare if she had ignored the terms of a valid restraining order. Thus, under all applicable state case law, the rulings divesting Petitioner of the custody of her children should have been reviewed when she presented new evidence with her application for a writ of error.

Indeed, pursuant to California's Domestic Violence Prevention Act ("DVPA") and Family Code § 6323(b)(1), the state courts were not permitted to make a finding of paternity by a party against whom there was a domestic restraining order. Here, Petitioner's new evidence showed that on July 7, 2016 (the date of the Custody Ruling) there was at least one restraining order against Brian based on his domestic

violence. If the new evidence had been available and before Dependency Court, the outcome would have been different.

As shown above, a writ of error is appropriate where: "(1) the petitioner has shown that some fact existed which, without fault of his own, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment; (2) the petitioner has shown that the newly discovered evidence does not go to the merits of the issues tried; and (3) the petitioner has shown that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ." *People v. Castaneda, supra*, 37 Cal. App. 4th at 1618-1619. All elements were met in this case.

The issue of the existence of a restraining order against Brian was not tried previously; the court simply assumed there was no such order, based on the representations of Brian's counsel on May 14, 2014. Family Court's later finding that such an order did exist was only issued in March 2021, so Petitioner could not have presented it earlier.

As for the remaining element – that the presentation of this evidence at trial "would have prevented the rendition of the judgment" below – this is also clear from applicable state case law. The relevant standard for determining the "substantial evidence" needed to support the Dependency Ruling "means such relevant

evidence as a reasonable mind would accept as adequate to support a conclusion; ***it is evidence which is reasonable in nature, credible, and of solid value***." *In re J.K.*, 174 Cal. App. 4th 1426, 1433, 95 Cal. Rptr. 3d 235, 240 (App. 2 Dist., Div. 7, 2009), *citing In re Jerry M.*, 59 Cal. App. 4th 289, 298, 69 Cal. Rptr. 2d 148 (App. 4 Dist., Div. 1, 1997) [emphasis added]. What is more, that standard cannot be met unless the court can confirm a finding of high probability on all relevant issues. *See In re Angelia P.*, 28 Cal. 3d 908, 919, 171 Cal. Rptr. 637, 643, 623 P.2d 198, 204 (1981). Clearly, in light of the newly available evidence of the restraining order, the finding that Petitioner was improperly reluctant for Brian to be alone with the children – while a valid restraining order existed that had been triggered by Brian's domestic violence – was not grounded in "reasonable," "credible" and "solid" evidence; nor did it reach "a finding of high probability." Accordingly, California's courts erred in denying Petitioner's application for review.

The same is true of another key finding contained in the trial court's Dependency Ruling and Custody Ruling: namely, the claim that Brian was the natural father of Petitioner's children. That claim was the basis of the trial court's condemnation of Petitioner for telling her children that they had a different biological father.

Thus, new evidence demonstrating the contrary – which Petitioner presented with her petition to California's Court of Appeal – required review by the state courts – which they denied.

First, the newly available evidence enabled an argument that Brian could not have been awarded custody of the children as a matter of law. *See Barkaloff v. Woodward*, 47 Cal. App. 4th 393, 399, 55 Cal. Rptr. 2d 167 (App. 1 Dist., Div. 4, 1996) (court "lacked authority under the DVPA [Domestic Violence Prevention Act] and the UPA [Uniform Parentage Act] to order visitation" in favor of a party who was neither a natural nor the adoptive parent).

At a minimum, had the new evidence been available at trial, Superior Court would have been legally obligated to consider the question of legal parentage with reference to factors which it never so much as mentioned at trial. California's Family Code § 7541(a) provides:

> If the court finds that the spouse who is a presumed parent under Section 7540 is not a genetic parent of the child pursuant to Chapter 2 (commencing with Section 7550), the question of parentage shall be resolved in accordance with all other applicable provisions of this division, including, but not limited to, Section 7612.

None of these provisions was actually considered in either the Dependency Ruling or the Custody Ruling.

Moreover, the new evidence undermined essential elements of the Dependency Ruling. The trial court had accepted without question that Brian was the children's natural father. (Pet. App. 22a, "Parentage – Findings and Judgment.") Likewise, the trial court

accepted without question that Petitioner lied to her children by telling them that Brian was not their biological father. (Pet. App. 62a-64a.)

Decisive evidence that Brian was not the biological father – which Petitioner presented to the Court of Appeal with her petition for a writ of error *coram vobis* – would have forced the court to reassess that conclusion. "Mt is the exclusive province of the [trier of fact] to determine the credibility of a witness." *Lenk v. Total-Western, Inc.*, 89 Cal. App. 4th 959, 968, 108 Cal. Rptr. 2d 34 (App. 5 Dist., 2001).

Moreover, since the new evidence underscored the fact that Petitioner had told the children the truth, the effect of that statement could not have been used to find her guilty of neglect as a matter of law. Even excessively harsh statements by a parent are insufficient to establish abuse. *See In re Joel H.*, 19 Cal. App. 4th 1185, 1201-03, 23 Cal. Rptr. 2d 878 (App. 5 Dist., 1993). As another Court of Appeal has stressed:

> [T]he parental conduct branch of subdivision (c) [of Welfare & Institutions Code § 300] seeks to protect against *abusive* behavior ***that results in severe emotional damage***. We . . . are talking about ***abusive, neglectful and/or exploitive conduct*** toward a child ***which causes any of the serious symptoms*** identified in the statute.

In re Alexander K., 14 Cal. App. 4th 549, 559, 18 Cal. Rptr. 2d 22 (App. 1 Dist., Div. 4, 1993) [emphasis added]; *accord, In re Mariah T.*, 159 Cal. App. 4th 428, 436, 71 Cal. Rptr. 3d 542, 548 (App. 2 Dist., Div. 8, 2008).