No.

IN THE
SUPREME COURT OF THE UNITED STATES

E.R.,
PETITIONER,
v.

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:
S.M. AND E.M.,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

Katayoun A. Donnelly
Azizpour Donnelly LLC
2373 Central Park Blvd.,
Suite 100
Denver CO, 80238
(720) 675-8584
katy@kdonnellylaw.com

Counsel for Petitioner, through the Office of Respondent Parent Counsel

March 13, 2024

QUESTIONS PRESENTED

1. Whether this Court's precedents, which apply an objective legal standard to determine whether there is an unconstitutional potential for judicial racial bias, bind the Colorado Supreme Court.

2. Whether the Court's objective test for judicial bias allows states to limit evidence of bias to the preexisting record.

3. Whether the Court's objective test for judicial bias allows states to remove the government's clear-and-convincing-evidence burden of proof in termination of parent-child rights cases and put it on parents and their children.

PARTIES TO THE PROCEEDINGS

Petitioner is the father, E.R. Respondent is the Arapahoe County Department of Human Services ("DHS"), represented by the Arapahoe County Attorney, acting in the interest of Father's children on behalf of the People of the State of Colorado.

RELATED PROCEEDINGS

There are no related proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is in Appendix A. The opinion of the Colorado Supreme Court that the Colorado Court of Appeals fully relies on to apply the subjective test is in Appendix B. The order of the Colorado Supreme Court, denying writ of certiorari, is in Appendix C.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Colorado Supreme Court entered its order on November 14, 2023. This Court's February 15, 2024 order extended the deadline to file the petition for writ of certiorari to March 13, 2024.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process and Equal Protection Clauses of the United States Constitution. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1.

STATEMENT OF THE CASE

On April 16, 2021, four days before oral arguments at the Colorado Court of Appeals in an appeal of the termination of parent-child rights, the Colorado Supreme Court issued its decision in *In re Chase*, 2021 CO 23, ¶ 7, censuring Natalie Chase (the presiding district court judge in the termination case) for violating Colorado Code of Judicial Conduct Rule 2.3, which prohibits judges from

manifesting bias or prejudice based on race or ethnicity. *See also, e.g.,* https://www.cbsnews.com/news/natalie-chase-colorado-judge-resigns-n-word/ (last visited March 7, 2024); https://nypost.com/2021/04/19/judge-who-said-n-word-declared-all-lives-matter-resigns/ (last visited March 7, 2024).

Two days later, Father, E.R., who is of Hispanic heritage, requested that the Court of Appeals remand his case for a new termination of parent-child rights hearing because of the impact of the former judge's biases on his fundamental constitutional rights and those of his children—a structural error.

On May 6, 2021, the Court of Appeals issued an order of limited remand in this case, rejecting Father's structural error argument but directing the parents to address the issue in Rule 60 proceedings before a new trial judge. *People In Int. of S.M.*, 2021 COA 64, 493 P.3d 279. About a dozen other remands followed.

On December 13, 2021, the juvenile court issued its first order in these limited remands in *People in Int. of A.P.*, 2019-JV-878, 21CA222. *A.P.* did not involve any person of color. On January 7, 2022, DHS filed a petition pursuant to Colorado Appellate Rule 21, challenging the juvenile court's ruling.[1]

---

[1] Father attempted to access the Colorado Supreme Court docket in *A.P.* to review the juvenile court's order and DHS's Rule 21 Petition to determine if he should file a motion to intervene. The Clerk of the Colorado Supreme Court informed him that, pursuant to Section 4.60 of CJD 05-01, the docket in *A.P.* was excluded from public access. Father was instructed to email a motion to request access to the Clerk of the Colorado Supreme Court. Following the Clerk's instructions, on January 25, 2022, Father submitted his motion to the Colorado Supreme Court via email. In that motion, Father explained the reasons for his request and pointed out: "[i]t appears that the Court's decision in 22SA6 could impact the fundamental constitutional parent-child rights of this Hispanic father and his children." *Id.* at 2. The Court inquired about the parties' position. On February 17, 2022, the Clerk

On June 6, 2022, in *In re People in Int. of A.P.*, 2022 CO 24, the Colorado Supreme Court reversed the juvenile court's ruling. Appendix B. Its decision in *A.P.* not only created a subjective legal standard but also did not include any discussion of the constitutional rights of parents and children (let alone parents and children of color) or the standards applied by this Court when addressing judicial bias in cases asserting such fundamental constitutional rights, *id. passim*—which were repeatedly raised and preserved in Father's case. *Id.* at ¶¶ 28-33.

On November 18, 2022, after a two-day hearing, the juvenile/trial court issued a written order denying Father's Rule 60 motion, reasoning that it was bound by *A.P.* to apply a *subjective* legal standard to determine whether former judge Chase was actually biased against Father. Appendix D. In doing so, the juvenile court ignored Father's legal argument that it should follow this Court's *objective* legal standard, Appendix E.[2] Father appealed.

The Colorado Court of Appeals similarly ignored Father's argument that it should follow this Court's objective test, Appendix A, and concluded that it was bound by *A.P.*'s subjective test. Appendix A, at 20 (¶ 56). Father filed a petition for writ of certiorari, asking the Colorado Supreme Court to address his constitutional

---

notified Father, via email, that the Colorado Supreme Court had denied his motion. Father also preserved his continuing objection to restricting his access for depriving him of his constitutional rights, citing *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

[2] Father has properly preserved this issue in his Rule 60 motion as well as every other pleading throughout this case. *See, e.g.,* Appendices G (Father's Rule 60 Motion) and H (Father's Opening Brief at the Colorado Court of Appeals). *But see* Appendix I (DHS' Opposition to Father's Petition for Writ of Certiorari).

arguments, which it had not addressed in *A.P.*, and follow this Court's objective legal standard. Appendix I. The Colorado Supreme Court denied Father's petition.

REASONS FOR GRANTING THE PETITION

Only this Court can resolve the tension between its precedents, which have consistently applied an objective test to determine the impact of judicial bias on litigants' constitutional rights, and the Colorado Supreme Court's decision applying a different (subjective) test.

Throughout the proceedings below, Father continuously asked Colorado courts to follow this Court's precedents applying an objective test to determine the impact of judicial racial bias in termination of parent-child cases, which implicate fundamental constitutional rights of children and their parents. They refused.

Their refusal highlights the need for this Court's guidance on whether Colorado is bound by the Court's precedents when addressing these constitutional questions.

I. Purging racial prejudice from the administration of justice requires applying an objective legal standard to address judicial racial bias; a standard that does not limit evidence of bias to the pre-existing record and does not put the impossible burden of proof by clear and convincing evidence on the litigants whose constitutional rights have been violated

Applying an objective test is imperative to the guarantees of due process and equal protection, especially where the source of bias is racial. This Court has consistently applied an objective test in cases involving bias—regardless of the

identity of the decisionmaker, *the timing of the discovery of the bias,* or the nature of the underlying issues. "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is *likely* to be neutral, or whether there is an unconstitutional *potential for bias.*" *Williams v. Pennsylvania,* 579 U. S. 1, 8 (2016) (cleaned up) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (emphasis added)); *see also In re Murchison,* 349 U.S. 133, 136 (1955) (not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness."); *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) (the Constitution requires that decisions be vacated where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.").

That same objective test applies to cases of judicial *racial* bias, especially in those rare cases (such as this one) where the judicial officer has been censured for being racially biased. *In re Chase*, 2021 CO 23, ¶7. In *Rippo v. Baker*, the Court emphasized: "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge has no actual bias." 580 U.S. 285, 287 (2017) (cleaned up). It then vacated the Nevada Supreme Court's judgment—which (like *A.P.*) had required evidence of actual bias—"because it applied the wrong legal standard." *Id.*

On the same day the Court issued *Rippo*, it reiterated in *Pena-Rodriguez v. Colorado*: "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." 580 U.S. 206, 221 (2017) ("The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." (cleaned up)).

The Colorado Supreme Court's decision in *A.P.* directly contradicts this Court's above teachings by applying a subjective test that requires proof of actual bias. *A.P.*, 2022 CO 24, ¶¶ 28, 29, 39. *A.P.* also, inappropriately, limits the inquiry regarding the (*actual*) racial bias of the decisionmakers to the existing record, without allowing admission of circumstantial evidence to develop the totality of circumstances. *A.P.*, 2022 CO 24, ¶¶ 30, 39. These limitations violate the due process rights of children and their parents. *See, e.g., Bracy v. Gramley*, 520 U. S. 899, 905-909 (1997) ("the petitioner was entitled to discovery because he had also alleged specific facts suggesting that the judge may have colluded with defense counsel to rush the petitioner's case to trial."); *Rippo*, 580 U.S. 285, 286 (citing *Bracy*).

Further, *A.P.* shifts the burden to the parents, whose constitutional rights have been violated by a racially biased decisionmaker (whose bias has been shown by concession or prima facia evidence). This shift also changes the nature of the

burden: to prove with *clear and convincing*, *direct*, and *on-the-record* evidence that the decisionmaker was *actually* biased. *A.P.*, 2022 CO 24, ¶¶ 19, 24.

This effectively impossible burden cannot be constitutional. *See. e.g., Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) ("Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."); *Remmer v. United States*, 347 U.S. 227, 229 (1954) (putting the burden on the government). The Colorado Supreme Court's test violates the guarantees of equal protection and a fundamentally fair proceeding under the Due Process and Equal Protection clauses of the United States Constitution. This is especially true in termination of parent-child rights proceedings, which involve fundamental constitutional rights of parents and their children. *See, e.g., Rippo*, at 287; *Pena-Rodriguez,* at 221; *Santosky*, at 753–54, 763; *Withrow*, at 47; *Remmer*, at 229; *Caperton*, at 883–84; *Williams*, at 1905; *In re Murchison,* at 136; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges the Court to grant this writ of certiorari.

Respectfully submitted,

Katayoun A. Donnelly
Azizpour Donnelly, LLC
2373 Central Park Blvd.,
Suite 100
Denver, Colorado 80238
(720) 675-8584
katy@kdonnellylaw.com

March 13, 2024