No. 24-5489

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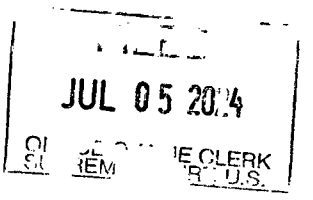

In the Supreme Court of the United States

J.L.L,
Petitioner.

v.

W.B.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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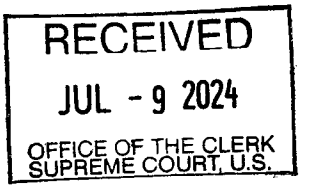

QUESTIONS PRESENTED

1. Whether Petitioner's right to procedural due process under the Due Process Clause of the Fourteenth Amendment was violated where the Alabama Court of Civil Appeals affirmed a decision of Juvenile Court of Calhoun County, Alabama that ordered Petitioner to enter into "counseling" with a specific individual without affording notice or opportunity to be heard prior to such order and the Alabama Supreme Court denied her petition for a writ of certiorari.

2. Whether Petitioner's right to substantive due process under the Due Process Clause of the Fourteenth Amendment was violated where the Alabama Court of Civil Appeals affirmed a decision of Juvenile Court of Calhoun County, Alabama that ordered Petitioner to enter into "counseling" where all record evidence demonstrates mental fitness and no termination point for the "counseling" was identified.

3. Whether Petitioner's right to substantive due process under the Due Process Clause of the Fourteenth Amendment was violated where the Alabama Court of Civil Appeals affirmed a decision of Juvenile Court

of Calhoun County, Alabama that ordered Petitioner to pay for supervised visitation with her child where the record demonstrates that she – a disabled veteran and former supervisor of child visitations with no negative history – is unable to afford such payments and no persuasive evidence supports the imposition of a requirement that her visitation be supervised.

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PETITION FOR A WRIT OF CERTIORARI

Janice L. Lozano petitions for a writ of certiorari to review the Alabama Supreme Court's judgment below.

OPINION BELOW

The Alabama Supreme Court's April 12, 2024 judgment denying certiorari is unpublished and included in the appendix at A001. The Alabama Court of Civil Appeals' opinion in this case is unpublished and included in the appendix at A002. The Juvenile Court of Calhoun County, Alabama's opinion in this case is unpublished and included in the appendix at A027.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) for writ of certiorari in a civil case after rendition of a judgement or decree by the highest court of a state in which decision could be had where a right or privilege is claimed under the United States Constitution or statutes. The Alabama Supreme Court issued a judgment on April 12, 2024.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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 THE CASE

I.

Petitioner ("Mother") is the mother of the minor child, C.A.B., who was born on September 14, 2018. The child lived exclusively with Mother for the first eight months of her life. The father, W.C.B., initiated a paternity action in the Juvenile Court of Calhoun County, Alabama in 2018 and sought sole legal and physical custody. When the child was eight-months-old, that court granted W.C.B.'s request, forcing the child to live with W.C.B. and requiring that Mother's visitation be supervised at her own expense. The present matter arises out of Mother's petition for modification of custody and visitation, filed June 8, 2022, which was followed on June 15, 2022 by an emergency motion for pendente lite relief.

Mother is a disabled veteran who holds a B.A. in psychology and has previously worked in a state social services agency in the area of child visitation. She thus has a professional background suitable to recognizing indicators of child abuse.

Numerous witnesses testified to the positive bond that she has with her child. All evidence indicates Mother and child are well bonded. No concerns regarding the child's welfare were expressed prior to Father filing for custody and no such concerns regarding Mother have been substantiated since.

In Mother's modification petition and subsequent motion for related pendente lite relief, she asserted that the following changed circumstances, among others, demonstrate that the child's best interests require modification: (1) direct evidence of probable physical abuse and medical neglect of the child by the custodial parent, W.C.B., and/or his girlfriend, such as physical marks and a burn on the child that remained untreated for weeks, arising after the custody order; (2) significant behavioral problems (such as violence) suddenly exhibited by the child at her daycare and other settings after the custody order required her to live with W.C.B.; and (3) noticeable fear and fear-based behaviors by the child when W.C.B.'s girlfriend would appear during the child's visits with Mother. Mother has also reported these concerns to the Alabama Department of Human Resources (DHR), which has conducted investigations but not confirmed the allegations.

Several hearings were heard on Mother's petition in February 2022. No evidence, from these or prior hearings, suggests that Mother is unfit to parent her child. Instead, the evidence in the record strongly supports Mother's fitness and parenting ability.

The record is clear that a previously ordered mental health evaluation, as well as a therapist who treated Mother for 10 years, found no evidence of mental health concerns that would impact the child or Mother's relationship with the child. Instead, these professionals gave evidence strongly indicative of Mother's mental health. No

similarly authoritative evidence, by medical or mental health providers, was offered in contradiction thereto.

Following a court-ordered mental health evaluation, the evaluator, Dr. Alan Blotcky, testified in an earlier trial underlying this case as follows:

> [Mother] shows no evidence of psychopathology on the MMPI-2...does not meet criteria for psychiatric disorder...does not present with evidence of being litigious or engaging in alienating behavior...no psychiatric or mental health reason to keep the [Mother] away from her daughter...[the Mother's] parenting should not be restricted or limited in any way...she is a safe and competent person...she should have custody of [the minor child]...it is potentially harmful for [the minor child] to be separated from her mother...separation of an infant from her primary caretaker can be a traumatic and damaging event...should be avoided if possible.

At the immediately underlying trial in present matter, Dr. Blotcky again testified that he has no mental health concerns regarding Mother or her relationship with her child.

Further, a letter was entered into evidence that was authored by Dr. Roy White, who treated the Mother for approximately 10 years. It verified that he had no mental health concerns regarding the Mother or her relationship with her child.

There is no evidence or finding that Mother ever has or ever would physically harm her child. Instead, Mother entered evidence that allowing the child to remain in W.C.B.'s custody is harming the child in multiple ways.

For example, Mother offered evidence that, since April 26, 2021, the child arrived at visitation with unexplained bruises and marks, became fearful when

Mother attempted to brush her hair (on more than one occasion), became fearful to show affection to Mother when she thought W.C.B's's girlfriend was within sight, reported being whipped by W.C.B. and his then girlfriend, had behavioral problems at school (such as biting, fighting, and defiance), was diagnosed with ADHD and medicated at age of three years old while in the W.C.B.'s care, has not received therapy recommended by medical care providers (supposedly because W.C.B., who had the child diagnosed with ADHD and medicated, was unable to find a therapist for two years), and suffered the effects of a significant burn incurred while in the W.C.B.'s custody without receiving appropriate medical care for several weeks. In short, Mother made a strong case that W.C.B. is abusing her child.

In addition, Mother presented evidence of her severely limited income due to disability. Yet, since the original custody order, she has been permitted only six hours of visitation per month, all of which must be supervised at her expense.

Mother demonstrated her legitimate inability to pay the costs of supervision and that W.C.B. has continually failed to cooperate in agreeing to more affordable supervision options so that Mother may exercise what limited visitation rights she has been granted. In effect, the order requiring her to pay for supervision to see her child has empowered W.C.B. to destroy her relationship with the child.

On March 1, 2023, the Juvenile Court for Calhoun County, Alabama entered

the order underlying the Alabama Court of Civil Appeals' opinion and Alabama Supreme Court judgment for which the writ is sought. Appendix at A001, A002, A027. The order denied Mother's motion for modification, thereby continuing to require that she pay the costs of supervision that she cannot afford in order to have time with her child.

Further, the Juvenile Court order asserted that Mother should stop reporting indicators of abuse to state social services agencies. A029. Apparently to that end, it ordered that the Mother "shall enroll in counseling with Freedom Counseling Services, David Yingling, . . . to address the issues set forth in the finding of fact set forth above within 10 days" and that she "shall pay for the cost of her counseling." A031.

Mother sought review at the Alabama Court of Civil Appeals, which avoided the legal questions presented (such as whether the lower court applied the correct legal standard) on purported preservation grounds. Mother then sought a writ of certiorari from the Alabama Supreme Court, which denied the writ. She now seeks a writ of certiorari from this Court on the basis of the Alabama courts' violation of her right to due process, focusing only on the issues in this case that appear to be of national importance.

REASONS FOR GRANTING THE PETITION

The overarching reason to grant the petition is that this case presents a clear and readily identifiable example of family court abuse of litigants' due process rights in a manner that harms children. Should the Court choose to review the record, it will see that Mother is plainly a fit parent with a strong background in precisely the areas that are most relevant to evaluating child abuse indicators and ensuring the well-being of children. The same cannot be said for the child's father, nor his girlfriend. If the basic requirements of due process were satisfied in this case, the child would be safe. Instead, Mother was suddenly ordered, without notice or opportunity to be heard, and with no specific request from the parties, to attend counseling with a specific individual. It is unclear whether her failure to do so would result in revocation of her visitation rights, contempt, or some other sanction. What is clear, however, is that no evidence supports the order and, moreover, the requirement adds to the already unaffordable cost of child support and, especially, supervision fees for the meager time she is permitted to spend with her child. As such, the underlying order is an unexplained and abusive exercise of judicial authority that not only harms Mother and her child, but also appears symptomatic of problems in the family court system nationally. Clear guidance from this Court regarding due process in this case will address the issue.

I.

This case involves a question of a state family court's authority to order a parent into the care of a specific therapist or counselor without notice or an opportunity to be heard. It is unknown how frequently such orders may occur because few reported cases address the issue, but such orders place the subject parent at potentially serious risk and violate their procedural due process rights.

Ordering therapy with a specific provider without notice or an opportunity to be heard could, for example, force a mother choose between visiting her child and subjecting herself to the supervision of someone who has previously harmed her, such as the perpetrator of an unreported sexual assault. This hypothetical is but one possible scenario where the lack of process may prove extremely dangerous.

The solution to this risk is also exceedingly simple. A clarification from this Court that an order to attend therapy or counseling with a specific provider requires notice and an opportunity to be heard would alleviate the risk and ensure that parents in family court are able to present concerns that they may have prior to being required to attend counseling.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (internal quotation marks omitted). "The basic legal questions presented by due process cases ... are familiar: (1) is

there a ... liberty interest protected by due process; and (2) if so, what process is due, and when must that process be made available?" *Bradley v. Vill. of Univ. Park*, 929 F.3d 875, 882 (7th Cir. 2019) (citation and internal quotation marks o,mitted).

In the present case, the liberty interest at stake is, in part, a person's ability to direct his or her own health care, including mental health care. *E.g. Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health,* 497 U.S. 261, 278-79, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990); *Toney v. Owens*, 779 F.3d 330, 337 (5th Cir. 2015). Presumably, failure to comply will threaten Mother's right to the limited visitation she is allowed, meaning that her relationship with her child is being leveraged to deny her the ability to choose a healthcare provider (if one is even appropriate).

Even if that liberty interest is reduced in the context of a family court proceeding involving visitation, the problem here is that literally *no* process was afforded to Mother. The Juvenile Court, without either party requesting it or any discussion of potential providers, simply ordered that Mother attend undefined "counseling" with a specific individual provider. A031.

Although no federal cases appear to have addressed this issue, several lower state courts have done so. All agree that the basic due process requirements of notice and an opportunity to be heard should be applied before a family court can

order a parent into therapy with a specific provider. *See Church v. Church*, 713 SE 2d 790 (NC App. 2011); *Reynolds v. Reynolds*, 272 A. 3d 455 (Pa. Super. 2022); *see also Hart v. Hart*, Cal. App. No. D078836 (Cal. App. 4th 2022) (discussing California statutory requirements "enacted to address due process concerns associated with requiring a parent to undergo involuntary therapy or counseling in a family court setting").

A ruling by this Court on point would firmly clarify and settle the law. Although the incidence of no-notice orders for therapy by specific providers is unknown, the fact that issues of this type have arisen in at least three states, as well as in this Alabama case, suggests the need for national guidance and warrants this Court's attention. Moreover, the importance of the fundamental rights at stake warrant this Court's attention.

II.

Similarly, the requirement that Mother attend counseling in this case presents a substantive due process problem that should be addressed to clarify the scope of family court authority with regard to medical and psychological health. There is no evidence in the record in which any medical or psychological professional suggests that Mother requires counseling, and the Juvenile Court order provides no criteria for determining when she will have completed its ordered

course of treatment.

It is axiomatic that a judge is not qualified or authorized to diagnose a litigant with mental health disorders. *C.f. Washington v. Harper*, 494 US 210, 229-235 (1990) (discussing the roles of medical professionals versus judges) *Parham v. JR*, 442 US 584, 607-608 (1979) ("The mode and procedure of medical diagnostic procedures is not the business of judges"); *Addington v. Texas*, 441 US 418, 429 (1979) ("Whether the individual is mentally ill . . . turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists"). Here, no evidence suggests that *any* qualified mental health provider regards the Mother as having *any* mental health problems relevant to her child.

In the absence of any such evidence, and considering the significance of the liberty interest at stake, the Juvenile Court clearly lacked the legal authority to order Mother into therapy.

If the law were otherwise, any judge hearing a family law matter would have authority to order any party into therapy at any time without cause. Moreover, in such a case – or in this case – there would be no means of determining when a course of therapy should terminate because there would be no medical or psychological basis upon which the therapy was initiated.

For example, how should Mother interpret the Juvenile Court order regarding the course of "counseling" she must complete? Should it be interpreted

to mean that the Mother must remain in therapy for the rest of her life? Or, perhaps, only until she agrees with the Juvenile Court judge that the potential indicators of the abuse of her child that she has observed reflect a problem with her mental health?

In fact, Mother underwent psychological evaluation earlier in these proceedings and the report obtained verified her mental fitness. It therefore violates Mother's substantive due process rights to require "counseling" of undefined scope for an undefined period without some evidence to support it. *C.f. Montoya v. Jeffreys*, 99 F.4th 394, 400 (7th Cir. 2024).

Substantive due process protects the fundamental rights enshrined in the first eight amendments, as well as other "deeply rooted" rights. *E.g. Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237, 142 S. Ct. 2228, 2246 (2022). "The liberty interest at issue in this case -- 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 v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000).

As discussed above regarding procedural due process, the concern in the present case is the complete lack of process or protection for Mother's fundamental right to direct her own healthcare and the trial court's apparent leveraging her liberty interest in a relationship with her child to destroy that right. While this type

of situation does not appear to have been discussed in any reported federal case, it was discussed by the Idaho Supreme Court recently.

In *Kelly v. Kelly*, 451 P. 3d 429, 444 (Id. 2019), the Idaho Supreme Court explained that:

> We take this opportunity to clarify that a judge has no authority to order medical/psychological treatment in a custody case unless there is direct testimony that such treatment would be in the best interest of the child. If the record supports such a conclusion, the trial court may appropriately order such treatment as a condition of visitation. Beyond that limitation, the trial court has no authority to make such *carte blanche* orders. The language cited from the order here is deficient because (1) it is not a condition of visitation and (2) it is not specifically tied to the best interest of Child.

This Court should take the present opportunity to make a similar clarification. While it is difficult to assess how frequently family court litigants face such unauthorized exercises of authority by family court judges, the underlying liberty interests are of such deeply-rooted importance that the problem warrants this Court's attention and guidance.

III.

Finally, given the deeply-rooted liberty interest of parents in the care and custody of their children, *Troxel*, 530 U.S. at 65, this Court should consider the lower courts' inattention to the reality that imposing the costs of supervised visitation on Mother, not to mention adding the costs of "counseling," effectively

prevents her from having a relationship with her child. This problem, while occasionally addressed by the state appellate courts, appears to be persistent and national in scope. *E.g. Lucas v. Byers*, 2024-Ohio-1341(Ct. App. Ohio 2024); *A.E. v. Madison County DHR*, Ala. Ct. Civ. App. No. No. CL-2022-0644 (Jan. 13, 2023); *A.L.C. v. J.H.*, 2010 Ind. App. Unpub. LEXIS 1552 (Ct. App. Ind. 2010); *Hock v. Hock*, 50 Ill. App. 3d 583 (Ill. App. 1977). Accordingly, guidance from this Court clarifying the application of a parent's fundamental interest in the care and custody of their children when the parent cannot afford court-ordered supervision would likely provide national benefit.

CONCLUSION

This family law case raises novel and important issues regarding the authority of a family court judge to order a parent into therapy with a specific provider without notice or an opportunity to be heard. Mother contends that the order violates her procedural and substantive due process rights, and the few courts to have considered the issue agree. However, such an order stands here and in an unknowable number of other cases. This case provides an ideal vehicle to address the issue.

Further, Mother's demonstrated inability to pay for supervised visitation demonstrates a disregard for her right to have time with her child. This issue recurs frequently in the state courts but receives inconsistent treatment from the state

courts. Therefore, it warrants this Court's attention and guidance.

Dated: July 3, 2024

Respectfully submitted,

(Signature)

Janice L. Lozano

8-8-2024

State of AL
County of Calhoun
Subscribed and sworn/affixed before me this 8th day of August, 2024
By Aquanya Mitchell

Notary Public
My Commission Expires 08/02/2026

AQUANYA MITCHELL
MY COMMISSION EXPIRES
AUGUST 02
2026
NOTARY PUBLIC
ALABAMA, STATE AT LARGE