

No. 26-5330

IN THE
SUPREME COURT OF THE UNITED STATES

E.R.,

Petitioner,

v.

NEW JERSEY DIVISION OF
CHILD PROTECTION AND PERMANENCY,

Respondent,

IN THE MATTER OF THE GUARDIANSHIP OF J.S., a minor.

On Petition for A Writ of Certiorari
To The *Supreme Court of New Jersey*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State with custody of a child was justified in assessing the ability of a parent to safely care for the child before placing the child in the parent's custody, where the parent never met the child, had a history of serious domestic violence and substance abuse, and repeatedly expressed an inability to care for the child.

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STATEMENT OF THE CASE

Petitioner E.R. and T.B. are the parents of J.S., born on April 15, 2020. Da17; Da449.¹ T.B. had a long history of drug abuse and was involved with the New Jersey Division of Child Protection and Permanency (the Division) for years before J.S.’s birth. Da24-25; Da32; Da79-80. On April 15, 2020, the Division received a report that T.B. had used methadone while pregnant with J.S. Da51. The Division investigated and determined that T.B. did not neglect J.S., but it opened a case to provide services to the family. Da71.

At that time, T.B. identified E.R. as J.S.’s father but said she did not have his contact information. Da51. She described E.R. as “extremely violent.” Da58; Da66. They were in a relationship for three years, during which E.R. abused her and refused to let her leave the home. Ibid. She fled to a domestic violence shelter when she was pregnant with J.S. and was transferred to a housing program. Ibid.; Da58.

On August 16, 2022, the Division received a report that T.B. was abusing drugs again. Da18; Da25. The Division attempted to work with T.B. over the next month, but she continued using fentanyl. Da27-28. Due to concern over the risk to J.S., the Division conducted an emergency removal and placed him in a resource home on September 15, 2022. Da29. On September 19, 2022, the Division

¹ References in the brief are consistent with those set forth in Petitioner’s brief at page 7, footnote 1. An additional transcript is cited numerically as in the briefs below: 7T for the March 13, 2024 trial date. The transcript for the trial court’s March 28, 2024 decision is included in Petitioner’s Certiorari Appendix, and is cited as “App. B, T,” for precise reference.

filed an order to show cause and verified complaint for custody of J.S., pursuant to N.J.S.A. 9:6-8:21, N.J.S.A. 30:4C-12, and New Jersey Court Rules 4:67-1 and 5:12-1, in the Superior Court of New Jersey, Family Part, Burlington County. Da744. At the hearing on the order to show cause the same day, the trial court approved J.S.'s removal and granted the Division custody. Da615.

T.B. reported that E.R. never met J.S. and she had no contact with him since he assaulted her while she was pregnant. Da33. The caseworker located him and reached out, and he responded a week later. Da94; Da105. T.B. had identified another man as J.S.'s father on his birth certificate, so E.R. agreed to take a paternity test. Da105. He provided the address of his home in Pennsylvania, and the Division mailed him notice of the next court date. Ibid.; Da111.

The Division received the paternity test results in January 2023 and called to tell E.R. he was J.S.'s father. Da199; Da489. E.R. indicated he wanted to get custody of J.S. but "needed some time to process the information." Ibid. E.R. called the caseworker on January 13 and agreed to attend a meeting. Da213. He indicated he was married and had not told his family about J.S. yet. Ibid.; Da217. The Division explained that they would have to assess E.R. in Pennsylvania under the Interstate Compact on the Placement of Children (ICPC). Da217. Two weeks later, E.R. said he could not take J.S. into his home because his wife would not agree. Da239. E.R. failed to attend a virtual family team meeting with the Division and did not attend the next court hearing. Ibid.; Da241; Da601; Da628.

Over the next year, the Division attempted to determine if E.R. was interested in obtaining custody of J.S. and whether he could safely care for him. However, E.R. repeatedly indicated he was not in a position to parent J.S., missed court hearings, failed to attend court-ordered services and visitation, and showed little commitment to J.S., who was placed in an adoptive home with his half-brother (one of T.B.'s older children). Da629-630; Da209; Da246; Da261; Da289-290; Da301; Da305; Da351; Da353-355; Da369; Da375; Da383; Da399; Da401; Da641-644; Da464; Da563; Da566; Da602; Da633.

On August 22, 2023, the trial court approved the Division's permanency plan of termination of parental rights, finding that T.B. wanted J.S. to be adopted and stopped participating in services and visitation, and E.R. had not visited or engaged in any services at all. Da641-644; 6T39:20-40:7; 6T44:2-13. E.R. never explained why he did not contact the Division to request contact with J.S. or to begin visitation, other than to claim he was busy with work. 6T36:2-39:16. The Division filed a complaint for guardianship of J.S. pursuant to N.J.S.A. 30:4C-15 to -20, on September 27, 2023. Da742-765.

On January 3, 2024, E.R. attended an expert psychological evaluation. Da672-685. When asked why J.S. was not placed with him after his paternity was confirmed, E.R. said he was not ready because of the "situation." Ibid. E.R. said he would be ready to care for J.S. "less than a year from now." Da680. He then revised his prediction and said he would be ready in about two months. Ibid.

E.R. denied having any problems, but the expert's testing and evaluation found that he had entrenched and maladaptive personality and character traits that adversely impacted his functioning. Da683-684. The expert diagnosed E.R. with a disruptive impulse control and conduct disorder and a personality disorder with narcissistic, paranoid, and antisocial traits. 5T74:5-75:1. He explained that this raised concerns because E.R. has a host of maladaptive personality and character traits that impact his parenting ability, including psychological immaturity, strikingly grandiose tendencies, self-absorption, egocentrism, a high level of anger and resentment, paranoia, hypervigilance, mistrust, a lack of empathy, and a propensity to be inconsistent, irresponsible, and unable to fulfill important obligations. Ibid.; Da683-684.

The expert noted that E.R. had no relationship with J.S. and was noncompliant with the Division, offering vague, ambiguous, and evasive explanations for his lack of involvement. Ibid. E.R. also admitted he needed additional time before he could care for J.S. Ibid. The expert opined that E.R.'s prognosis for significant and lasting change was poor and he did not support him as an independent caretaker then or in the foreseeable future. Da684.

By January 2024, E.R. still had not met J.S. or contacted the Division to start visitation. Da712-713. He was inconsistent in responding to the Division and appeared ambivalent about J.S. Da713-714; Da717. J.S.'s resource mother offered to facilitate virtual contact between J.S. and E.R. but he never agreed. 7T26:2-9. E.R. met the resource mother and the caseworker handed him a sheet

of paper with the resource mother's phone number so he could contact J.S., but E.R. crumpled it up and threw it away. 4T18:11-23; 4T24:12-14; 6T41:8-42:2. He complained that he did not like the way the resource mother talked to him. 7T21:22-22:4.

The guardianship trial was held on February 9, February 28, February 29, and March 13, 2024. 4T-7T. At the time of trial, E.R. still had no relationship with J.S., had not agreed to participate in any services, and never addressed the Division's concerns about his instability and allegations of domestic violence. 6T66:1-67:13; 6T87:12-19. E.R. never contacted the Division to arrange in-person or virtual visitation and only explained that he was too busy. 7T13:2-10; 7T25:13-18; 7T85:7-87:19; 7T90:10-91:16.

The expert psychologist testified that E.R.'s characteristics, traits, conditions, limited knowledge of parenting, and minimal involvement with J.S. for a protracted timeframe rendered him unable to function as a minimally adequate parent. 5T76:7-77:11. He further opined that E.R.'s prognosis for significant and lasting change was poor, so did not support him as an independent caretaker of J.S. now or in the foreseeable future. 5T77:12-16. Based on the amount of time J.S. was in placement, E.R.'s lack of involvement, and his inability to be a minimally adequate parent, the expert recommended a permanency plan that did not include placement or reunification with E.R. 5T79:14-80:15. He concluded that J.S. would be exposed to a risk of harm if placed with E.R. 5T101:11-23.

E.R. testified on his own behalf at the trial and denied any history of domestic violence toward T.B. or anyone else. 7T120:9-121:4. He acknowledged that T.B. then left him in the middle of the night but claimed it was to attend treatment. 7T123:8-21.

Asked if he understood that “the clock was ticking” because J.S. was in foster care, E.R. indicated that he felt rushed and wanted time to talk to his wife. 7T125:14-22. He claimed that the caseworker did not explain the process to him, was not responsive, and never provided him a number for the visitation program. 7T128:2-12; 7T128:13-129:6. He insisted that he never said that he and his wife had problems or that he had housing instability. 7T186:7-24. E.R. acknowledged that he was given the opportunity to contact J.S. through the resource mother but did not do so because he felt disrespected by her. 7T217:6-218:19; 7T138:24-139:6; 7T165:4-166:9.

The trial court issued a decision from the bench on March 28, 2024. App. B. The court found the Division’s witnesses were credible and its expert was very credible. App. B, T30:19-31:3. In contrast, the court found that E.R. lacked credibility, citing his vague and conflicting answers that were contradicted by documents and other witnesses. App. B, T35:25-36:24.

After making detailed factual findings, the court turned to the four prongs of the best interests test set forth in N.J.S.A. 30:4C-15.1. App. B, T7:10-37:2. On the first prong, the court found that J.S.’s safety, health, or development has been and would continue to be endangered by the parental relationship with E.R.

App. B, T40:13-44:1. The court cited his lack of involvement while J.S. was in foster care. Ibid. It found that E.R. never tried to contact or visit J.S. Ibid. The court also credited the expert opinion that E.R. was unable to parent and would expose J.S. to a risk of harm, and noted that E.R. admitted he was not able to care for J.S. yet. Ibid.

On the second prong, the court found that E.R. was unwilling and unable to eliminate the harm facing J.S. App. B, T45:9-47:17. The court cited E.R.'s failure to visit or do anything while J.S. was in foster care. Ibid. The court credited the expert opinion that E.R. would need therapy for at least a year before he could be considered as a placement option, and J.S. could not wait. Ibid. The court concluded that E.R. had no clear plan for J.S. and there was no evidence he could provide even a minimal level of stability, and a delay in permanency would harm J.S. Ibid.

On the third prong, the court found that the Division made reasonable efforts to provide the family services. App. B, T48:11-50:5. The court found that E.R. chose not to take advantage of what was offered. Ibid.

On the fourth prong, the court found that termination of parental rights would not do more harm than good to J.S. App. B, T51:23-54:9. The court found that E.R. could not provide a safe or stable home for J.S. Ibid. Meanwhile, J.S. was in a stable home with his brother and his resource mother and needed permanency. Ibid. The court also credited the expert opinion that E.R. was unable to parent and would need at least a year of therapy before he could even

be considered as a placement option. Ibid. It also credited his opinion that removing J.S. and placing him with his father would do more harm than good. Ibid. The court concluded that termination of parental rights would not do any harm to J.S. Ibid.

Finding that the Division proved all four prongs of the best interests test by clear and convincing evidence, on March 28, 2024, the trial court entered a judgment of guardianship terminating E.R.'s parental rights to J.S. Da1-5.

E.R. appealed to the New Jersey Superior Court, Appellate Division, arguing that the trial court erred in finding that the Division proved the four prongs of the statutory best interests test and that the Division impermissibly erected barriers to reunification by requiring him to submit to the ICPC assessment process. Db16-49.

On March 3, 2025, the Appellate Division issued a written decision affirming the judgment of guardianship. App. D. The Appellate Division rejected E.R.'s arguments concerning the four prongs of the best interests test and held that the record supported the trial court's finding that his testimony lacked credibility. App. D, 6-16. In its findings on the second prong, the panel cited E.R.'s failure to comply with the ICPC assessment as evidence demonstrating his lack of commitment to J.S. App. D, 12. It also cited the Division's efforts to have him complete the ICPC process as evidence supporting its findings on the third prong. App. D, 13.

On March 21, 2025, E.R. filed a petition for certification to the New Jersey Supreme Court, and on September 30, 2025, the New Jersey Supreme Court entered an order granting certification and summarily remanding the matter to the Appellate

Division “to reconsider without consideration of the ICPC.” App. E. The order indicated that the ICPC “does not apply to matters concerning parents and other enumerated relatives.” Ibid.

On January 14, 2026, the Appellate Division issued a written decision reaffirming the judgment of guardianship. App. A. The Appellate Division noted that the matter was remanded “to us to review our opinion without consideration of the [ICPC].” App. A, 3. The panel then “reaffirm[ed] the outcome of our prior opinion using a fuller analysis and one not dependent on the ICPC.” Ibid.

The Appellate Division again rejected E.R.’s arguments concerning the four prongs of the best interests test and held that the record supported the trial court’s finding that his testimony lacked credibility. Ibid.; App. A, 14. On the first and second prongs, the panel cited evidence that E.R. failed to assume any parental duties or to offer any plan to care for J.S., his history of domestic violence and substance abuse, his failure to engage in any rehabilitative efforts, and the uncontroverted expert evidence that E.R. was unlikely to be able to safely parent J.S. and would expose him to a risk of harm. App. A, 14-19. It also cited the evidence he did not propose any reliable timeline to achieve stability or to be able to care for J.S., who was at a “crucial age now and cannot wait for his father to start processes indefinitely.” App. A, 17-18.

The court directly addressed the ICPC issue and, while observing that E.R. did not comply with the ICPC evaluation, acknowledged that the New Jersey Supreme Court concluded that the ICPC does not apply to matters concerning parents. App.

A, 7. The panel rejected E.R.'s attempt to characterize his failure to comply with the ICPC assessment as determinative: "[D]espite [E.R.]'s assertion that lack of compliance with the ICPC evaluation process was central to the decision to terminate his parental rights, it was not. As the trial court found and as the record substantiates, many impediments broadly illustrate [E.R.]'s parental unfitness." Ibid.

On the third prong, the Appellate Division rejected E.R.'s argument that the Division failed to provide adequate services and erected barriers to reunification by requiring him to participate in the ICPC process. App. A, 19-21. The panel cited evidence in the record that the Division worked diligently to maintain contact with him but E.R. responded only with "inaction" that was indicative of his lack of commitment. Ibid. It also cited evidence that E.R.'s participation and involvement with the Division was inconsistent and that he often missed contact and court appearances, had an unstable housing situation, and failed to visit J.S. App. A, 4-9.

Finally, on the fourth prong, the panel noted sufficient evidence to support the trial court's finding that E.R. was unwilling and unable to parent J.S. App. A, 21-22. It determined that the trial court properly considered the uncontroverted expert testimony that E.R. was unfit to parent J.S. now or in the foreseeable future. Ibid. The panel thus concluded that there was substantial credible evidence to support the trial judge's findings on all four prongs. Ibid.

On February 2, 2026, E.R. filed another petition for certification to the New Jersey Supreme Court, asserting again that the ICPC was central to the trial court's

decision and that the New Jersey Appellate Division's decision was nothing more than "after-the-fact rationalization" and neglected to address his constitutional and jurisdictional claims. 2PNJb1-20. He argued that the trial court and Appellate Division decisions improperly relied on his failure to establish a relationship with J.S. because the Division imposed unlawful barriers despite a presumption that he was a fit parent. 2PNJb5-19. On May 22, 2026, the New Jersey Supreme Court denied his petition for certification. App. C.

E.R. now reasserts the arguments rejected repeatedly by the New Jersey courts and reframes them as constitutional issues.

REASONS TO DENY THE PETITION

I. THIS CASE DOES NOT PRESENT ANY "COMPELLING REASON" JUSTIFYING THE EXTRAORDINARY REMEDY OF THE GRANT OF A WRIT OF CERTIORARI.

E.R.'s petition provides no basis for review under Supreme Court Rule 10. He identifies no conflict among the federal courts of appeals, no conflict between the decision below and a decision of another state court of last resort or federal court of appeals, and no important question of federal law requiring resolution by this Court. Nor does E.R. identify any decision of this Court with which the judgment below conflicts. Instead, he seeks review of the application of settled constitutional law principles to a highly fact-specific matter involving parental rights and asks this Court to reject the trial court's factual findings and credibility determinations and accept his own account. This is not a proper basis for certiorari.

Supreme Court Rule 10 makes clear that review “is not a matter of right, but of judicial discretion,” and that a petition will only be granted for “compelling reasons.” Sup. Ct. R. 10. The Rule identifies, among the considerations that may ordinarily warrant review, conflicts among courts on important federal questions and decisions resolving important questions of federal law that remain unsettled by this Court, or that conflict with the Court’s precedents. *Id.* Rule 10 expressly warns that “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” *Id.* See *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) (explaining that the Supreme Court “is not the place to review a conflict of evidence or to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.”); *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) (“This Court’s review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.”).

This case falls squarely within the Rule’s admonition. E.R. does not identify a recurring legal issue that has divided the courts or an unsettled constitutional issue requiring this Court’s intervention. Instead, he contends that the State improperly withheld custody, imposed unnecessary conditions on visitation, prevented him from developing a relationship with J.S., and then relied upon the absence of that relationship to terminate his parental rights. But

his challenge is based on a mischaracterization of the facts and his dispute with the trial court's fact finding and credibility determinations.

The trial court did not accept E.R.'s characterization of the proceedings, and instead made findings directly contrary to the factual claims that underlie E.R.'s imagined constitutional issues. It found his testimony lacked credibility, while crediting the evidence that he repeatedly indicated he was unable to care for J.S. and failed to visit or to attempt to establish a relationship. App. B, T35:25-36:24; T40:13-44:1; T45:9-47:17; T48:11-50:5. Thus, before this Court could reach either constitutional question E.R. proposes, it would first have to decide whether the State actually prevented him from parenting or whether the absence of a parental relationship resulted from his own conduct and stated inability to care for J.S. That is not an unsettled question of constitutional law, but a dispute over what happened. Resolving this threshold issue would require this Court to choose between these competing factual accounts, reassess witness credibility, and reweigh the record.

This Court has repeatedly recognized that resolving factual disputes is the function of the factfinder, not a reviewing court. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) ("factfinding is the basic responsibility of district courts, rather than appellate courts"); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (a reviewing court should not "simply [make] factual findings on its own"); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985) (a reviewing court may not displace a factfinder's choice between

permissible views of the evidence merely because it would have weighed the evidence differently).

This principle applies with even greater force at the certiorari stage. The Court explained over a century ago that it does not grant certiorari merely “to review evidence and discuss specific facts.” *United States v. Johnson*, 268 U.S. 220, 227 (1925). This Court is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

A. The Petition Does Not Present An Unsettled Question Concerning The “Continuing Force” of *Stanley*.

E.R. first contends that review is warranted to address the “continuing force” of the presumption of parental fitness recognized in *Stanley v. Illinois*, 405 U.S. 645 (1972). But *Stanley’s* continuing force is not in doubt, and the decisions of the New Jersey courts do not conflict with it.

Stanley addressed a fundamentally different constitutional defect: the State treated an unmarried father as unfit and removed his children without any individualized inquiry into his actual fitness. *Id.* at 649, 657-58. The father had lived with his children and their mother for years, and the state did not contend that he neglected or failed to care for them. The constitutional infirmity was the State’s presumption that his status as an unmarried father alone rendered him unfit to parent, without any individualized finding that he failed to assume parental responsibility.

Subsequent decisions demonstrate that *Stanley* did not establish the categorical rule urged by E.R. In *Quilloin v. Walcott*, 434 U.S. 246, 254-56 (1978),

the Court recognized that *Stanley* did not resolve the full extent of constitutional protection applicable where a father was in a materially different parental position. Then, in *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983), the Court distinguished *Stanley* because Stanley had lived with and cared for his children, and explained that when an unmarried father “comes forward to participate in the rearing of his child,” his interest implicates constitutional protections. These decisions are contrary to E.R.’s suggestion that *Stanley* established an absolute rule requiring a State to transfer custody to every previously noncustodial parent unless it first proves their unfitness. The constitutional analysis depends upon the nature of the parent’s actual relationship with his child and his assumption of parental responsibility.

This case therefore does not present a question about the continuing viability of *Stanley*. It presents a dispute over whether E.R. attempted to and was capable of assuming parental responsibility and whether the State prevented him from doing so. The trial court resolved those questions at the guardianship trial.

E.R.’s proposed question assumes that the State withheld custody from a fit and willing father and then imposed conditions that prevented the creation of a parent-child relationship. But this characterization is not based on the findings made below, but on disputed evidence. To reach the broad constitutional question presented by E.R., this Court would first have to accept his characterization and reject contrary findings concerning his stated inability to

assume care and his lack of visitation or any effort to establish a relationship with J.S. This threshold dispute is factual and distinguishes this case sharply from *Stanley*, where the constitutional defect arose from the statutory scheme itself and did not depend upon reweighing conflicting evidence about the father's conduct. This case does not involve any such presumption, so this case is a poor vehicle for reconsidering or extending *Stanley*.

B. The Petition Likewise Does Not Present An Unsettled Question Under *Santosky*.

E.R. separately contends that this case presents an opportunity to address a due process concern he finds in *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982), whether the State may create the circumstances later relied upon as grounds for termination of parental rights. But *Santosky* establishes the rule that parental rights may not be terminated unless the state proves the requisite grounds by clear and convincing evidence. *Id.* at 769-70. It does not establish an independent constitutional rule that termination is prohibited whenever a parent alleges that state conduct caused a deterioration in the parent-child relationship.

In reaching its holding in *Santosky*, the Court contemplated factual determinations concerning the efforts of the State agency and the conduct of the parent. *Id.* at 748-49, 759-60. The statutory scheme at issue there required consideration of whether the agency made diligent efforts to strengthen the parental relationship and whether the parents maintained a relationship and planned for the child. *Id.* at 748-49, 759-60. Those facts need to be decided under the appropriate standard of proof.

E.R.’s effort to invoke *Santosky* fails. His asserted constitutional question rests entirely on the claim that the State created the ground for termination. But that premise was not established below and is the central disputed factual issue. E.R. contends that the State denied him custody and imposed barriers to his relationship with J.S., and then used the absence of a relationship to terminate his parental rights. The trial court, however, credited the evidence that he repeatedly indicated that he could not care for J.S. and failed to visit or attempt to establish a relationship with him. App. B, T35:25-36:24; T40:13-44:1; T45:9-47:17; T48:11-50:5.

Thus, before this Court could decide whether due process prohibits a State from “creating” the grounds for termination of parental rights, it would first have to decide whether that is what the State actually did in this case. The Court would have to determine why E.R. did not get custody of J.S., why he did not visit, whether he was willing and able to safely care for J.S., whether the conditions imposed by the Division prevented reunification, and whether E.R.’s own conduct contributed to the absence of any parent-child relationship. Those are factual questions, not unsettled constitutional ones.

**C. The Petition Confuses The Importance Of The
Underlying Liberty Interest With The Existence Of An
Important Federal Question**

Termination of parental rights unquestionably implicates a fundamental liberty interest. *Santosky*, 455 U.S. at 753. But the constitutional significance of the underlying interest does not mean that every termination case presents an important federal question warranting certiorari.

The question under Supreme Court Rule 10 is whether the petition presents an important and unsettled issue of federal law appropriate for resolution by this Court. Here, the governing constitutional principles are established. E.R. does not identify any disagreement between lower courts concerning these principles. His disagreement concerns what happened in this case and how those settled principles apply to the facts.

Nor is this case an appropriate vehicle for announcing some broader constitutional rule concerning state interference with the formation of a parent-child relationship. Any such ruling would depend upon resolution of the disputed factual predicates assumed by E.R. The Court would necessarily have to determine whether the State actually prevented him from obtaining custody, whether it prevented the development of a relationship or visitation, whether any restrictions were responsible for the absence of a relationship, and whether E.R. was willing and able to assume parental responsibility. E.R. cannot manufacture a question of constitutional importance by assuming those disputed facts in his favor. He effectively asks the Court to decide what constitutional rule would apply if his version of the facts was correct, but the New Jersey courts rejected those facts. Review would require the Court to revisit these credibility determinations, reweigh the evidence, and make its own findings before it could reach the constitutional questions proposed by E.R.

Supreme Court Rule 10 strongly disfavors this type of review. The petition does not present a conflict warranting resolution or an unsettled question of

federal law. It presents a dispute with the factual determinations and the application of settled law in a single parental rights proceeding.

D. This Case Is A Poor Vehicle For Resolving The Broad Constitutional Questions E.R. Offers.

Even if the constitutional questions identified by E.R. could warrant this Court's consideration in an appropriate case, this case is a poor vehicle for resolving them. The questions proposed by E.R. cannot be reached without first resolving the disputed factual predicates.

E.R. frames the case as presenting whether a State may deny custody to a presumptively fit parent, restrict that parent's visitation, and then rely upon the resulting absence of a parent-child relationship as a basis for termination. But this assumes that the State, and not E.R., caused the circumstances later considered in entering the judgment of guardianship. The trial court did not make that finding.

To the contrary, the trial court credited the evidence that E.R. repeatedly indicated that he was unable to care for J.S. and failed to visit him or attempt to establish any relationship. App. B, T40:13-44:1; T45:9-47:17; T48:11-50:5. It also rejected E.R.'s competing testimony as lacking credibility App. B, T35:25-36:24. Thus, this is not a case where the undisputed facts establish that the State affirmatively prevented a willing and capable parent from developing a relationship with his child and then used this as a basis to terminate his parental rights.

Before either of the constitutional questions proposed by E.R. under *Stanley* and *Santosky* can be reached, the Court would have to resolve the disputed facts in his favor. This makes this case ill-suited for review. It would also provide a poor vehicle for announcing any new constitutional rule because such a ruling would be informed by the highly particular and fact-sensitive circumstances. The Court would have to assess E.R.'s willingness and ability to assume custody, his history of visitation or lack of visitation, whether any conditions were imposed by the Division on his contact with J.S., and how E.R. responded to any such conditions. This would require reexamining the trial court's credibility determinations and making factual determinations that are not appropriate for a reviewing court. *See* Sup. Ct. R. 10; *Johnston*, 268 U.S. at 227. The Court should not use this case to address the constitutional questions offered by E.R. Because those questions would require revisiting disputed factual findings and credibility determinations, this case is a poor vehicle for further review.

E. The State Appropriately Sought To Assess E.R.'s Parenting Ability And The Judgement Of Guardianship Was Supported By Abundant Evidence That E.R. Was Unable To Safely Parent.

E.R. seeks the Court's intervention based on a mischaracterization of the efforts by the New Jersey Division of Child Protection and Permanency to assess his ability to safely care for J.S. and supervise their contact, claiming the Division manufactured concerns about his parenting ability and imposed barriers to reunification. However, the New Jersey courts properly rejected these

arguments based on abundant evidence that termination of E.R.'s parental rights is in J.S.'s best interests.

E.R. attempts to raise constitutional and jurisdictional arguments premised on the Division's purported imposition of barriers on his establishing a relationship with J.S., but the Division appropriately and justifiably assessed his parenting ability. E.R. never had custody or even met J.S., and the Division had little information about him other than that he had a previous drug-related conviction and violently assaulted J.S.'s mother. Da32-33; Da58; Da66; Da79; 7T48:20-50:24; 6T59:3-13; 6T32:24-33:14.

The Division did not delay reunification or impose artificial barriers to reunification. In fact, the only delay was attributable to E.R.'s own feet-dragging. Da209; Da301; Da305; Da348; Da604; Da728-730. It took him months to provide basic information, and when he finally did, he advised that he could not take J.S. because of marital troubles and unstable housing. Ibid.; Da563; Da369; Da375; Da383; 6T29:21-30:22; 7T75:3-24; 7T90:10-91:16. At the time of his psychological evaluation in January 2024, on the eve of trial, he acknowledged that he still was not ready to assume custody of J.S. Da680. Thus, the Division's attempt to investigate valid safety concerns had no impact on the outcome of this case and the Division's initial investigative efforts were reasonable. E.R.'s renewed effort to divert blame does not merit certification or any further review.

E.R. also cites the Division's claimed failure to provide more convenient visitation. However, the trial court found his testimony concerning his lack of

contact lacked credibility. App. B, T35:25-36:24. This finding is supported by ample credible evidence that the Division workers maintained contact with E.R. and tried to encourage him, but he claimed he was too busy to visit and showed no interest in even virtual or phone contact. Da246; Da354-355; Da375; Da399; Da401; Da602; Da679; Da712-714; Da717; 6T36:2-39:16; 6T41:8-42:24; 6T60:1-67:13; 6T87:12-19; 7T13:2-10; 7T21:22-22:4; 7T25:13-26:9; 7T25:13-18; 7T85:7-87:19; 7T90:10-91:16; 7T104:2-12. E.R. is the only one responsible for his failure to visit J.S. or build a relationship -- he knew what he needed to do but chose not to do it. Ibid.; Da209; Da217; Da290; Da349; 6T28:1-29:10; 6T34:5-22; 6T36:2-40:7; 6T41:8-42:24; 6T44:2-45:11; 6T66:1-67:13; 6T82:25-83:19; 6T87:12-88:13; 7T7:1-9:19; 7T13:2-10; 7T21:22-22:4; 7T25:13-26:18.

Thus, the New Jersey courts appropriately rejected E.R.'s claims that the Division imposed artificial barriers to reunification in affirming the trial court's finding that termination of his parental rights was in J.S.'s best interests. There is no indication that E.R. will be able to safely parent J.S. or that he ever offered any real plan to care for him or demonstrated any commitment to him. Da683-684; 5T74:5-75:1; 5T76:7-78:25; 5T199:21-101:10; 7T57:13-60:9; 7T64:3-70:16; 7T75:3-24; 7T85:7-87:19; 7T90:10-91:16; 7T104:2-12. The Division's expert also opined persuasively that E.R. is unable to parent and poses a risk of harm to J.S. Da683-684; 5T74:5-75:1; 5T76:7-77:16; 5T101:11-23. He also opined that E.R. would need at least a year of therapy before he could be considered as a placement option, and his prognosis would remain poor even if he fully committed to

therapy. Da684; 5T78:1-25; 5T94:17-95:5; 5T100:21-101:10. These opinions were supported by E.R.'s own admission on the eve of trial that he was not ready to parent and might need up to a year. Da680; 5T46:14-47:1.

This matters for certiorari because even if his erroneous predicates are accepted, there is independent evidence that E.R. was unable to safely parent J.S. Accordingly, resolving the constitutional questions offered by E.R. would not resolve the case. The judgement of guardianship was not based solely on the absence of a parent-child relationship but also on E.R.'s unfitness and the likelihood of harm to J.S. from reunification. This further underscores why this case is a poor vehicle for deciding the broader constitutional questions offered by E.R.

CONCLUSION

For these reasons, this Court should deny the petition for certiorari.

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