

No. 15-1317

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**In the Supreme Court of the United States**

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VANESSA G.,

*Petitioner,*

v.

TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES,

*Respondent.*

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

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel.

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## OPINIONS BELOW

The October 21, 2014 opinion of the Tennessee Court of Appeals affirming the termination of Petitioner's parental rights is not reported but is available at 2014 WL 5390572. Pet. Apx. 1a. The January 29, 2016 opinion of the Tennessee Supreme Court affirming the opinion of the Court of Appeals is reported at 483 S.W.3d 507. Pet. Apx. 20a.

## STATEMENT OF THE CASE

The Tennessee Department of Children's Services petitioned to terminate Petitioner's parental rights to Carrington H. on October 24, 2013. Pet. Apx. 28a. The Juvenile Court of Maury County, Tennessee, appointed counsel for Petitioner and heard the Department's petition on December 20, 2013. Pet. Apx. 30a. The juvenile court terminated Petitioner's parental rights in an order entered on February 27, 2014. Pet. Apx. 40a. Petitioner appealed to the Tennessee Court of Appeals, which affirmed the juvenile court. Pet. Apx. 41a-42a. The Court of Appeals granted the motion of Petitioner's appointed counsel to withdraw. Pet. Apx. 42a.

Proceeding *pro se*, Petitioner applied for permission to appeal to the Tennessee Supreme Court, raising for the first time whether her appointed counsel's representation was inadequate and thus deprived her of her statutorily guaranteed right to counsel. Pet. Apx. 42a. The Tennessee Supreme Court granted the application and appointed Petitioner new counsel to address "(1) whether the right to counsel in a termination of parental rights proceeding includes the right to effective assistance of counsel; and (2) [i]f so,

what procedure and standard should the Court adopt to review the claim.” Pet. Apx. 43a.

The court held that Petitioner’s statutory right to appointed counsel did not require “adoption of an additional procedure . . . [to] attack the judgment terminating parental rights based upon ineffective assistance of appointed counsel.” Pet. Apx. 82a. The court acknowledged this Court’s holding in *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18 (1981), that while the Due Process Clause of the Fourteenth Amendment entitles parents to “fundamental fairness” in parental-termination proceedings, it does not require States to appoint counsel for parents in every such proceeding. Pet. Apx. 55a; see *Lassiter*, 452 U.S. at 32. While Tennessee *statutorily* provides the right to appointed counsel for indigent parents in every parental-termination proceeding, Pet. Apx. 56a, the Tennessee Supreme Court declined Petitioner’s request “to go a step further” and hold that this “statutory right to appointed counsel includes, in every case, the right to challenge a judgment terminating parental rights based on ineffective assistance of counsel.” Pet. Apx. 57a, 72-73a. The court refused to “import criminal law post-conviction type remedies” into parental-termination proceedings. Pet. Apx. 68a. In reaching this conclusion, the court pointed to this Court’s decisions in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *Wainwright v. Torna*, 455 U.S. 586 (1982), holding that, in the absence of a constitutional right to counsel, there is no constitutional right to effective of assistance of counsel, even in proceedings where counsel is appointed. Pet. Apx. 60a.



The Tennessee court reasoned that the constitutional mandate of fundamentally fair procedures could be achieved without compromising the interests of children in permanency and safety: “Tennessee court rules, statutes, and decisional law are already replete with procedures . . . designed to ensure that parents receive fundamentally fair parental termination proceedings,” including the heightened standard of clear and convincing evidence, a statutory right to counsel, and a directive that the intermediate appellate court review a trial court’s findings for each termination ground, even if unchallenged on appeal. Pet. Apx. 45a, 52a, 56a, 69a. “Moreover,” the court concluded, the record in this case “refutes [Petitioner’s] assertion that her counsel’s representation denied her a fundamentally fair proceeding.” Pet. Apx. 73a. While the dissent urged that Tennessee recognize a claim for ineffective assistance of counsel in parental-termination proceedings, it did not “disagree . . . that the mother was not deprived of a fundamentally fair parental termination proceeding.” Pet. Apx. 92a.

Petitioner now seeks this Court’s review.

**REASONS FOR DENYING REVIEW****I. THIS CASE IS A POOR VEHICLE FOR DECIDING THE QUESTION PRESENTED FOR REVIEW.**

Contrary to Petitioner’s assertion (Pet. 21), this case is a poor candidate for certiorari because the question presented for review involves only a question of state law. Petitioner asks this Court to decide whether the right to counsel in a termination-of-parental-rights proceeding includes the right to the effective assistance of counsel. Pet. i. But the right to counsel at issue in this case was Petitioner’s *statutory* right to counsel, i.e., her right to have counsel appointed under Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii),<sup>1</sup> as the Tennessee Supreme Court made quite clear in its opinion. *See, e.g.*, Pet. Apx. 42a (recounting that Petitioner, in her application for permission to appeal, “asserted that her appointed counsel’s representation was inadequate and deprived her of the right to counsel *statutorily guaranteed* to indigent parents in termination proceedings”) (emphasis added); Pet. Apx. 52a (proceeding to consider “[Petitioner’s] assertion that her *statutory right* to appointed counsel necessarily includes the right to effective assistance of counsel”) (emphasis added); Pet. Apx. 57a (observing that “Tennessee’s statutory right to counsel is not disputed, and it is also undisputed that [Petitioner] was represented by appointed counsel in this matter. Instead, [Petitioner] asks us to go a step further and hold that *the statutory right* to

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<sup>1</sup>The right to appointed counsel in termination proceedings is also secured by Tenn. Sup. Ct. R. 13, § 1(c), (d)(2)(B).

appointed counsel includes [the right to effective assistance of counsel]”) (emphasis added).

Thus, the question presented for review is only a question of Tennessee state law. Indeed, in most of the States whose decisions Petitioner says “conflict” with the decision here (Pet. 10), the right to effective assistance of appointed counsel in parental-termination cases exists as a matter of state, not federal, law. *See, e.g., Jones v. Ark. Dep’t of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005) (“[T]he legislature intended the right to counsel for parents in termination proceedings to include the right to effective counsel”); *State v. Anonymous*, 425 A.2d 939, 943 (Conn. 1979) (“Where, however, as here, a statute . . . mandates the assistance of counsel, it is implicit that this means competent counsel.”); *In re R.E.S.*, 978 A.2d 182, 189 (D.C. Ct. App. 2009) (“[W]e hold that parents who are represented by appointed counsel in a termination of parental rights proceeding have a statutory right to the effective assistance of counsel.”); *In re A.R.A.S.*, 629 S.E.2d 822, 825 (Ga. Ct. App. 2006) (“[A]n indigent parent has a statutory right to effective legal representation.”); *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989) (“This statute [giving parents the right to counsel in a termination proceeding] implies a right to *effective* assistance of counsel; . . . .”); *Matter of Bishop*, 375 S.E.2d 676, 678 (N.C. 1989) (“[T]he right to counsel provided by [state statute] includes the right to effective assistance of counsel”); *In re Geist*, 796 P.2d 1193, 1200 (Or. 1990) (“[T]he legislature intended a statutory right to counsel to include a right to adequate counsel.”); *In re M.D.(S)*, 485 N.W.2d 52, 55 (Wis. 1992) (“we conclude that a statutory provision for appointed counsel includes the right to *effective* counsel”). *See*

also, e.g., *In re V.F.*, 666 P.2d 42, 45 (Alaska 1983) (holding that because the Alaska Constitution guarantees indigent parents the right to appointed counsel in termination proceedings, the effective assistance of counsel is also guaranteed); *J.B. v. Fla. Dep't of Children and Families*, 170 So.3d 780, 790 (Fla. 2015) (holding that the right of indigent parents under the Florida Constitution to counsel in termination proceedings necessarily includes the right to effective assistance of counsel); *In re Guardianship of A.W.*, 929 A.2d 1034, 1037 (N.J. 2007) (holding that the guarantee of the right to counsel in termination cases under state statute and New Jersey Constitution includes the right to effective assistance of counsel).

In the petition itself, Petitioner restates the issue a bit differently, asserting simply that the question is whether parents are entitled to the effective assistance of counsel in termination proceedings under the Due Process Clause. Pet. 9, 16-17, 21. But that question does not warrant this Court's review because the answer must be "no." As the Tennessee Supreme Court observed, and as Petitioner herself concedes (Pet. 19), the Due Process Clause does not require States to appoint counsel for parents in every parental-termination proceeding. Pet. Apx. 55a (citing *Lassiter*, 452 U.S. at 32); see Pet. 19. If parents are not entitled to appointed counsel in every termination proceeding under the Due Process Clause, it necessarily follows that parents are not entitled to the effective assistance of appointed counsel in every termination proceeding under the Due Process Clause. As discussed above, the Tennessee Supreme Court did not decide the separate question whether, in this particular termination proceeding, Petitioner had a *constitutional* right to

appointed counsel, in addition to a statutory right. The court emphasized, in holding that the statutory right to counsel did not require adoption of a procedure to attack the judgment based on ineffective assistance of counsel, that there is no right to effective assistance of counsel in the absence of a constitutional right to appointed counsel. Pet. Apx. 61a, n.24.<sup>2</sup>

**II. THE DECISION OF THE TENNESSEE SUPREME COURT COMPORTS WITH THIS COURT'S PRECEDENTS. THE FOURTEENTH AMENDMENT DOES NOT COMPEL ADOPTION OF A STATE PROCEDURE FOR CHALLENGING THE TERMINATION OF PARENTAL RIGHTS BASED ON INEFFECTIVE ASSISTANCE OF APPOINTED COUNSEL.**

Review by this Court is not warranted even if the question Petitioner means to present is whether the Fourteenth Amendment demands that a parent who has been appointed counsel under state law in a parental-termination proceeding be afforded a procedure for challenging the termination of parental rights on the basis of ineffective assistance of appointed counsel. The decision of the Tennessee Supreme Court, holding that fundamental fairness in termination proceedings is satisfied without requiring the adoption

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<sup>2</sup> In a footnote, the court did state that “even assuming *Lassiter* provides Mother with a constitutional right to counsel, nothing in *Lassiter* requires state courts to import criminal law concepts of ineffective assistance of counsel or to assess counsel’s performance by standards developed in the criminal law context. Instead, *Lassiter* requires state courts to ensure that parents receive fundamentally fair procedures.” Pet. Apx. 60a, n.22.

of such a procedure, fully comports with this Court's precedents.

Recognizing that parents enjoy a right to care and custody of their children as a “fundamental liberty interest protected by the Due Process Clauses of the state and federal constitutions,” *Troxel v. Granville*, 530 U.S. 57, 65 (2000), Tennessee provides respondent parents with appointed counsel in parental-termination actions as a statutory right. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii). Due process under the Fourteenth Amendment demands that a state treat individuals with “fundamental fairness” whenever its actions infringe a protected liberty or property interest, such as when the state moves to terminate or impair a parent’s right to custody and care of their child. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982). But unlike the Sixth Amendment in the criminal context, the Fourteenth Amendment’s demand of fundamental fairness does not necessarily require the appointment of counsel for parental-termination actions. *See Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 31 (1981).

Contrary to Petitioner’s assertions, Tennessee’s parental-termination proceedings are fundamentally fair. Numerous procedural safeguards exist to ensure fairness: parents receive notice of grounds for termination and the opportunity to contest them;<sup>3</sup> parents enjoy the statutory right to counsel from trial to appeal;<sup>4</sup> Tennessee law places the heightened burden

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<sup>3</sup> Tenn. Code Ann. § 36-1-113(d), (e), (g).

<sup>4</sup> Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii).

of clear and convincing proof upon the movant, as required by this Court's decision in *Santosky*;<sup>5</sup> and Tennessee's appellate courts will not affirm a termination of parental rights without a record complete enough to allow fair appellate consideration of the trial court's findings.<sup>6</sup> *See also* Pet. Apx. 69a-73a.

Petitioner implies that Tennessee is content with simply having a "warm body with a law license" representing such a parent. Pet. 18. Not so. Tennessee's courts are fiercely protective of parental rights, routinely examining the record on appeal to determine if parents were denied a fundamentally fair hearing by deficient counsel. *See, e.g., In re Grayson H.*, No. E2013-01881-COA-R3-PT, 2014 WL 1464265, at \*10-11 (Tenn. Ct. App. Apr. 14, 2014) (no perm. app. filed); *In re M.H.*, No. M2005-00117-COA-R3-PT, 2005 WL 3273073, at \*7-8 (Tenn. Ct. App. Dec. 2, 2005) (no perm. app. filed); *In re S.D.*, No. M2003-02672-COA-R3-PT, 2005 WL 831595, at \*14-15 (Tenn. Ct. App. Apr. 8, 2005) (no perm. app. filed); *In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 WL 1838179, at \*15 (Tenn. Ct. App. Aug. 16, 2004), *perm. app. denied* (Tenn. Nov. 8, 2004). Tennessee trial courts are empowered to seek additional information or expert testimony if necessary to ensure fairness. *See* Tenn. R. Juv. P. 39(e). In its decision here, the Tennessee Supreme Court made plain its expectation that these practices continue. *See* Pet. Apx. 51a, 71a.

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<sup>5</sup> Tenn. Code Ann. § 36-1-113(c).

<sup>6</sup> *See, e.g., In re Austin C.*, No. M2013-02147-COA-R3-PT, 2014 WL 4261178, at \*6 (Tenn. Ct. App., Aug. 27, 2014).

Indeed, the court ensured that Petitioner received the due process to which she was entitled in this case. The court thoroughly reviewed each of the grounds for termination of Petitioner's parental rights and the best-interests analysis, finding that the record supported each of the trial court's determinations. Pet. Apx. 75a-82a. It also reviewed the performance of Petitioner's counsel, concluding that "appointed counsel's representation did not deprive Mother of a fundamentally fair parental termination proceeding." Pet. Apx. 73a; *see* Pet. Apx. 73a-75a. Even the dissent agreed that a review of the record indicated that Petitioner received a fundamentally fair termination proceeding. *See* Pet. Apx. 92a.

The court's decision not only comports with the Fourteenth Amendment's requirement of fundamentally fair proceedings, it also appropriately balances parental rights with the welfare of Tennessee's children. It is plain that "transporting the structure of the criminal law, featuring as it does the opportunity for repeated re-examination of the original court judgment through ineffectiveness claims and post-conviction processes, has the potential for doing serious harm to children whose lives have by definition already been very difficult." *Baker v. Marion Cnty. Office of Family & Children*, 810 N.E.2d 1035, 1038-39 (Ind. 2004). And this Court's precedents likewise acknowledge the harms of impermanence: "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." *Lehman v. Lycoming Cnty. Children's Servs.*, 458 U.S. 502, 513-514 (1982). No



child should ever fear that her adoptive home could be lost after a long-shot collateral attack on a final parental-termination order—especially a child who has already suffered more than most.

While Petitioner would understandably prefer a post-termination action allowing a second chance to defeat the termination of her parental rights, the Constitution does not, as the Tennessee Supreme Court properly concluded, require the adoption of such a procedure. Tennessee's existing safeguards are constitutionally adequate and provide the fundamental fairness guaranteed to parents by the Fourteenth Amendment in parental-termination proceedings. *See Lassiter*, 452 U.S. at 27.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

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