No. 21-955

IN THE

Supreme Court of the United States

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS, *ET AL.*,

Petitioners,

v.

GEMINI INSURANCE COMPANY, *et al.*,

Respondents.

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

REPLY BRIEF

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ARGUMENT

I. The Louisiana Supreme Court's holding that children given in adoption have *one* right of action for the wrongful death of their adoptive parents and relatives but have *no* right of action for their biological parents, while a child born outside of marriage presumed to be the child of another *has* two rights of action is inherently unequal and triggers heightened scrutiny.

The category of beneficiaries after "children of the deceased" under La. C.C. arts.2315.1 and 2315.2 are the parents of the deceased. Grandfathers and grandmothers whose child dispose of their child by adoption stand to benefit from the death of their child if this decision stands. But not the adopted biological child, even though they might inherit from their biological parent. Louisiana has said *no* to this alternative. Putting away a child and their rights is abhorrent.

Respondents argue the adopted child has a "new family," suggesting "...both non-adopted and adopted children ...have a right to sue." (Brief of Respondent to Petition for Writ for Certiorari, p.7). This is not true. Children do *not* have a right of action for the death of their biological parents *upon adoption* if the Louisiana Supreme Court's construction of La. C.C. art. 199 is upheld. If born outside of marriage, not adopted and presumed by law to be the child of another man they have *two* rights of action. This disparate treatment is inherently *unequal* and discourages, rather than promotes, adoption.

The State of Louisiana endeavors to guard *everyone*, especially children. If the decision of the Louisiana

Supreme Court stands, children lose the right to pursue claims for the death of their biological parents and siblings upon their adoption. *All* children lose their rights. Those born outside of marriage *also* lose the right to pursue claims for the death of their biological parents and siblings upon their adoption. A child born outside of marriage may have two (2) fathers, one as presumed by law (such as adoption) and a biological father by nature. *Warren v. Richard*, 296 So.2d 813, 816-817 (La. 1974). They have two rights of action for wrongful death as long as they are not adopted. If they are adopted, a right of action is lost under this ruling. Adoptions are therefore discouraged. Such treatment is inherently *unequal.*

A child has no voice in its adoption. Their rights should not be affected by parental decisions. The Louisiana legislature has approved of this "dual" paternity. See, e.g. La. C.C. art. 196. Some "legal" presumptions of paternity may be invoked "...only on behalf of the child." Id. Filiation is *not* a one-way street. Parents may surrender their rights upon adoption; not children.

The fundamental flaw in respondent, Gemini Insurance Company's argument that Louisiana law "... allows adopted children an equal, *though not identical* right of action as non-adopted children" (emphasis added) for the death of their biological parent is that it is simply not true. *Warren v. Richard,* 296 So2d. 813, 816-817 (La. 1974). Appendix B, p. 31-24a. In *Warren* the Louisiana Supreme Court held that "an illegitimate child could recover for the wrongful death of her biological father when, at the same time she was also the legitimate child of another man under the law." Appendix B. p.31a-37a, concurrence by Johnson, C.J. in opinion before rehearing,

Rismiller v. Gemini Insurance Company, 202-03 (La. 12/11/20), 2020 WL 7310506 *p. 6-8, *Warren* cited *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U.S. 73,88 S.Ct. 1515,20 L.Ed.2d 441 (1968), *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) and *Gomez* v. *Perez,* 409 U.S. 535, 93 S.Ct. 872,35 L.Ed.2d 56 (1973) and concluded that to hold otherwise would contravene these opinions and be unconstitutional as a denial of Equal Protection of the law.

Examples of legal presumptions of paternity under the Louisiana Civil Code are many. La. C.C. art. 185 ("The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the termination of the marriage."), La. C.C. art. 195 ("a man who marries the mother of a child" and executes an authentic act of acknowledgment is "presumed to be the father of that child"), La. C.C. art. 196, (Acknowledgment by authentic act, *but*, "The presumption can be invoked only on behalf of the child."). In this case, the presumption is La. C.C. art. 185. La. C.C. art. 3506(8) defines children as "persons born of marriage" and persons born "outside of the marriage."

Therefore, there are many instances under Louisiana law where a child may have two (2) fathers, one "legal" father and one natural father. Adoption is merely one. Evidence used to establish paternity is, however, *biological*, i.e. DNA. La. C.C. art. 1901. This is not surprising as" ... the critical requirement for classification of a person as a child ... is the *biological relationship* between the tort victim and the child." (emphasis added).

Jenkins v. Mangano Corp., 00-0790 (La. 11/28/00), 774 So.2d 101, 103 citing *Warren,* Id.

There is nothing equal at all in granting two causes of action to unadopted children who have two fathers, one biological and one under law, and denying the right of action to sue for the death of a biological parent or siblings to adopted children. This treatment is inherently *unequal* and discourages adoptions.

La. C.C. art. 199 as construed is, therefore, unequal in its treatment of adopted children. The distinction is based on the legitimacy of their birth, i.e. whether born in or outside of marriage. This distinction makes them a semi-suspect class triggering heightened scrutiny and puts the burden of proof on the State to show an important governmental interest to justify the disparate treatment. *Clark, v. Jeter*, 450 U.S. 456, 486, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988). In this case, the State has not attempted to carry that burden. In fact, the State has sided with the Petitioners. "[T]his Court could reasonably read the phrase "except as otherwise provided by law" in Article 199 to exclude wrongful death and survival actions from the termination of filiation." Brief of the Attorney General, State of Louisiana, p. 5. The Louisiana Supreme Court, on rehearing, chose not to do so. Such a statement by the Attorney General of the State of Louisiana is hardly surprising, as state legislative policy has expressly declared that continued involvement of biological relatives in the life of the adopted minor child "do not violate any public policy of this State." La. Ch. Code art. 1269.1.

La. C.C. art. 199 is part of the Louisiana Civil Code, as are La. C.C. arts. 2315.1 and 2315.2. *King v. Cancienne*, 316

So.2d 366 (1975), (referring to putative spouse provisions in La. C.C. arts 117 and 118 to define "spouse"). This is apparent by the Louisiana Supreme Court's reference to La. C.C. art. 199 in defining the effects of adoption.

Rights of action to pursue wrongful death and survival actions do not arise until the wrongful act occurs and the victim dies. In 2009 the Louisiana legislature repealed La. C.C. art. 214 which divested children of their "legal rights" and replaced it with La. C.C. art. 199 in La. Acts 2009, No. 3, §4 which provides that "The provisions of this Act relative to the enactment of C.C. art. 199 and 200 are declared to be curative and remedial and therefore shall be applied retroactively to January 1, 2009 as well as prospectively."[1] There is nothing *sui generis* about La. C.C. arts. 2315.1 and 2315.2. They are part of the Louisiana Civil Code. *King*, Id.

Reliance upon federal immigration cases to avoid higher scrutiny is also in error. Immigration laws that discriminated on the adoption status of the minor child were "...repealed by the Child Citizenship Act of 2000, Pub. L. 106-395, 114 Stat. 1631, codified at 8 U.S.C. §1431 et. seq. and replaced with a more generous provision that places adopted children on equal footing." *Martinez v. Attorney General United States*, 761 Fed. Appx. 133, 134 (3rd Cir. 2019). Rational basis review was assumed for all immigration cases, see, e.g. *Smart v. Ashcroft*, 401 F.3d 119, 122 (2nd Cir. 2005) until *Sessions v. Morales-Santana*, ___ U.S. ___, 137 S.Ct. 1678, 198 L. Ed.2d 1678 (2017)

1. La. C.C. art 200 provides that "The adoption of minors is also governed by the provisions of the Children's Code." Reliance upon La. Ch. Code art. 1256 by Respondents is, therefore, in error.

where this Court held, *inter alia*, that "[a] challenged law does not receive minimal scrutiny merely because it is related to immigration." *Dent v. Sessions* 900 F.3d 1075, 1081 (9th Cir. 2018). In the *Dent* case the court performed an equal protection analysis and utilized a rational basis review as to the adoptive parents (not the child) and upheld the statute due to legitimate concerns of deterring immigration fraud. Id at 1082. Such interests justifying this construction of La. C.C. art. 199 to exclude causes of action to children given in adoption for the death of biological relatives have *not* been advanced by the State of Louisiana in this case. Instead, the attorney general has counseled in favor of judicial restraint urging that La. C.C. art. 199 be construed in a manner that avoids this constitutional question.

II. This is an Equal Protection case; not a Substantive Due Process case.

Petitioners do not seek a declaration that a cause of action for the deaths of relatives is a fundamental, though unremunerated, right, *Obergefell v. Hodges*, 576 U.S. 664, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), although the two often converge in traditional Equal Protection analysis. They merely seek the heightened scrutiny of traditional Equal Protection analysis, the shifting of the burden of proof for the state to show an important governmental interest and for the Louisiana Supreme Court to exercise judicial restraint. *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2256, 138 L.Ed.2d 772 (1997). They seek the recognition of the political process based upon sound prior Equal Protection cases from this Court. The construction of La. C.C. art. 199 must be based on "... something more than [the Louisiana Supreme Court's]

own beliefs." *Obergefell*, Id. at U.S. 706, S.Ct. 2623, (C.J. Roberts dissenting).

CONCLUSION

The Writ of Certiorari should be granted based upon *Levy, Glona, Weber* and *Gomez* and the decision by the Louisiana Supreme Court reversed.

Respectfully submitted:

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