No. 23-_____

In the Supreme Court of the United States

KEITH ANDREWS,

Petitioner,

v.

JARRED BRANDON KINNETT, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a biological father of the child of a married woman have a right to notice of his paternity before any prescription or peremption can extinguish his right to avow paternity?

2. Where the state opens the door to the biological father to petition for filiation of a child born of a married woman, and that father seizes the opportunity to exercise his parental duties and rights at the first opportunity, does the biological father become vested in a fundamental right to parent his child?

3. Should a married woman's silence as to the suspected true paternity of her baby constitute bad faith deception of the biological father?

PARTIES TO THE PROCEEDINGS

Petitioner and
Plaintiff- Appellant in Intervention below

- Keith Andrews, Biological father of GJK

Respondent and
Defendants-Appellees in Intervention below

- Karen Cohen Kinnett, Mother of GJK
- Jarred Brandon Kinnett, legal father of GJK

Respondent and Interested Party
Pursuant to LA Rev Stat 9:345

- GJK, a minor child

Respondent and Interested Party
Pursuant to 28 U.S.C. § 2403(b)

- Jeff Landry, Attorney General of the State of Louisiana

LIST OF PROCEEDINGS

Supreme Court of Louisiana

No. 17-CA-625

Karen Cohen Kinnett, Appellee vs. Jared Brandon Kinnett, Appellee (Keith Andrews, Intervenor/ Appellant)

Published: 366 So.3d 25

Date of Final Opinion: June 27, 2023

Fifth Circuit Court of Appeal, State of Louisiana

No. 17-CA-625

Karen Cohen Kinnett, Appellant vs. Jared Brandon Kinnett, Appellant (Keith Andrews, Intervenor/ Appellee)

Published: 355 So.3d 181

Date of Final Opinion: December 28, 2022

24th Judicial District Court, Parish of Jefferson, State of Louisiana

No. 768-195, Div. E

Karren Cohen Kinnett, Keith Edward Andrews v. Jarred Brandon Kinnett, State of Louisiana

Date of Trial Court Judgment: January 10, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

PROCEEDINGS FOLLOWING REMAND

INITIAL APPEAL

TABLE OF CONTENTS – Continued

Page

DISTRICT COURT

STATUTORY TEXT

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana on the constitutionality of La. C.C. art. 198 is published as *Kinnett v. Kinnett*, 2023-00060 (La. 6/27/23), 366 So. 3d 25. (App.1a-37a). This decision reversed the opinion of the Louisiana Fifth Circuit Court of Appeal, published as *Kinnett v. Kinnett,* 17-625, (La. App. 5 Cir. 12/28/2022) 345 So. 3d 1122, which ruled in favor of Petitioner on remand. (App.38a-68a). The opinion of the Supreme Court of Louisiana on the merits and remanding the matter is published as *Kinnett v. Kinnett*, 2020-01134 (La. 10/10/21), 332 So.3d 1149. (App.88a-103a). This decision reversed the opinion of the Fifth Circuit Court of Appeal ruling in favor of Petitioner on the merits, published as *Kinnett v. Kinnett,* 17-625, (La. App. 5 Cir. 08/06/2020) 302 So. 3d 157. (App.104a-193a). The district court opinions are unpublished.

JURISDICTION

The Louisiana Supreme Court issued its final judgment on June 27, 2023 (App.1a-38a). Jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

The constitutionality of a statute of the State of Louisiana is drawn into question herein, therefore, under the requirements of 28 U.S.C. § 2403(b), the Louisiana Attorney General has been served with a copy of this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION

U.S. Const., amend. V

> No person shall . . . .be deprived of life, liberty, or property, without due process of law . . .

U.S. Const., amend. XIV, § 1

> . . . . 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.

LOUISIANA CONSTITUTION

LA Const. art. I, § 2
Due Process of Law

> No person shall be deprived of life, liberty, or property, except by due process of law.

LA Const. art. I, § 3
Right to Individual Dignity

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery

and involuntary servitude are prohibited, except in the latter case as punishment for crime.

LA Const. art. I, § 12
Freedom from Discrimination

In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.

LA Const. art. I, § 22
Access to Courts

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

LOUISIANA STATUTE

La. Civil Code Article 198
Father's action to establish paternity; time period

A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.

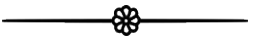
If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years

from the day of the birth of the child, whichever first occurs.

In all cases, the action shall be instituted no later than one year from the day of the death of the child.

The time periods in this Article are peremptive.

Amended by Acts 1944, No. 50; Acts 1948, No. 482, § 1; Acts 1979, No. 607, § 1; Acts 2005, No. 192, § 1, eff. June 29, 2005.



STATEMENT OF THE CASE

Of utmost importance to the present matter is the fact that, unlike all of the other states, Louisiana allows for "dual paternity." That is, Louisiana not only recognizes the husband of the mother as the legal father, but allows for filiation by the biological father of a child born in another's marriage, and in such case allows the biological father to join as a third parent, rather than substituting the biological father for the husband. Under the doctrine of dual paternity, Louisiana recognizes the inherent right of the biological father and the child to be able to legally acknowledge biological fact, and yet still protect the child from being bastardized or stripping the legal father of any rights, if the husband chooses to not disavow. The presumption of the husband's paternity in Louisiana was never meant to be irrebuttable. In this way, the state has opened the door to a biological father exercising his paternal right to parent and, if he seizes that opportunity, that right must necessarily

be protected by the courts. A right without protection is no right at all.

Louisiana law provides that, when a child is born in marriage the child is presumed to be the child of the husband. La. C.C. art. 185. (App.241a-242a). If another man is the father, the biological father has one year from the birth of the child to file an action of avowal. This time period is peremptory, unless the mother in bad faith deceives the biological father, in which case the time runs from the day that he knew or should have known that he is the father of the child. La. C.C. art. 198. Under Louisiana law, if a time period fixed by law for the existence of a right is peremptory, that right is extinguished if not exercised during the peremptive period. La. C.C. art. 3458.

This is a divorce proceeding and this matter arises from the pre-trial exceptions phase in the trial court. As to the issue currently before this court, a final opinion and judgment has been issued by the state's highest court.

Mr. Andrews timely raised the constitutionality of La. C.C. art 198 at the trial of the exceptions to his petition for avowal of paternity, contending that the time limitations of art. 198 infringed upon a biological father's constitutional right to paternity, (App.1 94a-200a). The District Court refused Mr. Andrews' request for time to amend his petition and serve the Louisiana Attorney General and entered a judgment granting the exceptions on the merits. (App.236a-238a). On appeal, the Louisiana 5th Circuit reversed and remanded for a trial on the constitutionality of art. 198. (App.194a-200a). Pretrial proceedings and a trial of the constitutionality of art. 198 were conducted

wherein the District Court refused to allow any evidence to be admitted. (App.205a-209a). This evidence was proffered by Mr. Andrews, and judgment was entered finding art. 198 constitutional. (App.49a, 52a-59a, 69a-72a, 201a-204a). The matter was timely appealed to the Louisiana 5th Circuit Court of Appeal, which first reversed and remanded on the merits. (App104a-158a). On appeal, the Louisiana Supreme Court ("LaSC") reversed on the merits and remanded the matter back to the 5th Circuit Court of Appeal, which found art. 198 unconstitutional and reversed the District Court judgment. (App.88a-102a, 38a-68a). On appeal, the LaSC issued its June 27, 2023, opinion finding art. 198 constitutional. (App.1a-32a).

In the present matter, Karen Kinnett had an intermittent affair with Keith Andrews over the course of 13 months and became pregnant from their final encounter in November of 2014. With the exception of two text messages between Ms. Kinnett and Mr. Andrews five days later, the parties did not communicate thereafter for over five months, until a text exchange on May 7, 2015. Ms. Kinnett was pregnant in May and testified that she knew then that Mr. Andrews was possibly her child's father. She did not, however, tell Mr. Andrews then that she was pregnant or that he might be the father. G.J.K. was born on August 5, 2015. Mr. Andrews testified that he had made several attempts to contact Ms. Kinnett after the May 7, 2015 text exchange, without response.

On September 1, 2015, Mr. Andrews tried texting Ms. Kinnett again, and she responded. He testified that she apologized for not answering his texts and explained that she had had sexual relations with her husband one night, had gotten pregnant, and had

had a baby with her husband. She further explained that she was staying in her marriage for the sake of the children. Mr. Andrews testified that, during the September 1st conversation, it crossed his mind that he could be the child's father, but he testified further that, at that point, he did not recall the date of his last sexual encounter with Ms. Kinnett, and had no reason to doubt her insinuation that her husband was the father. During that communication, Ms. Kinnett did not tell Mr. Andrews when G.J.K. had been born or how old he was. Ms. Kinnett, while initially testifying that, "I told him it was my husband's child," eventually restated, "I think the message was that I had had a baby and that I was trying to work on my marriage."

After the September 1, 2015 text exchange, communication between Mr. Andrews and Ms. Kinnett continued in the form of occasional texts as friends. At no time during these exchanges did Karen Kinnett tell Mr. Andrews that he might be the father of her son.

Fifteen months later, on December 9, 2016, some four months after the one-year-from-birth time period contained in La. C.C. art. 198 had lapsed, Ms. Kinnett called Mr. Andrews by phone. During this conversation, she informed him that she had performed a sibling DNA test on her two children, which indicated that G.J.K. and his sister B.A.K. did not share the same biological father, to a 95% certainty.

Mr. Andrews then met Ms. Kinnett and G.J.K. the very next day and obtained a direct DNA paternity test which determined that he is 99.999999998% likely the father of GJK. Karen Kinnett told her husband Brandon Kinnett the news of GJK's pater-

nity in early January. Mr. Kinnett left the marital abode immediately and did not return.

Karen Kinnett and her two children were left without a means of support and in a home that she could not afford. In the following months, Keith Andrews helped Ms. Kinnett find an apartment for herself and the children, and pay the security deposit and first month's rent. Mr. Andrews provided funds for support and assisted in parenting the child until Karen Kinnett cut him off from contact in April of 2017. (This happened immediately after the first hearing on the exceptions wherein Ms. Kinnett's deceit and infidelity were made known in open court in the presence of her family and in-laws.) (*See e.g*. App.130a-144a, 157a, 224a). Karen Kinnett filed a Petition for Divorce from her husband on January 20, 2017. Brandon Kinnett filed his Answer to the Petition on February 6, 2017, and Appellant, Keith Edward Andrews, filed a Motion and Petition for Intervention claiming paternity of the minor child G.J.K. and requesting joint custody on February 10, 2017. This was less than 60 days after Mr. Andrews learned of his paternity. On February 21, 2017, Brandon Kinnett filed Peremptory Exceptions of No Right of Action, Prescription and Peremption. Oppositions to the Exceptions were filed by both Appellant, and Karen Kinnett. These were first heard before Domestic Commissioner Bailey, who, in written reasons, granted the exception of peremption. (App.224a-227a).

Mr. Andrews appealed this decision to the district court, where two separate trials were held. The first trial was on the merits of the law and facts relevant to the exceptions, and the second was on the constitutionality of La. C.C. article 198. The first trial judgment

(App.214a-215a) and appeal (App.104a-158a, 88a-103a) were based on the finding of the trial court that the mother did not know who the father of GJK was, but that Mr. Andrews knew or should have known that he was the father. The case was decided in the context of a divorce proceeding with the trial judge finding there was no intact family, and recognizing both that a 2/2/3 custody order was already in place with the husband and wife living separate and apart, and the clear fact, beyond any doubt, that Mr. Andrews was the biological father. Nevertheless, the trial court held that there was no bad faith deception on the part of the mother, that she had no duty to disclose her suspicions, and therefore the peremptive period of one year from the date of birth of the child applied and the avowal action was prescribed. The Louisiana 5th Circuit Court of Appeal reversed the trial court, finding that: 1) the mother clearly had superior knowledge of her pregnancy and conception (and therefore the paternity of the child) than the biological father; 2) that she misled Mr. Andrews as to his potential paternity, through both her words and silence, and, 3) the bad faith deception provision in La. C.C. art. 198 was thereby triggered, causing the one-year period to start on the date that Andrews took the DNA paternity test and knew the fact of his paternity. (App.104a-158a).

The Louisiana Supreme Court ("LaSC") reversed the 5th Circuit and restored the opinion of the trial court, specifically stating that the mother's silence is not bad faith as long as she had a subjective "reasonable" belief that her husband was the father, despite knowledge of the possibility of another man's paternity. The court also remanded the case back to the 5th

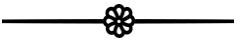
Circuit for a determination of the constitutionality of La. C.C. art. 198. (App.88a-103a).

On remand for the constitutional issues, the 5th Circuit Court of Appeal found that La. C.C. Art. 198 is unconstitutional as applied to Mr. Andrews. (App. 38a-68a). The court held that, because he grasped the first opportunity to parent the child, he was vested in a fundamental right to parent, and that any prescriptive or peremptory period could not begin to toll until he had notice of the fact of his paternity. The Court found that Article 198 as applied to the facts of this case was violative of Mr. Andrews' right to due process under the Louisiana Constitution. (App.68a).

The LaSC again reversed this opinion stating that the legislature was free to establish any time period it wanted to for filiation actions and it was not in violation of any constitutional protections. (App.31a-32a). Specifically, the La. Supreme Court cited Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*, despite the fact that the Court in prior decisions, had found that case to be inapplicable in Louisiana because, 1) California did not allow any claims of filiation to a child born of marriage and Louisiana does, and 2) uniquely among the several states, Louisiana has dual paternity. That is, the husband is not removed as the child's father but rather the biological father is added as a third parent. (*See*, *T.D. v. M.M.M.*, 730 So.2d 873 (La. 1999)).

This application asks this Court to find that the peremptory prescriptive period in La. C.C. art. 198 is unconstitutional both as applied and on its face because in Louisiana, when the biological father has seized the opportunity to parent his child, he is vested with a fundamental right to parent, which the courts

are bound to protect, and because a biological father has a right to notice of his paternity prior to the peremptive period extinguishing his paternity. Alternatively, this Application asks the U.S. Supreme Court to reverse the LaSC in keeping with the reasoning of the Louisiana 5th Circuit Court of Appeal and clarify that the mother's silence in such a situation is bad faith deception.



REASONS FOR GRANTING THE PETITION

The Louisiana Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court (Sup. Ct. R. 10(c)).

I. THE LASC HAS RULED THAT THERE ARE NO CONSTITUTIONAL RIGHTS FOR A BIOLOGICAL FATHER REGARDING HIS CHILD BORN IN ANOTHER'S MARRIAGE, MISAPPLYING *MICHAEL H. V. GERALD D.*, AND ITS OWN PRECEDENT.

Does a Biological Father Ever have a fundamental right to parent his Child?

Where the state opens the door to the biological father to petition for Avowal of a child born of a married woman, and that father seizes the opportunity to exercise his parental duties and rights at the first opportunity, does the biological father become vested in a fundamental right to parent his child?

This case presents a novel question of, when a state opens the door to the biological father for avowal of a child born of a married woman, in the context of a dual paternity regime, does the biological father become vested in a fundamental right to parent his child assuming the father seized the opportunity to exercise his parental duties and rights at the first opportunity?

The LaSC has previously recognized that a biological father's right to the opportunity to develop a relationship with his child is a constitutionally protected interest deserving of Due Process protection. *In re A.J.F.*, 764 So.2d 47 (La. 2000). Louisiana specifically extends this right to a biological father affording him the right to avow his illegitimate children,[1,2] because a father's right to avowal is fundamental.[3, 4] If the right to avow and exercise of paternal rights are fundamental and among the oldest recognized by the courts, do those rights simply disappear because the child is born inside another's marriage?

Louisiana jurisprudence and statutes expressly recognize dual paternity, *See Warren v. Richard*, 296 So.2d 813, 816-17 (La. 1974); *Smith v. Cole*, 553 So.2d

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1 *In re A.J.F.* at 55. (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)).

2 *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (internal quotations omitted).

3 *In re A.J.F.* at 55, 57 (2000).

4 *See also* Louisiana Children's Code Article 101. Preamble " . . . *the role of the state in the family is limited and should only be asserted when there is a serious threat to the family, the parents, or the child . . . "*

847 (La. 1989) and La. C.C. art. 198. It is the position of the Petitioner, Mr. Andrews, that Louisiana has opened the door to avowal both through La. C.C. art. 198, et al., and its dual paternity regime, and that, as the biological father, he thus has rights to due process and equal protection that must be addressed before he is deprived of his fundamental right to avow his child.

The Louisiana 5th Circuit Court of Appeal correctly found that a biological father who grasps the opportunity to exercise his paternal rights, becomes vested in those rights, which are fundamental, cognizable and worthy of protection by the courts, regardless of whether or not the child is born into the marriage of another.

The La. Supreme Court, misapplying precedential cases, from the U.S. Supreme Court and its own precedents, reversed the 5th Circuit and declared that under *Michael H. v. Gerald D.*, 491 U.S. 110 at 141, a biological father of a child born of another's marriage has no cognizable rights under the U.S. or Louisiana constitutions. The LaSC had previously rejected the concept that only biological fathers with a "fully developed relationship" with their children possess a constitutionally protected interest in parenthood. *In re: Adoption of B.G.S.*, 556 So.2d 545 at 550-51. *See also*, *State in the Matter of R.E.,* 642 So.2d 889 (La. Ct. App. 1994) (concurrence emphasizing that the father had never had the opportunity to meet his child or develop a substantial relationship where the mother surrendered the child days after the birth); *Lehr v. Robinson*, 463 U.S. 248 at 271 (1983) (dissent pointing out that the biological father would have developed a substantial relationship with his child if

the mother had not hidden the child's whereabouts from him).

Relying upon the line of United States Supreme Court cases relevant to the issue, the LaSC previously found that a biological father has "cognizable constitutional rights to parenthood," *In re A.J.F.*, 764 So.2d at 57, when he has "dedicated himself to his paternity when there is yet time for him to make a valuable contribution to the child's development." *B.G.S.*, 556 So.2d at 550, 553 (quoting *Lehr*, 463 U.S. at 261-62.) Therefore, a "fully committed unwed father of a newborn child has a constitutionally protected interest in his opportunity to develop a mutually beneficial emotional or psychological bond with his child" which is "defeasible if not preserved by dedicated, opportune fatherly action." *B.G.S.* at 550.

> The interest of a biological parent in having an opportunity to establish a relationship with his child is one of those liberties of which no person may be deprived without due process of law under our state constitution.[5]

B.G.S., 556 So.2d at 550, 553 (La. 1990) (quoting *Lehr*, 463 U.S. at 261).

This constitutionally protected interest does not cease to exist when the biological father's child is presumed to be the child of another man. *Finnerty v.*

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[5] Recognizing that the "reciprocal rights and obligations of natural parents and children" are included among the individual rights discussed in Article 1, section 24 of the Louisiana Constitution, which provides that the "enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state." *B.G.S.* 556 So.2d at 556, 551.

Boyett, 469 So.2d 287 (La. Ct. App. 1985). The "biological relationship does entitle a natural father to at least some opportunity to develop a personal relationship with his child, and thus to assume a responsible role in the future of his child." *See Smith v. Jones*, 566 So.2d 408, 413 (La. Ct. App. 1990), writ denied sub nom. (*See also*, *Kemph v. Nolan*, 569 So.2d 981 (La. 1990) (denying the biological father the right to avow paternity also denied him of his opportunity to establish a relationship with his child, which, according to the relevant precedent, he was obliged to take advantage of in order to have his parental rights protected under the constitution).)

In rendering its opinion herein of June 27, 2023, (*Kinnett II*) (App.1a-37a) the LaSC reversed the opinion of the Louisiana 5th Circuit Court of Appeal. In doing so, the LaSC stated that the legislature was free to establish any time period it wanted for filiation actions and that it was not in violation of any constitutional protections. The LaSC dismissed any relevance of *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), because the child in that case was not born within another's marriage. Likewise, the Court glossed over and misapplied the foundational principals underlying this Court's opinion in *Lehr v Robinson*, 463 U.S. 248 (1983).

In the case of an unwed father, this Court, in *Lehr*, stated:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's

> future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Lehr v. Robertson, 463 U.S. at 262 (footnote omitted, emphasis added).

1. The Misapplication of *Michael H.*

Despite acknowledging these precedents, the LaSC refused to recognize that Mr. Andrews was possessed of any rights or that they are cognizable and worthy of protection by the courts. Instead, the La.SC relied on the plurality opinion in *Michael H. v. Gerald D*., 491 U.S. 110, 141, 109 S.Ct. at 2352, 105 L.Ed.2d at 118 (1989), writing in its opinion that,

> . . . the *Michael H. v. Gerald D*. case presents the same issue under the same circumstances as that presented in this case: what rights does a putative biological father, who sired a child with a married woman, have when there is a legal father to whom the mother was married and living with when the child was conceived and born? The answer provided by the U.S. Supreme Court in *Michael H. v. Gerald D*. was that when a choice must be made between two competing interests such as these (the inability of a biological father to parent a child "adulterously begotten" versus the preservation of the integrity of a "traditional family unit") the Court "leaves that to the

> people of [the state]," through their elected legislators.

Kinnett v Kinnett, 2023-CJ-00060, 366 So.3d 25, (La. June 27, 2023). (*Kinnett II*) (App.1a-37a).

The conclusion by the LaSC in this present matter (*Kinnett II*) is fundamentally incorrect and a misapplication of *Michael H.* for several reasons. The LaSC had previously found the *Michael H.* case to be inapplicable in Louisiana because: 1) California did not allow any claims of filiation to a child born of marriage at the time of the case while Louisiana does; 2) The couple in the *Michael H.* case was not divorcing whereas the couple in the case at bar were divorcing (as is the case herein); 3) Louisiana recognizes the fundamental right to parent and the right to avow a child; and, 4) uniquely among the several states, Louisiana has dual paternity. That is, the husband is not removed as the child's father but rather the biological father is added as a third parent. (*See*, *T.D. v. M.M.M.*, 730 So.2d 873) (concurrence of Justice Knolls).)

In *Michael H. v. Gerald D.*, *supra*, the state of California had categorically denied any right to avowal of a child born of a legal marriage, and this Court's plurality opinion found that, in such circumstances, there is no fundamental liberty interest. However, unlike California, in Louisiana the law allows for avowal actions, even where the child is born of the marriage to another man, and the jurisprudence does acknowledge a fundamental right to parent, as stated in *In re A.J.F.*, 2000-CJ-0948, 764 So.2d 47 (La. 2000) (which has more recently been codified in the amendment to La. Civil Code article 136). Further, Louisiana jurisprudence and statutes expressly recognize dual

paternity, so the legal and factual scenarios in the two cases are substantively different.

The Louisiana court also improperly relied on *Michael H*. for the principle that ruling for one father would diminish the rights of the other father, given that in Louisiana, this is not the case.

The U.S. Supreme Court in *Michael H*. (according to the plurality opinion) was forced to pick between the rights of two fathers. This conclusion is in no way applicable to the present case, as the two fathers are not mutually exclusive under Louisiana's dual paternity regime. To provide protection for Petitioner only provides greater protection for G.J.K., and importantly, does not deny the bond created between the husband and G.J.K. However, to deny constitutional protection of due process to Petitioner, may, and most likely will, have the effect of denying rights, resources and protections to G.J.K. The ruling against Mr. Andrews has only strengthened the likelihood, as established by the expert child psychiatrist testimony proffered by Mr. Andrews, that G.J.K. will be harmed when he ultimately learns of his paternity and that the Kinnetts kept his biological father from him and that "the application of Article 198 in GJK's case is more likely to cause him harm than prevent harm." (App.58a-60a, 112a).

Michael H. was relied on as precedent by the LaSC despite being a plurality opinion. Although this Court addressed therein the question of whether a biological father may avow a child presumed to be the child of another man, *Michael H* is not controlling as to the fundamental right of avowal. This Court has stated that when, "no single rationale explaining the result enjoys the assent of five Justices, the

holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." The narrow grounds for which *Michael H.* was decided is that the particular California Rule of Evidence § 621, which states that a presumption of paternity may be rebutted only by the mother or her husband, did not violate the natural father's due process rights. Justice Scalia believed that because there is no historically recognized right, or no common law tradition that gives the putative father a right to establish paternity when there is another presumed father, that this is, and should be, the end of the constitutional analysis. However, this rationale was rejected by six of the eight Justices. Justice O'Connor, joined by Justice Kennedy, did not agree that history and tradition were the only mode by which a substantive right could be found or protected under the Constitution. Justice O'Connor concluded that she "would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." Here, Louisiana jurisprudence and its unique dual paternity regime clearly constitute something "unanticipated" as cautioned by Justice O'Connor. In addition, Justice Stevens' critique of the rationale clearly shows no interest in denying the right completely:

> Today's plurality, however, does not ask whether parenthood is an interest that historically has received our attention and protection . . . . Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such

> protection . . . The plurality's interpretive method is more than novel; it is misguided . . .

Michael H. v. Gerald G., 491 U.S. 110 at 133 (1989).

Justice Stevens flatly disagreed with the plurality opinion's conclusion that a natural father can never have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth. (*Michael H.* at 2347 (Stevens, J., concurring in judgment).

And, Justices White and Brennan wrote in dissent,

> . . . the fact that Michael H. is the biological father of Victoria is to me highly relevant to whether he has rights, as a father or otherwise, with respect to the child. Because I believe that Michael H. has a liberty interest that cannot be denied without due process of the law, I must dissent.

Michael H. v. Gerald D., 491 U.S. 110 (1989)

The rationale in *Michael H.* is at best questionable, and even then, it was only applied narrowly to the particular California statute and the specific appellant. As the LaSC stated in *T.D. v. M.M.M.*, "a biological father clearly has the right to avow his illegitimate child under the law of this state." (*T.D. v. M.M.M.*, 730 So.2d 873 at 876) Despite this precedential ruling, the same court denied that your Petitioner had any such right.

It is important to note that none of the conditions and jurisprudence giving rise to the *Michael H.* decision are still in effect in California. The LaSC is

relying on a case that is not only distinguishable in almost every factual way and not precedential, it is based on laws that no longer exist. The time is ripe for this Court to revisit the issue of a biological father's rights to due process (including notice) and equal protection of the laws, vis-à-vis avowal of his child.

This present writ application presents the Court with the opportunity to settle this issue, or to at least clarify it. Petitioner asks that this Court find that, when the state has opened the door to a biological father's right to avowal, the courts have a duty to protect that right and the state may not then deny that right without notice, nor may it leave the determination of that right in the hands of a third non-neutral party, as is the mother in this case. This is especially true in light of Louisiana's dual paternity regime.

2. Custom and Tradition

Even using Justice Scalia's reasoning that a right has to be based in history and traditions, the law in Louisiana regarding avowal qualifies the natural father for protection of a fundamental right. At the same time that the United States Supreme Court began to recognize the constitutional rights of "illegitimate" children, the LaSC recognized dual paternity in *Warren v. Richard*, 296 So.2d 813, 816-17 (almost 50 years of tradition and history) and the legislature began corresponding revisions to the Louisiana Civil Code. Furthermore, as early as 1989, LaSC acknowledged in *Smith v. Cole*, that Louisiana jurisprudence and law were already slowly whittling away at the idea that Presumption of Paternity to the husband

of the mother of the child was an irrebuttable presumption. The Court in *Smith v. Cole* confirmed that "[r]ecognition of actual paternity, through filiation actions brought by the legitimate child, the biological father or the state, does not affect the child's statutory classification of legitimacy," and that "[l]egitimate children cannot be bastardized by succeeding proof of actual parentage." *Smith v. Cole*, 553 So.2d 847, 854. There is no reason that the LaSC or this Court should find that *Michael H.* stands for the absolute restriction on the fundamental right to establish paternity in Louisiana.

In 1999, in analyzing the facts of *Michael H.*, the LaSC stated, in *T.D. v M.M.M.*, that they, too, found the case before them distinguishable, because,

> . . . unlike Louisiana law, a California statute specifically prohibits dual paternity and mandates that the husband of the mother of the child born during marriage is conclusively presumed to be the father. Such a finding is not tenable in Louisiana because the law of this State allows recognition of dual paternity and Article 184 presumption of paternity is rebuttable.

T.D. v. M.M.M., 730 So.2d 873, 875 (Emphasis added).

In the present matter, the biological father grasped the opportunity to parent and exercise his paternal rights and duties at the first possible moment. Because of this, he became vested in his fundamental right to parent his child which is cognizable by the courts and worthy of the court's protections.

Ultimately, the LaSC in the present matter found that it is completely and exclusively within the

legislative prerogative to make whatever limitations it wants to the rights of the biological father, without restriction by the courts, thereby shirking its responsibility to give any rigorous analysis to the constitutional challenge.

This application invites the Court to clarify that a biological father does have a fundamental right of avowal of his paternity when the state has opened the door to such actions, and that such a right is cognizable and worthy of protection by the courts.

II. DOES A BIOLOGICAL FATHER OF THE CHILD OF A MARRIED WOMAN HAVE A RIGHT TO NOTICE OF HIS PATERNITY BEFORE ANY PRESCRIPTION OR PEREMPTION CAN EXTINGUISH HIS RIGHT TO AVOW HIS PATERNITY?

The LaSC has ruled that the biological father of the child of a married woman has no constitutional rights, and therefore it is not necessary that he receive notice of his paternity before the prescriptive period of La. C.C. art. 198 begins to toll. Thereby, the Court extinguished Mr. Andrews' right to avow his paternity without due process.

The LaSC's recent interpretation of 'bad faith' as set forth in its first opinion in this matter (*Kinnett I*), instructs that "'a mother who knows another man is possibly the father of her child' is not in bad faith in failing to disclose that knowledge of possible paternity after the child's birth if a trial judge finds credible the mother's belief that one man, rather than the other —whom she had sexual relations within a single . . . conception period—is the father." *Kinnett*, 345 So.3d at 1129-30, quoting *Kinnett*, 332 So.3d at 1156. (App. 47a).

The LaSC's interpretation of La. C.C. Art. 198 has placed the biological father's rights completely at the mercy of the mother. Ms. Kinnett, by failing to disclose material facts to Mr. Andrews for the nine months of her pregnancy, including even the fact that she was pregnant, and for over a year after the birth of the child, has effectively extinguished Mr. Andrews constitutional right to avowal and his paternity.

The LaSC held that the mother in such a situation has no duty to inform a potential father of her suspicions about his paternity or to conduct her own investigation, but that the potential father has a duty, upon any suspicion of potential paternity, to investigate, and to file suit within one year of the child's birth, even without actual knowledge of his paternity and even with strong indications from the mother that he is not the father. With no duty to act quickly or to notify, the mother herself can then raise peremption as a defense to an avowal action brought by the biological father under Article 198. In some scenarios, a biological father may have no knowledge that a child has been born at all, yet he may be deprived of the opportunity to establish his constitutional right to parent his child by the mother's silence.

If the LaSC's interpretation is upheld, then every man who has sexual relations with a married woman would have a duty to investigate that woman for up to 21 months after coitus. He must follow her life to determine if she has a child and insert himself into the couple's marriage and demand a paternity test, and/or file suit to obtain same, and declare his paternity. Every man in Louisiana would have to do this. Families would be torn apart and thrown into chaos and children would be harmed by this absurd

reasoning, which, without doubt, would result in many incorrect claims and damage to intact families without justification, something that is clearly contrary to many centuries of custom and law. This will all happen even if the child turns out to actually be the child of the husband. Requiring that the natural father receive notice of his paternity before the prescriptive period begins to toll stops these scenarios and truly limits the potential for disruption of any intact family unit.

This is one of the several issues testified to by Mr. Andrews' expert witness, Dr. Loretta Sonnier, whose expert report and testimony were admitted by the La. 5th Cir. and LaSC as proffered at trial: "the application of Article 198 in GJK's case is more likely to cause him harm than prevent harm." (App.112a). That is, the Article, as interpreted by the LaSC, does more harm to the child than it does to protect the child. In this way, the article is violative of the rational basis test for constitutionality.

The La. 5th Circuit further points out, correctly, that "an impartial decision maker is essential to due process." *In re Adoption of B.G.S.*, 556 So.2d 545 (La. 1990). Yet, under the LaSC's opinion in *Kinnett I*, *supra*, the biological mother alone, in many, if not most circumstances, will control whether the biological father is notified of her pregnancy, or of the child's birth, or of the possibility of his paternity based upon facts uniquely within her knowledge. "[T]he placement of this decision in the hands of a potentially adverse decision maker violates the most basic principles of due process under both our state and federal constitutions." *Adoption of B.G.S.* at 556. In this way, the opinion of the LaSC violates the U.S. Constitutional

protections of due process and equal protection set forth in the 5th and 14th amendments.

Procedure By Presumption

Under Art. 198, the natural father's right to avowal is arbitrarily cut off after one year, during which time his rights lie completely in the hands of the mother. It may be easy to pass a law that cuts a biological father's rights off at one year, and it may be the easiest and most efficient way to deal with a difficult issue in the short run. But the easiest way is not the correct way from a due process standpoint. The LaSC in *B.G.S.* set aside the state's reliance on procedure by presumption. The *B.G.S.* court quoted the following passage from *Stanley*, which also criticized procedure by presumption: "Procedure by presumption is always cheaper and easier, ... [But] it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. *Stanley v Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

Based on *Stanley*, the LaSC in *B.G.S.,* then held that, under both U.S. and Louisiana due process protections, procedure by presumption was not a proper substitute for a hearing and a judicial determination of fitness or unfitness to parent, because of the State's minimal interest in family matters.

Like the adoption statute in *B.G.S.*, the La. Legislature, in La. C.C. Article 198, is improperly relying on a presumption that any avowal action brought after one year is *per se* harmful to the child, because of the upheaval of such litigation and its consequences for a child who may be living in an intact family, who may have become attached to the

legal father over many years. (*See* Comment (e) to La. C.C. art. 198; (App.261a-264a). The legislature is presuming that, if a biological father has not brought an avowal action by the end of one year from the birth of the child, then his rights are not worthy of protection.

The fact that Act 192, (2005 Reg Sess.) establishing Art. 198, (App.261a-264a) on its face, equivocates by using "may," *ipso facto* proves that its reliance on procedure by presumption is flawed. "May" must be used because it *cannot* be presumed that all children will be living in an intact family, and it *cannot* be presumed that all children have become attached to the legal father over many years. Therefore, the mandatory termination of the biological father's rights through peremption is improper procedure by presumption. Again, the report and testimony of Dr. Sonnier (proffered at trial) shows how this goal is not served by the Article. Act 192 Comment (e), also states that 2 years is the limit for harm to the child then reduces the limit to 1 year in the body of the article (*See* Act 192 (2005 Reg. Session (La.)) Note (e)), thereby violating the most basic rational basis test of constitutionality. This present case is proof of exactly these scenarios, in light of the pending divorce proceedings, which ultimately led to an interim custody order, there was already upheaval before the avowal action was ever filed. (App.216a-223a).

The issue of paternal rights is fundamental and one of the oldest rights subject to Heightened Scrutiny[6] as expressed by the U.S. Supreme Court, which has opined that "[T]he interest of parents in the care,

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6 *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

custody, and control of their children [. . .] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel, supra.* Furthermore, "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection."[7]

The proceedings herein constitute the legal efforts of Petitioner to assert and exercise his fundamental rights to avow and parent his son, G.J.K., which are unconstitutionally infringed upon by Act 192 and Article 198's one-year peremptive prescription period. There should be no doubt that such paternal rights, including the right to avow, are fundamental rights and subject to heightened scrutiny.

The refusal of the LaSC to give credence to its own precedents and the precedents of this U.S. Supreme Court, to misapply non-precedential cases and refuse to acknowledge basic foundational principals of American jurisprudence requires that this Court reverse the opinions of the LaSC.

This petition asks this Court to acknowledge that, when the state has opened the door to a natural father's right to avow a child born of another's marriage, that right is fundamental and the state may not arbitrarily cut that right off without notice of his paternity, which cannot be left in the biased hands of the mother.

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[7] *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (internal quotation marks omitted, emphasis added).

III. SHOULD WILLFUL SILENCE CONSTITUTE BAD FAITH?

The La. Supreme Court's ruling that a married woman's silence to the biological father as to the suspected true paternity of her child is not bad faith deception violates the biological father's due process rights.

On the merits of the primary claim below, the decision hinged on what constitutes bad faith deception. Specifically, whether willful silence on the part of the mother when she has a suspicion of the true paternity of her child, coupled with her purposely misleading statement that she had a child with her husband, constitutes bad faith deception. Without the relief prayed for herein, the LaSC will have significantly eroded a fundamental foundation of our American jurisprudence.

This Court has never specifically opined on what constitutes bad faith, despite the fact that it is an issue in many cases. Here is an opportunity to not only correct the error of the LaSC, but to clarify what it means to be in bad faith and good faith in American jurisprudence.

BLACK'S LAW DICTIONARY defines "bad faith' as follows:

> bad faith n. (17c) 1. Dishonesty of belief, purpose, or motive <the lawyer filed the pleading in bad faith>. — Also termed mala fides (mal-ə-fI-deez).
>
> "A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in

> judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts § 205 cmt. d (1979).
>
> * * *
>
> *Cf.* GOOD FAITH. — bad-faith, adj.

BLACK'S LAW DICTIONARY (Thompson Reuters, St. Paul, MN, 11th Edition, 2019) emphasis in original.

So, considering this definition, it is clear that bad faith does not require an affirmative act on the part of the mother. It merely requires that she not proceed in good faith or that she failed to perform in such a way as to inhibit the biological father's rights. It is not necessary that she affirmatively lied or that she tried to mislead the biological father, (although in this case it is alleged that she did, in fact, purposely mislead the biological father). It is only necessary that she failed to cooperate in Petitioner's performance of his duty. The fact that she did not investigate or tell the biological father of her suspicions is a lack of diligence and slacking off of her duties, willfully rendering imperfect performance. Silence cannot protect the mother from her own bad faith. The silence itself is bad faith. It is safe to say that one is either in good faith or in bad faith. There is no neutral ground between them.

In the present matter, we know from the record that during the entire course of her pregnancy, Karen Kinnett knew, with some degree of certainty, that her husband was possibly not the father of her child,

and that Mr. Andrews possibly was. Yet she failed to disclose this knowledge or suspicion until it was convenient for her and failed to take any action at all until it was to her own benefit, and only *after* the one-year prescriptive period had run for the biological father to file an avowal action—all in subversion of the rights of the biological father. This is nothing if not bad faith.

Up until her disclosure of the 'sibling DNA test' results to Petitioner—over 18 months after the child was born, Ms. Kinnett proceeded with a lack of diligence and 'slacking off' from her duty to investigate and to disclose her knowledge and suspicions. Karen Kinnett willfully rendered imperfect performance of her duty to disclose facts and suspicions regarding paternity to Keith Andrews. She failed to cooperate in Mr. Andrews' performance of his duty and therefore was in bad faith under the letter of the law in both her actions and her omissions.

Under the LaSC's opinion herein, however, no mother ever need investigate or disclose her suspicions of paternity to anyone. She need only stay silent and the prescriptive period will run out, permanently depriving the biological father of the chance to avow <u>without him even knowing it existed</u>.

By finding that silence is not bad faith, the LaSC deprived Mr. Andrews of the notice requirement of due process. Notice requires some communication, and by allowing Ms. Kinnett's silence to be good faith, the LaSC has pretermitted the notice requirement to Mr. Andrews.

This issue is not a small matter for the state courts, but is, in fact, an unconstitutional deprivation

of Mr. Andrews' due process rights under the United States Constitution. Moreover, if silence of relevant suspicions and knowledge is not bad faith, then other notice requirements under our legal system may be subject to erosion as well. Because of this, it is important that this Supreme Court address the issue clearly and firmly in stating that silence about relevant suspicions and facts by one party is, *ipso facto* or *per se*, bad faith. The potential permutations may otherwise be far reaching, even into contracts and interstate commerce.

CONCLUSION

The LaSC has abandoned both its own and US Supreme Court precedent and misapplied *Michael H.* despite it having previously determined that it had no precedential value in Louisiana. It has refused to acknowledge that a biological father has rights to avowal in Louisiana, despite decades of history to the contrary, and our dual paternity doctrine. It has refused to acknowledge that the natural father should be entitled to some notice of his paternity prior to any prescriptive or peremptive period beginning to run. Further, the LaSC has held that silence is not bad faith, thereby depriving biological fathers of the notice required for due process under the Constitution. If silence of relevant suspicions and knowledge is not bad faith, then our entire system of contracting and civil interactions of all sort are subject to erosion as well.

It is the assertion of the Petitioner that the opinions of the Louisiana 5th Circuit Court of Appeal are correct in both *Kinnett I* (App.104a-193a) and *Kinnett II* (App.38a-68a). The Petitioner incorporates those opinions herein as part of his argument for the granting of this Petition for Writ of Certiorari and encourages this Court to adopt that Court's reasoning.

WHEREFORE, Petitioner prays that, after due proceedings had:

That this Application for Writ of Certiorari be granted and that the decisions of the LaSC be reversed and that of this court, or those of the Louisiana Fifth Circuit Court of Appeal be substituted therefore;

That this Court find that Keith Andrews has a fundamental right to parent his child, that he grasped the opportunity to do so, and that this right is worthy of protection by the courts;

That this court, in acknowledging Keith Andrews' rights to avow, find that he is entitled to the concomitant right to notice of his paternity before any prescriptive period may begin to run;

That the court find that, as a matter of law that silence of relevant facts and suspicions is bad faith *per se* and that Karen Kinnett did, in fact in bad faith deceive Keith Andrews.

Respectfully submitted,

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