No. 23-358

In the Supreme Court of the United States

KEITH ANDREWS,

Petitioner,

v.

JARRED BRANDON KINNETT, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS JARRED BRANDON KINNETT AND KAREN COHEN KINNETT

Jacqueline Maloney
3445 North Causeway Blvd.
Suite 210
Metairie, LA 70002

Allison K. Nestor
Counsel of Record
Leonard L. Levenson
650 Poydras Street
Suite 2750
New Orleans, LA 70130
(504) 586-0069
allinestor@gmail.com

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Does a biological father of a child, conceived during and born into another's marriage, have an unqualified fundamental right to parent his child when he confessed, shortly after learning the married woman gave birth, that he believed he could be the father of the child, and instead of taking immediate action to avow paternity he waited more than a year, which was past the prescriptive/peremptive period in the state statute providing putative fathers an avenue to establish paternity?

2. Where the state court of last resort, after analyzing *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Santosky v. Kramer*, 455 U.S. 745 (1982), *Lehr v. Robertson*, 463 U.S. 248 (1983), and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), determines that these decisions make a clear distinction between protecting the rights of parents who are part of a family unit into which the child is born, regardless of marital status, as compared to a putative biological father, not living in a family unit with the child at issue, and these parties' rights are subject to applicable state laws, has the court of last resort decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court?

3. Has a petitioner met the jurisdictional requirements of 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c), when he asks this Court to correct a lower court's definition of bad faith and good faith and clarify the meaning of these terms for American Jurisprudence and also requests this Court to fashion a remedy that

ensures every man who has sexual relations with a married woman will not be taxed with the duty to investigate that woman for up to 21 months after coitus?

4. When the factual findings and credibility determinations, established by the state court of last resort, are misrepresented by a petitioner to this Court and this Court must accepts the misrepresentation as the established finding of fact to address petitioner's questions presented, does this require the denial of a petition for writ of certiorari?

5. When questions as to the constitutionality of a state statute have not been presented to or decided by the highest court of the state, does this Court have jurisdiction to review those questions?

6. When a previously filed, unrelated petition for certiorari seeking review of state laws alleged to violate due process rights of a biological father by establishing a peremptive period for that father to establish paternity when the child is born to a married mother, and that petition was denied by this Court, does that support denial of a subsequently filed petition seeking review of very similar issues?

7. When petitioner asserts he has an unqualified fundamental right to avow paternity and parent his biological child who was conceived during and born into another's marriage, because his state has a unique law that provides dual paternity and this assertion is false because multiple states have either codified or jurisprudential laws providing for the possibility of more than two legal parents under specific circumstances, does this required denial of a petition for writ of certiorari?

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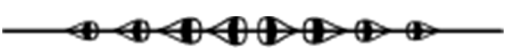

COUNTER STATEMENT OF THE CASE

I. Introduction

To grant Petitioner, Keith Andrews ("Petitioner"), the relief he seeks, this Court must reject the factual findings of the Louisiana Supreme Court ("LaSC"), which affirmed all of the findings of the trial court. At trial Petitioner provided lengthy and very detailed testimony including explanations as to text message communications between himself and Respondent, Karen Cohen Kinnett ("Ms. Kinnett"). The credibility of Petitioner and Ms. Kinnett drove most of the factual findings. Ms. Kinnett was found to be credible. Petitioner, his statements, his decisions, and his text messages were found to be "troubling," "most troubling," and "extremely troubling." Pet.App.233a-235a.

Respondents, Jarred Brandon Kinnett ("Mr. Kinnett") and Ms. Kinnett (collectively "Respondents"), suggest Petitioner's assertions in his Petition for Writ of Certiorari are similarly troubling. Petitioner warns this Court of the dire consequences of failing to reverse the LaSC as causing " . . . every man who has sexual relations with a married woman [will] have a duty to investigate that woman for up to 21 months after coitus." This seeks convenience. Petitioner wants this Court to ensure that the consequences of his actions, and those of all male paramours, will be shouldered entirely by the married woman. This is not an important issue of federal law that requires resolution by this Court.

Also, Petitioner cannot seek relief from this Court for "every man who has sexual relations with a

married woman . . . " because the only constitutional challenge presented to the LaSC was whether Louisiana Civil Code Article 198 ("Art 198") is unconstitutional as-applied to Petitioner. He did not present a facial challenge or equal protection challenge to the LaSC. Furthermore, Petitioner suggests his matter implicates LA Const. arts. I, §§ 3, 12 & 22, which grant Louisiana citizens the Right to Individual Dignity, Freedom from Discrimination, and Access to Courts, respectively. Petitioner never argued any violations of these State constitutional rights in any lower court.

Petitioner also argues the LaSC's reliance on *Michael H. v. Gerald D.,* 491 U.S. 110, 109 (1989) is fundamentally incorrect because *Michael H* is not binding precedent therefore not controlling. Also, he finds *Michael H* factually distinguishable from his matter in that Louisiana, unlike California, the state in which *Michael H* originated, has a unique dual paternity regime, which no other state has. Allegedly the very existence of dual paternity bestows Petitioner with a fundamental right to avow paternity of his biological child born into another's marriage. Petitioner argues that based on all of these arguments not only should the LaSC's rulings be overturned, but so should this Court's ruling in *Michael H.*

Ironically, every case Petitioner cites in support of his alleged fundamental right to avow paternity is factually distinguishable because none involve a child conceived during and born into an intact family. He refuses to acknowledge or analyze the fully established fundamental rights of Mr. Kinnett, as legal father, and Ms. Kinnett. His sole argument with respect to Mr. Kinnett's established parental rights is that the unique dual paternity regime of Louisiana would not

diminish those rights. It is self-evident, without expert testimony or any jurisprudence, that the grant of rights to a third parent indeed diminishes the fundamental rights of two (2) legal parents. Petitioner never analyzes the effect of how three (3) legal parents would dramatically reduce and impede both Respondents' rights.

II. Petitioner's Requested Relief

Petitioner seeks various forms of relief including protection for all men who have sexual relationships with married women to ensure those men will not have to investigate those women for up to 21 months after coitus to determine if the women were impregnated. To ensure these protections for all such men, Petitioner asks for a summary disposition reversing two (2) rulings of the LaSC. Pet.App.1a, 87a. and reinstating two (2) rulings of the state appellate court. Pet.App.39a, 105a. Alternatively, Petitioner asks this Court for the following declarations: (1) the time limitation for him to avow paternity of his biological child born to a mother during her marriage, imposed by state law, is unconstitutional both facially and as applied; (2) he established a fundamental right to parent his biological child by "grasping the opportunity to do so;" and (3) he has a fundamental right to avow paternity which cannot be extinguished without the married mother of his child giving him notice that he could possibly be the father.

Petitioner further offers this Court the opportunity to do the following: (1) clarify the meaning of the terms "bad faith" and "good faith" for American jurisprudence; (2) determine the meaning of "bad faith deceives" as used in the state law he argues is unconstitutional; and (3) determine which litigant has the burden of proof under the same state law.

As a basis to grant certiorari pursuant to Rule 10(c) of the Supreme Court Rules and give Petitioner his requested relief and afford this Court the many opportunities alleged above, Petitioner alleges the LaSC has decided an important federal question in a way that conflicts with decisions of this Court.

III. Procedural History, Factual Findings, and Judgments

A. Trial Court Proceedings

The evidence in the record supports that almost seven (7) years ago on February 10, 2017, Petitioner filed an intervention in Respondents' divorce proceeding, seeking to avow paternity pursuant to La. C.C. Art. 198 ("Art. 198") of one (1) of Respondents' two (2) children. The child at issue was one and a half years old at that time. He was born August 5, 2015. Respondents' other child was five years old.

La. C.C.Art. 198, provides:

> 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.

In response, Mr. Kinnett filed exceptions alleging, in part, that Petitioner's Intervention was untimely and his action under Art. 198, was perempted. The exceptions went to trial and after significant and lengthy testimony from Petitioner and brief testimony from Ms. Kinnett — not before one trial court, but two[1] — Petitioner was found, by both courts, to have confessed to knowing in or around October or November 2015, that he could be the child's father. Nevertheless, Petitioner did not file suit to establish paternity until fifteen (15) months after the birth of the baby, which is untimely under Art. 198. Pet.App.229a.

Of important note, the state district court judge was profoundly impacted by the content of Petitioner's

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[1] In the state district court in Louisiana where these proceedings were initiated, there is a commissioner's court who first heard the exceptions filed by Respondent, Jarred Brandon Kinnett, to Petitioner's action to avow paternity and for custody. Petitioner provided lengthy and very detailed testimony as to his relationship and his last sexual encounter with Ms. Kinnett, including the date of that encounter. Petitioner also confessed that he learned of the birth of the child within two to three months after the child was born. Based on the time frame in which the child was born and the last date of his sexual encounter with Ms. Kinnett, he indeed believed the child could be his. Ms. Kinnett also testified, briefly. Based on the parties' testimony, the Commissioner ruled that Petitioner suspected the child was his within a few months after his birth but took no action to prove paternity until fifteen (15) months later, which was untimely under La. C.C.P. Art. 198.

lengthy and detailed testimony and copies of text-message conversations between Petitioner and Ms. Kinnett. In fact, the trial found those things "most troubling" and found they drove much of the factual findings. Specifically, the trial court declared:

> Some of the things that are most troubling to me in this case are the text messages and the evidence that were introduced, which in large part drive a lot of the factual findings. On February 23rd of this year, at 5:34, Mr. Andrews sends to Mrs. Kinnett a text message, which I find to be extremely troubling based upon the wording of it. And I quote,
>
> > "We do have to say you deceived me as to my paternity of the child, because if not, I don't have a claim. It sounds bad but that is how the statute is worded so that is what we have to say. I'm still 100 per cent Team Karen, but having—me having custody of Grant is very, very important to both of us since you will get to be with him during my time."
>
> Those words do not suggest to me the idea of telling the truth. Those words suggest, based upon their wording, we have to say one thing in order to achieve another result. I find that troubling.
>
> Mrs. Kinnett, in response to a text, in bold letters,
>
> > "I did not deceive you. I had no idea. You will be lying if you say that."
>
> So there's some push back.

* * *

> And then on February 23rd of 2017, in a text message at 7:54 p.m.,
>
> > "I'm sorry things didn't work out differently between us back then." This is from Mr. Andrews to Mrs. Kinnett. "I feel responsible for the hell you're going through right now. I wish I would have whisked you away from a bad situation and we had had Grant together."
>
> These are the words that cause me most concern, "I am very sorry I did not do that." That clearly indicates that in previous time as it's written, you had knowledge, you had the ability to intervene and you didn't. And you're apologizing for it.

Pet.App.234a-235a.

The trial court further found there was no evidence that suggested Ms. Kinnett in bad faith deceived or had the intent to deceive Petitioner as to his paternity. The court based this on assessing the different, conflicting testimony, and again, assessing the parties' credibility. Lastly, the trial court found the duty and obligation to act under Art. 198 rested fully upon Petitioner. Pet.App.235a.

After the trial and after rendition of the judgement dismissing Petitioner's intervention, Petitioner's counsel made an oral motion to amend his petition to add a claim that Art. 198 is unconstitutional. The trial court, finding the motion untimely because Petitioner's motion to amend came after his matter had been dismissed, denied the oral motion to amend. Pet.App.237a.

Petitioner appealed and before the merits were considered, the appellate court remanded the matter to the trial court so Petitioner could amend his original action to include constitutional challenges to Art. 198. Pet.App.195a. Petitioner's amended petition alleged new facts including that he assisted Ms. Kinnett financially by providing her with a total of $5,115.00. There is nothing in the record demonstrating that Petitioner has paid anything towards the minor since 2017.

Petitioner also alleged that he spent, over a period of four (4) months, approximately forty-one (41) hours (an average of approximately two and one half (2.5) hours per week) with the minor. These forty-one (41) hours allegedly established a connection between Petitioner and minor. Petitioner, however, made no allegations (nor did he proffer any testimony) as to knowing anything about the child — like his favorite food, favorite toy, bedtime, waketime, nightly routine, or daycare schedule. Nor are there allegations that the minor recognized Petitioner or expressed joy or distress upon Petitioner's arrival or departure.

With respect to the basis for Art. 198's unconstitutionality, Petitioner alleged it violated his substantive and procedural due process rights and equal protection laws under state and federal constitutions and there was no compelling governmental interest that was protected by limiting his time to avow to one (1) year.

At trial, Petitioner attempted to introduce fact evidence including documents and testimony to demonstrate he paid Ms. Kinnett and spent time with the minor as detailed in his amended petition. Petitioner also sought to introduce expert testimony of a professor with Tulane University's Department of Psychiatry

and Behavioral Science with knowledge as to Child and Adolescent Psychiatry. This expert was to explain how Art. 198 does not fulfill its intended purpose of protecting children. Respondents filed motions in limine to exclude all fact and expert testimony and evidence because none of the witnesses were qualified to address or were going to address fundamental rights under the state and federal constitutions and how or why Art. 198 violates those rights including whether the time limitation in Art. 198 violate substantive and procedural due process or equal protection rights.

Respondents' motions in limine were granted. The trial court reasoned that Petitioner's position in support of expert testimony missed the mark. Demonstrating that child developmental science was not considered when establishing the one (1) year peremptive period within Art. 198 does not demonstrate that Art. 198 is unconstitutional. Instead, any witness should have addressed whether the article does or does not serve a legitimate governmental purpose of protecting the status of a child vis-à-vis his mother and father, his family, his classmates, and the world. Pet.App.206a.

After the trial on Art. 198's constitutionality, during which Petitioner proffered his testimony and documentary evidence and that of his expert, the court found Art. 198 to be constitutional. Specifically, that statutes mandating peremptive periods are within the purview of the Louisiana legislature and Petitioner did not submit evidence that Art. 198 was unconstitutional. Pet.App.202a.

B. The Appellate Court's Opinion as to Petitioner's Avowal Action Under Art. 198

The Louisiana Fifth Circuit Court of Appeal ("appellate court") reversed the trial court finding Petitioner's claim was not perempted under Art. 198. The court pretermitted discussion of the constitutional issue. Even though Petitioner and Ms. Kinnett's credibility played a significant role in the trial court's finding of fact and reasons for judgment, the appellate court went to great lengths to find an alternate version of facts. Pet.App.105a.

The appellate court analyzed and relied upon single statements made by the parties, broke down the alleged meaning within the parties' text message exchanges, and declared that, as a woman, Ms. Kinnett held all the knowledge and thus all the responsibility, including a responsibility when it came to the application of Art. 198. While there was no testimony on these issues, the appellate court declared that Ms. Kinnett knew the stages of her menstrual cycle, the effectiveness of her birth control and she even knew the approximate date of conception. The appellate court found Ms. Kinnett had "engaged in perfidious silence," she "lie[d] by omission," and she deceived Petitioner in bad faith. Pet.App.135a-136a.

Additionally, the appellate court determined Petitioner's confession at trial, that when he learned of the child's birth he believed he could be the child's father, did not equate to "knew or should have known" as contemplated in Art. 198. Moreover, the appellate court found the trial court had committed legal error by failing to interpret Art. 198 as imposing a duty on Ms. Kinnett to inform both the legal and potential

biological father of the possible of their paternity. Pet.App.105a.

C. The LaSC's Reversal of the Appellate Court and Remand

Respondents both filed writ applications with the LaSC, and both were granted reversing the appellate court and affirming the trial court's dismissal of Petitioner's avowal action. The appellate court's judgment was solely dependent on its own finding of fact and the LaSC found no basis for the appellate court to engage in a *de novo* review of the trial court proceedings and no basis for the appellate court to engage in fact finding. Pet.App.87a. Because the appellate court pretermitted review of the constitutional issues, the LaSC remanded those matters to the appellate court for decision.

D. The Appellate Court's Opinion as to Art. 198's Constitutionality

The appellate court made two (2) rulings on remand. Pet.App.39a, 70a. The first reversed the trial court judgments granting Respondents' motions in limine excluding any fact witnesses from the trial, finding that the exclusion impeded the discovery process and prevented Petitioner from properly challenging Art. 198's constitutionality. Pet.App.70a-71a. The appellate court then remanded the matter back to the trial court for Petitioner to hold a new trial on his amended petition during which he could conduct more discovery and present additional evidence at trial. Pet.App.71a.

Ms. Kinnett filed an application for writ of certiorari with the LaSC arguing Petitioner had ample opportunity to proffer any testimony and evidence to

the trial court. Petitioner had additional fact witnesses on his witness list and the trial court did not prohibit any proffered testimony. Failure to proffer anything beyond his own testimony and that of an expert was Petitioner's choice. Ms. Kinnett further argued that the appellate court's decision to remand the matter for a new trial and not utilize the proffered evidence in the record violated Louisiana's Code of Civil Procedure and a significant history of jurisprudence from each circuit court in Louisiana.

Mr. Kinnett filed a writ of mandamus, alternatively an application for writ of certiorari seeking the LaSC to compel the appellate court to rule on the constitutionality of Art. 198. In response the LaSC granted Respondents' writ applications and ordered the appellate court to review the trial court's judgment as to Art. 198's constitutionality.

On remand, the appellate court found Petitioner's biological link and his proffered evidence demonstrating that he "grasped the opportunity" to parent the child had established a vested liberty interest for him in the constitutional right to parent his biological child. However, as a basis for this ruling the appellate court utilized its former findings of fact from its previously reversed opinion. Pet.App.40a.

The appellate court's determination that Petitioner acquired a vested liberty interest was the basis for finding Art. 198, unconstitutional as applied because Art. 198 provides no method of notice prior to terminating his vested right. The specific facts upon which the appellate court relied were: (1) Petitioner filed an intervention to avow paternity into a divorce proceeding; (2) at the first opportunity, he had consistent interaction with the minor; and (3) there was no longer a

governmental interest of maintaining an intact family. Pet.App.39a.

E. The LaSC's Reversal of the Appellate Court

Respondents filed Applications for Writ of Certiorari ("Application for Writ") to LaSC. Mr. Kinnett argued that the appellate court misapplied state and federal jurisprudence to support the finding that Petitioner had a vested liberty interest in parenting the minor child. Mr. Kinnett further argued the ruling from this Court in *Michael H. v. Gerald D.,* 491 U.S. 110 (1989) which provides a biological father of a child born to a woman married to another man has no liberty interest in continuing his relationship with the child. Additionally, a natural father's unique opportunity to parent conflicts with the similarly unique opportunity of the husband of the marriage and it is not unconstitutional for a State to give categorical preference to the latter.

Additionally, Mr. Kinnett reminded the LaSC of its previous ruling in this matter, which was ignored by the appellate court, that Petitioner possessed the opportunity to avow the minor in the time provided under Article 198. Also, Petitioner confessed that upon learning of the minor's birth he believed he could be the father, but he took no action, including, as Mr. Kinnett highlighted, never asking Ms. Kinnett at that time he learned she had given birth, the single question of whether he could be the father.

The LaSC reversed the appellate court and affirmed the trial court's judgment finding the relevant jurisprudence from this Court and the LaSC does not support and unqualified fundamental right to Petitioner

under the facts of this matter. The LaSC examined the following jurisprudence from this Court: *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lehr v. Robertson*, 463 U.S. 248 (1983); and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

Contrary to Petitioner's assertions the LaSC did not find, after its analysis, that a biological father of a child born into a marriage has no constitutional rights to the child. The LaSC held that competing interests exist between a biological father and a legally presumed father and by instruction from this Court, that the state of Louisiana, and all states, through legislative policy, make the choice between competing interest. Pet.App.1a.

F. Misstatements of Fact

In accordance with Rule 15.2 of the Rules of the Supreme Court, Respondents identify all the perceived misstatements of fact and law made by Petitioner in his Statement of the Case and Reasons for Granting the Petition.

Petitioner provides an unsubstantiated and selective rendition of his and Ms. Kinnett's alleged trial testimony as the controlling facts in this matter. This portrays the facts, Ms. Kinnett, and the Petitioner, himself, very differently from the findings of the LaSC, who affirmed the trial court. Pet.App.87a, 225a, 229a. As more fully explained in Respondents' Reasons for Denying Certiorari, although Petitioner has not included the transcripts of trial testimony in his appendix nor asked this Court to review and set aside the lower courts' finding of fact, this Court must accept Petitioner's

version of facts and depiction of Ms. Kinnett and himself, to address Petitioner's Questions Presented.

The misstatements as perceived by Respondents begin with Petitioner's allegation that his affair with Ms. Kinnett was intermittent. The LaSC affirmed the trial court's finding that Ms. Kinnett and Petitioner had an ongoing and repetitive sexual relationship. Pet. App.87a, 152a. Petitioner further states that after their last sexual encounter in November 2014, he and Ms. Kinnett exchanged very few text messages, although he did try to contact her several times in May 2015.

Petitioner wisely did not attach any trial transcripts to support his allegations because they would disclose the reason why the parties were not in contact. Petitioner had told Ms. Kinnett he was too busy to see her as he had been dating someone else while seeing her. He was also running his own law practice and opening a restaurant and he told Ms. Kinnett that " . . . with all this going on, [he] really [didn't] feel like [he] could be in this with [her]."

Additionally, to diminish the effect of his confession, that he believed he could be the father of the minor when Ms. Kinnett told him she had given birth, Petitioner testified that he could not then recall the date of his last sexual encounter and had no reason to doubt that she had her husband's child. The transcript, however, contains Ms. Kinnett's unrefuted testimony that Petitioner again confessed, following the child's DNA test, that he had suspected for some time that the child was his and thought at some point Ms. Kinnett would come forward and tell him.

Petitioner also alleges to this Court that Ms. Kinnett was abandoned by Mr. Kinnett and had no

means of support. Thereafter, Petitioner provided support and assisted in parenting. Again, had the transcript been attached Petitioner likely would not have made these statements. Ms. Kinnett had full-time employment and indeed had a means of support. Further, Petitioner's alleged "assistance in parenting" typically was his appearances in the evenings to eat dinner and play with the children. He did not live with the children, he did not drive them to school, prepare them food, assist them with homework, dressing, nor go grocery shopping, do the laundry or clean, all things parents regularly do.

Petitioner further declares Ms. Kinnett cut-off Petitioner's visits with the minor. However, Louisiana provides an avenue for individuals who do not have legal-parent status to seek visitation. La. Civil Code Article 136 ("Art. 136"), titled Award of visitation rights, allows a relative of the child by blood or affinity to petition for visitation. The court will grant visitation if it finds it in the best interest of the child. The record contains no attempt by Petitioner to seek visitation under Art. 136 wherein he could have argued that his alleged relationship with the minor, allegedly established through his approximately 2.50 hours a week of visitation, was in the best interest of the child. Instead, Petitioner is arguing those facts to this Court more than six (6) years later.

G. Misstatements of Law

Petitioner begins his Statement of the Case and argues in Reasons for Granting Certiorari that Louisiana has a unique law allowing for "dual paternity," which no other states have, presenting a novel question involving fundamental rights for this Court. Petitioner

heavily relies on this concept and its alleged uniqueness as a basis for this Court to grant relief. Petitioner's claim is false. In truth, there are multiple other states in addition to Louisiana that jurisprudentially or by statute provide rights to parenting for more than two (2) legal parents, including California, CA Fam Docs § 7612 (2020) and Delaware, Del. Code Ann. tit. 13 § 8-201(C)(2018)[2] both of which also have time limitations, established by their respective legislatures for putative fathers to establish paternity.

Additionally, Petitioner misinforms this Court as to the substance of the LaSC's judgment of September 10, 2021, by identifying it as "order granting proffer." This judgment did not "grant the proffer." Instead, it granted Respondents' applications for writs of certiorari for review of the appellate court's July 7, 2022, decision which remanded Petitioner's constitutional challenge back to the trial court for more discovery and a new trial. Pet.App.87a. After granting the writ applications, the LaSC declared there was evidence in the record, including proffered evidence for the court to review to make its ruling. Pet.App.103a.

The proffered testimony was not made part of the record by any ruling of the LaSC. The appellate court's judgment of July 7, 2022, found the trial court abused its discretion when granting Respondents' motions in limine. The same judgment reversed the motions in

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[2] There are presently thirteen (13) states, including Louisiana that recognizing legal rights of more than two (2) parents. *See e.g.* Me. Rev. Stat. Ann. tit. 19-A, § 1891(3); Vt. Stat. Ann. tit. 15C, § 501(a)(1); D.C. Code Ann. § 16-831.01(1)(A); *In In re Parentage of J.B.R.*, 336 P.3d 648 (Wash. Ct. App. 2014); and *In re Custody of C.C.*, 1 N.E.3d 1238, 1250 (Ill. App. Ct. 2013).

limine and opened the door for the appellate court to consider Petitioner's proffered testimony. Pet.App.70a.

Petitioner further argues the LaSC cannot rely on *Michael H. v. Gerald D.,* 491 U.S. 110 (1989) because it is not valid law, its rationale is at best questionable, and it is time for *Michael H* to be reversed. Contrary to this assertion, the LaSC relied on far more than *Michael H.* It also referenced and analyzed the following cases explaining how this Court's precedent does not support Petitioner's arguments: *Stanley v. Illinois*; *Quilloin v. Walcott*; *Caban v. Mohammed*; *Santosky v. Kramer*; and *Lehr v. Robertson*. Pet.App.7a-23a.

REASONS FOR DENYING CERTIORARI

I. TO RULE ON THE QUESTIONS PRESENTED, THIS COURT MUST REJECT THE FACTUAL FINDINGS OF THE LOUISIANA SUPREME COURT AND ACCEPT PETITIONER'S RENDITION OF FACTS.

As detailed herein, the parties' credibility drove most of the fact finding in the lower court. Petitioner has not directly requested this Court engage in its own fact finding. However, to address Petitioner's questions presented, all the issues raised, and to grant any requested relief, this Court must accept Petitioner's allegations as the established facts in the lower court.

A. Petitioner's Question Presented I

Petitioner's Question Presented I and accompanying arguments in support ask this Court to address the issue of '[w]here 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?" Before addressing any alleged legal issue and reaching any conclusion, this Court must presuppose that Petitioner seized the opportunity to exercise his parental duties at the first opportunity. To do so, however, conflicts with the findings of the LaSC and its judgment affirming the trial court, which determined Petitioner knew or should of know of his child's birth in October or November 2015, but he took no legal action or any other action until February 2017. Pet.App.87a, 229a.

If this Court rejects all the finding of fact by LaSC, which affirmed the finding of the trial court, then this Court would still be required to engage in its own fact finding as to whether Petitioner's time and interaction with the child, which he detailed in his proffered testimony as an average of 2.5 hours a week over a period of four (4) months Pet.App.75a-78a, was sufficient in quality and duration to demonstrate that Petitioner seized the opportunity to exercise his parental duties, creating a vested fundamental right to parent. Alternatively, this Court must presuppose that Petitioner's version of facts are correct.

B. Petitioner's Question Presented III

Petitioner's Question Presented III and accompanying arguments in support allege the lower court's finding that his right to avow was perempted under Art. 198, "hinged on what constitutes bad faith deception." The portion of Art. 198 that contains this bad-faith phrase is:

> . . . 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 . . .

The LaSC affirmed the trial court's finding of fact that Petitioner knew or should have known that the minor could be his child after his communication with Ms. Kinnett in October or November of 2015. The evidence in the record demonstrates Petitioner filed his intervening petition to avow paternity on February 10, 2017, which is more than one (1) year after he knew of should have known that the child was his. Even if this Court accepts Petitioner's invitation to clarify the meaning of good faith and bad faith for American Jurisprudence and determined that Ms. Kinnett did act in bad faith, this will not change the factual findings as to when Petitioner knew or should have known of his child's birth.

Petitioner further argues the LaSC's failure to find Ms. Kinnett deceived Petitioner in bad faith violates his due process rights by depriving him of notice. This is not a genuine issue for this Court. Instead, it is a disguised request for this Court to review the factual findings of the lower court, engage in its own fact finding, and establish new findings of fact. Specifically, Petitioner asserts to this Court:

> 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.

Pet.6.

Petitioner's version of facts are contrary to those determined by the LaSC who declared that when determining whether Ms. Kinnett deceived Petitioner in bad faith, the credibility of Ms. Kinnett's belief as to her child's father was the critical issue. Subsequently, the LaSC affirmed the trial court's finding that Ms. Kinnett was mistaken about who the father of her child was, but she was not deceptive. Pet.App.96a-99a.

This Court has a long history of deferring to judicial findings of fact and regarding those findings as conclusive. *Egan v. Hart,* 165 U.S. 188, 191; 17 S. Ct. 300, 301; 41 L. Ed. 680 (1897) (declaring that the trial court's finding of fact, approved and affirmed by the LaSC, which are purely questions of fact, are conclusive). Petitioner's requested relief will require this Court to ignore *Egan v. Hart* and engage in its own fact finding.

II. PETITIONER WAIVED THE ISSUE OF WHETHER LA. C.C. ART. 198 IS FACIALLY UNCONSTITUTIONAL OR A VIOLATION OF HIS EQUAL PROTECTION RIGHTS.

Petitioner seeks review by this Court of two (2) LaSC decisions which address the interpretation, application and constitutionality of Art. 198. Pet.App.1a, 87a. Specifically, the final judgments rendered below

are: (1) Art. 198 is not unconstitutional as applied to facts and circumstances involving Petitioner, Keith Andrews, Pet.App.1a; and (2) there was no bad-faith deception by Respondent, Karen Kinnett, therefore Petitioner's avowal action was not timely. Pet.App.87a.

Petitioner argues the need for review because allegedly one LaSC decision conflicts with relevant decisions of this Court. He also argues both LaSC decisions raise several questions of federal law that should be settled by this Court. With respect to the latter, Petitioner declares "[t]he time is ripe to revisit the issue of a biological father's rights to due process (including notice) and equal protection of the laws *vis-a-vis* avowal of his child." Petitioner then 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."

More specifically Petitioner argues the LaSC's improper interpreted of Art. 198 places a biological father's rights to avow paternity completely at the mercy of the mother and the only way to protect a biological father's rights is to impose a duty upon a mother to disclose to the biological father the possibility of his paternity.

Accordingly, Petitioner is not only arguing that Art. 198 is unconstitutional as-applied, but he is also arguing that it is unconstitutional on its face. Petitioner, however, waived this issue. At trial, Petitioner made multiple various constitutional challenges to La. C.C. Art. 198 ("Art. 198"), including facial and as-applied challenges. After all the challenges were dismissed,

Petitioner appealed and urged the same multiple various challenges including that La C.C. Art. 198 was unconstitutional on its face and as applied. The appellate court found Art. 198 to be unconstitutional, only, as applied to Petitioner. Pet.App.39a.

Subsequently, Respondents filed Applications for Writs of Certiorari ("Application for Writs") to the LaSC. Jarred Brandon Kinnett requested a reversal of the appellate court and reinstatement of the judgment of the trial court. Petitioner, Keith Andrews, did not file an Application for Writs to LaSC. Accordingly, the only constitutional challenge presented to LaSC as to Art. 198, was an as-applied challenge and the only ruling from the LaSC as to Art. 198 was that, under the factual circumstances present, Art. 198 is constitutional. Pet.App.1a.

Pursuant to 28 U.S.C. § 1257(a) this Court's appellate jurisdiction only authorizes review of final judgments rendered by the highest court of a State in which a decision could be had. This Court has declared that it is without jurisdiction unless the question as to the constitutionality of a state statute has either been presented for decision to the highest court of the state, or has been decided by the highest court of the states. *Wilson v. Cook*, 327 U.S. 474, 480-81 (1946) (finding that although petitioner had complained to the lower court that the state statute was illegal and void and in violation of Art. IV, § 3, cl. 2 and Art VI, cl. 2 of the Constitution, there were no assignments of error as to the Constitutional issues submitted to the Supreme Court of Arkansas and the opinions of the state supreme court did not rule on the validity of the state statute under the laws of the Constitution of the United States) (citations omitted).

III. THE DECISION OF THE LOUISIANA SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner argues the LaSC misapplied cases from this Court (*Michael H. v. Gerald D* and *Lehr v. Robinson*) and its own precedent to declare a biological father of a child born of another's marriage has no cognizable rights under the U.S. or Louisiana Constitutions. This is false and a complete misrepresentation of the LaSC's opinion. The correct opinion of the LaSC is: "On review, we hold, under the factual circumstances presented in this case, that the putative biological father has no fundamental constitutional right to parent a child born to a mother, who was married to and living with another man at the time of the child's conception and birth." Pet.App.2a.

To arrive at this opinion, the LaSC spent considerable time analyzing the following relevant and valid precedent from this Court and contrasting it all to the circumstances of the instant matter: *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246(1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lehr v. Robertson*, 463 U.S. 248 (1983); and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Pet.App.7a-23a. From their analysis, the LaSC determined:

> [A] clear distinction has been made between protecting the rights of parents who are part of a family unit into which the child is born, regardless of marital status, as compared to a putative biological father, not living in a family unit with the child at issue, whose rights the Supreme Court states are subject to applicable state law.

Pet.App.7a.

There simply is no merit to Petitioner's assertion that the LaSC decided an important question of federal law that has not been, but should be, settled by this Court. There is further no merit to Petitioner's argument that the LaSC has decided an important federal question in a way that conflicts with relevant decisions of the Court. Because there is no conflict between the LaSC's decision and this Court's precedent, this Court has no jurisdiction pursuant Supreme Court Rule 10(c).

With respect to the alleged misapplication of its own precedent, Petitioner claims the LaSC previously found *Michael H. v. Gerald D* inapplicable in Louisiana and therefore contradicts itself when using *Michael H* as precedent to rule on his matter. This claim comes from a footnoted comment in a concurring opinion in the matter of *T.D. v. M.M.M.*, 730 So. 2d 873, 877, fn. 2 (La. 1999) *abrogated by Fishbein v. State ex rel. Louisiana State Univ. Health Scis. Ctr.*, 898 So. 2d 1260 (La. 2005).

It is well established that concurring opinions, while persuasive are not binding and do not constitute authority under the doctrine of *stare decisis*. *First Nat. Bank of Picayune v. Pearl River Fabricators, Inc.*, 971 So. 2d 302, 314-15 (La. 2007). Furthermore, Louisiana follows a civilian tradition which does not recognize *stare decisis* as an authoritative source of law. Instead, Louisiana follows *jurisprudence constante* which requires the existence of a long line of cases following the same reasoning and does not contemplate adherence to a principle of law announced and applied on a single occasion in the past. *Bergeron v. Richardson*, 320 So. 3d 1109, 1115 (La. 2021).

Also, the LaSC detailed how and why *T.D. v. M.M.M.*, *supra*, cannot be utilized as support for Petitioner's argument. Specifically, the LaSC stated:

> Given that a major portion of the *T.D. v. M.M.M.* decision has been abrogated (relative to the application of the laches doctrine) and, since La. C.C. art. 198 and its predecessor, La. C.C. art. 191, were enacted after the rendition of that opinion, *T.D. v. M.M.M.* is not authoritative in determining the constitutional validity of the subsequently-enacted La. C.C. art. 198, at issue herein.

Pet.App.27a.

IV. A Prior Petition for Certiorari to This Court Presenting an Issue Very Similar to Petitioners Has Been Denied.

A prior petition for certiorari has been filed with this Court seeking review of a state law alleged to have violated due process rights of a biological father by prohibiting the father's ability to petition for paternity or parental rights when his child was born to a married woman. *M.L. v. Florida Department of Children and Families, et. al.*, 4D16-4087 (Fla. 4th DCA 2017).

In *M.L. v. Florida Department of Children and Families*, filed with this Court on September 1, 2017 and denied December 11, 2017, petitioner's child was born into a marriage, but the married parties had been separated for over eight (8) years. Florida law considered the husband the sole and legal father of the child. In proceedings initiated by the state to terminate the married parties' parental rights, the state precluded the biological father from intervening to obtain parental rights and custody of his child.

The petitioner in *M.L.* had significantly more connections to his child than Petitioner alleges herein. In *M.L.* petitioner's name was listed on the birth certificate and he had multiple weekend visitations with the child. Additionally, the married parties supported the biological father's action to obtain parental rights. Nevertheless, this Court found the circumstances not appropriate to grant certiorari.

CONCLUSION

Respondents, Jarred Brandon Kinnett and Karen Cohen Kinnett, request this Court deny the petition for writ of certiorari filed on behalf of Keith Andrews.

Respectfully submitted,

Allison K. Nestor
Counsel of Record
650 Poydras Street, Suite 2750
New Orleans, LA 70130
(504) 586-0069
allinestor@gmail.com

Leonard L. Levenson
650 Poydras Street, Suite 2750
New Orleans, LA 70130
(504) 586-0066
lenlawyer@aol.com

Jacqueline Maloney
3445 North Causeway Blvd., Suite 210
Metairie, LA 70002
(504) 333-6934
jackie@maloneylawfirm.net

Counsel for Respondents
Jarred Brandon Kinnett
and Karen Cohen Kinnett

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