No. 23-358

In The Supreme Court of the United States

KEITH ANDREWS,

Petitioner,

v.

JARRED BRANDON KINNETT, ET AL.,

Respondents.

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

BRIEF IN SUPPORT OF GRANTING WRIT

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QUESTIONS PRESENTED

1. Does discrimination against non-marital children extend to children born from extramarital affairs under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution?

2. Under LA. Const art. I, § 3 can La. Civ. Code art. 198 discriminate against a child on the basis of birth?

3. Should the Louisiana Legislature have considered the best interest of the child factors during the development of La. Civ. Code art. 198?

4. Is the best interest of the child analysis the sole responsibility of the courts?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff- Appellant in Intervention below

- Keith Andrews, Biological father of G.J.K.

Respondent and Defendants-Appellees in Intervention below

- Karen Cohen Kinnett, Mother of G.J.K.
- Jarred Brandon Kinnett, legal father of G.J.K.

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

- G.J.K., a minor child

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

- Jeff Landry, Attorney General of the State of Louisiana

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ARGUMENT

I. Equal Protection Claim under the Fourteenth Amendment of the United States Constitution prohibits discrimination against non-marital children born from extramarital affairs.

The Equal Protection Clause of the Fourteenth Amendment in the United States Constitution provides, "no state shall […] deny any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV. Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. *In re Gault*, 387 U.S. 1, 1 (1967). The majority in *In re Gault* held that "children are persons under the Fourteenth Amendment, overcoming the Constitution's failure to mention children explicitly." *Id*. Furthermore, "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood v. Danforth,* 428 U.S. 52, 74 (1976). However, the constitutional rights afforded minors may differ in their substance or their implementation from those guaranteed to adults, as "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults" through the doctrine of *parens patriae*. *Id.* at 75. The doctrine of *parens patriae*, literally "parent of the country," refers to the state's role as sovereign in promoting the welfare of its citizens, with emphasis placed on the best interests of the child. *Finlay v. Finlay*, 240 N.Y. 429, 433 (N.Y.1925).

A. Louisiana Civil Code article 198 discriminates only against children born from extramarital affairs which is subject to intermediate scrutiny.

Discrimination against non-marital children has always been a classification subject to intermediate scrutiny justified by the unfairness of penalizing children for their parents' decisions. *Pickett v. Brown*, 462 U.S. 1, 8 (1983). The Court recognized that condemning ***these*** children is not only "illogical but unjust." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972); *See also Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (where the court held in regards to legitimate or illegitimate children that it is "invidious to discriminate against them with no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother"). Additionally, placing blame on those who are not responsible is counter to the basic concept of our legal system. *Id.* Ensuring that legal burdens bear an adequate relationship with the individual responsible is critical to our justice system. *Id.* Moreover, placing any sort of penalty on a child is "ineffectual as well as an unjust way of deterring the parent." *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). While it may not be obvious as to the manner in which someone is born, it is unchangeable, thereby qualifying as an immutable characteristic. *Id.* Additionally, it has no determination on how someone will "participate in and contribute to society." *Id.*

B. La. Civ. Code art. 198 is not substantially related to the government's interest in preventing undue litigation and disparately impacts children born from extramarital affairs by denying a reasonable opportunity for children to know their biological fathers.

The interests of the state, the child, and the parents vary depending on the context in which they are examined. A court should employ distinct analytical approaches depending on the type of right sought to be enforced by the child. *Pace v. State ex rel. Louisiana State Emp. Ret. Sys.,* 648 So. 2d 1302, 1307 (La. 1995). Specifically, the framework for evaluating equal protection challenges to statutes of limitation that apply to suits to establish paternity is as follows: (1) the limitation must allow for a reasonable opportunity for the child or those with an interest in the child to assert claims on the child's behalf; and (2) any time limitation placed on that opportunity must be substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims. *Id.*

When evaluating what constitutes a reasonable opportunity for a parent to petition for paternity, courts take into consideration the specific facts of each case. *E.g., Pickett v. Brown*, 462 U.S. 1, 1 (1983) (where the court evaluated the mother's financial difficulties, relationship with the child's father, the mother's desire to avoid family and community disapproval, and the emotional strain inflicted on the child); *Leger v. Leger,* 258 So. 3d 624, 628 (2017) (where the court took into consideration the work requirements of each parent, how long

the child spent with the father, and the family structure); *In re A.J.F.* 764 So. 2d 47, 47 (La. 2000) (the court considered arrest history, desire to care for the child, and ability to provide for the child).

Most recently, courts have started to look at the importance of DNA testing as it relates to paternity and filiation. In *Pace v. State*, the Louisiana Supreme Court analyzed the attenuated relationship between the statute of limitations established in LA. R.S. 45:543(19) and establishing paternity. The court found that the provision which provided that illegitimate children seeking survivor's benefits because of their natural father's death must obtain a judicial decree of filiation during their parent's lifetime did not afford illegitimate children an adequate opportunity to establish paternity. *Id.* As the state was aiming to prevent stale and fraudulent claims, the court evaluated the use of DNA testing when establishing paternity. *Id.* at 1309. They acknowledged that "the attenuation caused by scientific progress is certainly a large factor in determining whether a period of limitations substantially furthers the state's interest." *Citing Mills v. Habluetzel*, 456 U.S. 91, 103-04, 71 L. Ed. 2d 770, 102 S. Ct. 1549 (1982) (O'Connor J., concurring). Furthermore, the court found that the time limitation placed on that opportunity was not substantially related to the state's interest in preventing stale or fraudulent claims, such that the provision denied illegitimate children equal protection of the law. *Pace* at 1307.

La. Civ. Code art. 198 currently places a one-year limitation on paternity actions if a child is presumed filiated to another man. According to controlling federal case law, this limitation does not

present a biological father with "reasonable opportunity" to assert a claim on behalf of the child and Courts around the country have held that limiting periods of time to establish paternity is unconstitutional. *Habluetzel* at 91 (holding that a Texas statute that placed a one-year limitation on paternity actions was unconstitutional); *see also Pickett v. Brown*, 462 U.S. 1, 18 (1983) (holding that Tennessee statute that placed a two-year limitation on paternity actions was unconstitutional); *Clark v. Jeter,* 486 U.S. 456, 463 (1988) (holding that Pennsylvania's six-year statute limitation did not provide reasonable opportunity to assert claim over an illegitimate child). Furthermore, considering the attenuation caused by scientific progress relative to DNA testing, this limitation is not substantially related to the state's interest in avoiding the litigation of stale or fraudulent claims. Moreover, providing a reasonable opportunity to attach a child to his biological parent can in no way be seen as stale or fraudulent. Additionally, Courts have agreed that a statute providing a limited timeline to establish paternity is not substantially related to the state's interest of avoiding litigation of stale or fraudulent claims. *See also District of Columbia ex rel. W.J.D. v. E.M.*, 467 A.2d 457, 457 (1983) (holding that DC statute imposing a two-year period of limitations on actions to establish paternity is not substantially related to interest of government in preventing prosecution of stale of fraudulent paternity claims and is unconstitutional as denying equal protection to children who are born out of wedlock); *Jeter* at 464 (holding the six-year statutory limitation is not substantially related to Pennsylvania's interest in avoiding litigation).

When applying the Equal Protection Clause, the Court established that statutes which discriminate against children born outside of marriage must be substantially related to an important governmental objective. *Levy v. Louisiana*, 391 U.S. 68, 68 (1968) (holding denial to illegitimate children the right to recover from wrongful death constituted invidious discrimination against them); *see also New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619, 619 (1973) (holding a state law was unconstitutional when it discriminated against non-marital children in receiving public assistance); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding it was unconstitutional to deny substantial benefits accorded to children generally from illegitimate children); *Trimble v. Gordon*, 430 U.S. 762, 762 (1977) (holding it was unconstitutional to prevent illegitimate children from inheriting from fathers who died intestate). Upholding the constitutionality of La. Civ. Code art. 198 only ensures that children born from extramarital affairs will continue to be denied knowledge of their heritage, medical history, loss of access to inheritance, and any other legal privilege afforded due to filiation, an outcome which is wholly unnecessary in a state with dual paternity.

Therefore, this Court should find that La. Civ. Code art. 198 denies equal protection and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because (1) a child filiated to another man may only be filiated to his biological father within the first year of his life, barring the applicability of the bad faith exception; and (2) this limitation is not substantially related to the state's

interest in avoiding the litigation of stale or fraudulent claims nor is it substantially related to the stated interest of preserving the intact family and avoiding the upheaval of litigation.

II. An Equal Protection claim under the LA. Const. art. I, § 3: The arbitrary peremptory timeline in La. Civ. Code art. 198 extinguished the link between G.J.K. and his biological father.

La. Civ. Code art. 198 violates the Louisiana Constitution of 1974 Article I, § 3 because it unreasonably discriminates against children born of a relationship between a married mother and a man other than her husband[1] and denies the biological fathers of these children a ***reasonable opportunity*** to file a paternity action.[2] The relationship of rights

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[1] La. Civ. Code art. 185 establishes the presumption of paternity of the husband ("The husband of the mother is presumed to be the father of a child ***born*** during the marriage or within three hundred days from the date of the termination of the marriage."). This has been referred to as the strongest presumption in the law. *See* cmt (b).

[2] La. Civ. Code art. 197 reads "a child may institute an action to prove paternity even though he is presumed to be the child of another man. If the action is instituted after the death of the alleged father, a child shall prove paternity by clear and convincing evidence." This article grants G.J.K. the right to filiate to Keith Andrews after he achieves majority but not before without a parental action on his behalf. Without this, G.J.K. lacks all legal rights to the parent-child relationship such as inheritance, the right to litigate on his father's behalf, and receiving financial support. It is unlikely that either of his parents will institute a paternity action on behalf of G.J.K. As Justice Griffin noted in his dissent in the Louisiana Supreme Court's June 27, 2023 decision, "it is my sincere hope that the adults in this matter will set aside their animosity in favor of

between a child and their biological father is deserving of a reasonable opportunity and should not be terminated by an arbitrary peremptory period.

Additionally, LA. Const. art. I, § 3 states, "no law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations." LA. Const. art. I, § 3. Under Article I, § 3, the court shall apply the equal protection analysis in accordance with the legislative classification of the individual. *Pace* at 1305. The Louisiana Supreme Court determined the presumption of a statute classifying a person on the basis of birth is that it denies equal protection of the laws and is unconstitutional unless it is shown the classification substantially advances an important objective of the government. *Id*. Therefore, "a law containing a statutory classification based on any of the six enumerated grounds does not enjoy the usual presumption of constitutionality." *Manuel v. State*, 677 So. 2d 116, 119 (La. 1996). La. Civ. Code art. 198 must be declared unconstitutional unless the state can show that it survives an intermediate or "heightened" scrutiny analysis.[3]

Under federal law, children derive their fundamental rights through their parents' liberty interests, and any law that is challenged is subject to

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the best interests of the child. A child who will one day be old enough to fully understand and appreciate the circumstances which accompanied this extensive legislation." *Kinnett v. Kinnett*, 366 So. 3d 25 (La. 2023).

[3] *Id.* at 120. The La Supreme Court notes here that rational basis analysis is only appropriate if the classification is not one of the enumerated grounds in LA. Const. art. I, § 3; the court further notes that the burden of proof is on the proponent of constitutionality.

strict scrutiny. In Louisiana, children also retain their own fundamental rights, and any law discriminating on the basis of one of the six enumerated grounds in LA. Const. art. I, § 3 is subject to intermediate or "heightened" scrutiny. Under LA. Const. art. I, § 3, the equal protection analysis to be applied is dependent on the legislative classification of the individual, as viewed on a spectrum: (1) when a law classifies individuals on the basis of race or religious beliefs, it shall be repudiated completely, (2) when the law classifies person on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis, and (3) when the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

In *Sibley v. Board of Sup'rs of Louisiana State Univ* and again in *Pace v. State ex rel. Louisiana State Emp. Ret. Sys*., the Louisiana Supreme Court noted, "when a statute classifies a person on the basis of birth […] it is presumed to deny equal protection of the laws and to be unconstitutional unless the state or other advocate of the classification shows that the classification substantially furthers an important governmental objective." *Pace* v. 1305. Thus, a law containing a statutory classification based on any of the six enumerated grounds does not enjoy the usual presumption of constitutionality with its attendant burden of proof on the party challenging its constitutionality; rather, the burden switches to the

proponent of the classification and the standard of review is heightened. *Manuel v. State*, 692 So. 2d 320, 339 (La. 1996).

The Louisiana Supreme Court clarified the test for determining the constitutionality of the classification based on the discrimination of birth. *Id.* at 340. When considering this classification a court may examine several factors, including:

> (1) Whether each interest asserted by the state is actually implicated by the classifications employed by the statutory scheme;
> (2) Whether there are reasonable non-discriminatory alternatives to the challenged statutory scheme by which the state's asserted interest and objectives might be satisfied; and
> (3) Whether the discriminatory classifications contained in the challenged statutory scheme undercut any countervailing state interests.

Id. at 324. When applying these factors, the court emphasized that in cases where the constitutional analysis is in question but the facts of the case are different, the "key factor in reviewing classifications is the degree of correlation between the means and the ends that is required by the judiciary and the extent to which the judiciary will analyze the permissible purpose of the
legislation." *Id.* at 344.

The question in the present case is whether La. Civ. Code art. 198 classifies children on the basis of birth. The code article reads:

> 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 the paternity, the action shall be instituted within one year from the day the father knew or should have known 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 the Article are peremptive.[4]

La. Civ. Code art. 198 creates two classifications of children. The first classification is a child without a presumed father. This child is not impacted by the peremptive period exception in La. Civ. Code art. 198. Rather, he enjoys the right to filiate to his biological father at any point. The second classification, however, is subject to the

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[4] *See* Legislative History for peremptive definition. Page 18 *Infra.*

peremptive period exception in La. Civ. Code art. 198 ***because*** the child was automatically filiated to his mother's husband regardless of a biological link. Here, the code article classifies children on the basis of birth by categorizing them according to the circumstances underscoring their birth; namely, when the child's mother is married to a man other than his biological father at the time of conception. Thus, La. Civ. Code art. 198 discriminates on the basis of birth.

As La. Civ. Code art. 198 classifies children on the basis of birth, this Court must presume that the code article denies equal protection and is unconstitutional unless the state can show that classification is "not arbitrary, capricious, or unreasonable" (LA. Const. art. I, § 3) because it substantially furthers the appropriate governmental purpose. Louisiana's attributed governmental purpose is protecting the child from the upheaval of litigation and protecting the intact family.[5] While the goals are laudable, they do not reflect the achieved reality in Louisiana of article 198. *See also Leger v. Leger*, 258 So. 3d 624 (La. App. 3 Cir. 2017); *State, Dept. of Children and Family Services ex rel. A.L. Lowrie*, 167 So. 3d 573 (La. 2015); *K.A.E.M. v. J.M.C., Born H.*, 979 So. 2d 613 (La. App. 3 Cir. 2008); *W.R.M. v. H.C.V.*, 951 So. 2d 172 (La. 2007); *Staten v. Brown*, 940 So. 2d 105 (La. App. 2 Cir. 2006). Furthermore, there are reasonable, non-

[5]*See* La. Civ. Code art. 198 cmt. (e) (The article's intent is to "protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father.")

discriminatory alternatives to the classification of children on the basis of birth by which the state's interests in protecting the child can be satisfied.[6] Finally, the classification undercuts the state's interest by preventing them from filiating to their biological fathers and from experiencing a natural relationship that could serve their best interest.

The imposed one-year peremptive period established in La. Civ. Code art. 198 requires biological fathers to impose on potentially intact families as litigation is their only way to filiate to the child. Furthermore, this peremptive period creates adverse parties as a biological father may be forced to prove bad faith of the mother. *See Bass v. Sepulvado*, 340 So. 3d 1158, 1158-66 (La. App. 3 Cir. 2022) (An extensive discussion about a mother's bad faith in light of the *Kinnett v. Kinnett* ruling). This not only generates undue litigation, but creates further grief or burden for a child, not less. In the present case, the peremptory period increased litigation and adversely impacted the intact family unit. Therefore, this Court should find that La. Civ. Code art. 198 denies equal protection and is unconstitutional under the LA. Const. art. I, § 3 because it discriminates against children on the basis of birth.

III. The legislature did not account for the child at all when it developed La. Civ. Code art. 198.

In Louisiana, the sources of law are legislation and custom. La. Civ. Code art. 1. Legislation is a

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[6] La. Civ. Code art. 198 cmt. (g) (states that the Department of Social Services is not bound by the time periods in this Article).

solemn expression of legislative will. La. Civ. Code art. 2. The paramount consideration for statutory interpretation is to ascertain the Legislature's intent for enacting a law. *State v. Johnson,* 844 So. 2d 568, 575 (La. 2004). The starting point of interpretation is the law itself. *Rando v. Anco Insulations Inc.,* 16 So. 3d 1065, 1075 (La. 2009). Where a law is unambiguous and does not lead to absurd consequences, it should be applied as written; (La. Civ. Code art. 9) and a court should not attempt to find ambiguity where there is none. *Edwards v. Daugherty,* 883 So. 2d 932, 941 (La. 2004). However, if a law is unclear, its meaning should be construed to best comport with the Legislature's intent, (La. Civ. Code art. 10) examining the context in which the words occur, (La. Civ. Code art. 11) and reading the parts or provisions together in harmony with one another. *Johnson,* 844 So. 2d at 576 (citing *State ex rel. Mims v. Butler,* 601 So. 2d 649, 652 (La. 1992)). A court may find that the overall effect of a change in law or an amendment to the law creates ambiguity. *Rando,* 16 So. 3d at 1075 (citing *Fruge v. Muffoletto,* 137 So. 2d, 336, 339 (La. 1962)).

Prior to enactment of La Civ. Code art. 198 with its one-year peremptive period exception, the jurisprudence allowed for a liberal prescriptive period, with varying results. *Putnam v. Mayeaux,* 645 So. 2d 1223, 1226 (La. App. 1 Cir. 1994) (no applicable prescriptive period for avowal action; one year and three days was a reasonable time); *T.D. v. M.M.M.,* 730 So. 2d 873, 876-77 (La. 2009) (six years was not too long to wait to bring avowal action). Prescription bars the right to recover but does not formally extinguish the right, while peremption extinguishes the right altogether, completely

destroying the cause of action itself. *Chevron Oil Co. v. Huson,* 404 U.S. 97, 102 (1971); *Istre* v. *Diamond M Drilling Co.,* 226 So. 2d 779, 794-5 (La. 3 Cir. 1969); *Succession of Pizzillo,* 65 So. 2d 783, 786 (La. 1953). Peremption is a period of time fixed by law for the existence of a right that, unless timely exercised, is extinguished upon the expiration of the time period. La. Civ. Code art. 3458. A peremptive period may not be renounced, interrupted, or suspended. La. Civ. Code art. 3461. Understanding the legislative history of article 198 of the Louisiana Civil Code serves to illuminate the intent missing from the Article's peremptive period exception.

Though similar to parentage, the legal construct of filiation is singular to Louisiana. La. Civ. Code art. 179 (filiation is the legal relationship between a parent and a child). Current La. Civ. Code art. 198 began as HB 842, a 2004 stand-alone law offered as a precautionary measure to another law in the event the latter did not pass, which it did not.[7] That legislation, HB 368, was an overhaul of the filiation laws, which included the creation of an avowal action for the biological father.[8] HB 842 included a two-year peremptive period for avowal action brought by a biological father. H.B. 842, p. 1, Reg. Sess. (2004) ("This action shall be instituted

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[7] See Meeting of the Civil Law Committee of the Louisiana House of Representatives (4/5/2004), H.B. 842, *available at* http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2004/apr/0405_04_Day05_2004RS (Timecode: 2:46:55) (Website no longer available)

[8] See Meeting of the Civil Law Committee of the Louisiana House of Representatives (4/5/2004), H.B. 842, *available at* http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2004/apr/0405_04_Day05_2004RS (Timecode: 1:11:52 – 1:15:02)

within two years from the date of birth of the child."). HB 368 was amended by the House Civil Law Committee to include this same two-year provision. In 2005, when legislating HB 91, a duplicate to the larger filiation package that was offered in HB 368, (H.B. 91, Reg. Sess. (La. 2005)), a Senate committee proposed an amendment to change the peremptive period originating in HB 842 from two years to one. (Senate Greensheet Digest for H.B. 91, p. 2, Reg. Sess. (La. 2005)). The reason offered in committee for the change in the peremptive period was that it made the bill consistent "so that everything would be one year" across the statutory package and that "the time change makes it a continuation with the entire bill."[9] The peremptive period exception left the Senate committee on Judiciary A as part of HB 91 (Act 192, Reg. Sess. (La. 2005)) to later become article 198. The new article contained no peremptive limitations except in three instances. The first is a peremptive period of a year from the child's death in posthumous avowal actions. The following two exceptions, one with the element of bad faith[10] and one without, deal directly with a child already filiated to another man.[11] This is the only article offering an avowal

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[9] Representative Derrick Shephard. *See* Senate Committee on Judiciary A (06/07/2005), H.B. 91, accessed through the Louisiana Senate Records Office.

[10] The bad faith exception in article 198 allows for ten years from the birth of the child or a year from when the father knew or should have known that child was his, whichever is sooner. There is little explanatory material in the Civil Code (*see* La. Civ. Code art. 198 cmt. (f)) regarding this peremptive period. To qualify for the adjusted peremptive period, a biological father must litigate the mother's bad faith.

[11] *See* footnote 65.

action in those circumstances and provides the statutory basis for dual paternity.

With sparse discussion on the intent of the legislators enacting what would become article 198 on the record in the legislature, a later Louisiana Civil Code Official Comment (e) of the article offered an intent. Namely, the one-year peremptive period is placed on the biological father to "protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father." La. Civ. Code art. 198, Official Comments (e). The original language of the bill limited an avowal action to a marriage in the process of dissolution or already dissolved. H.B. 842, p. 1, Reg. Sess. (2004); H.B. 368, p. 13, Reg. Sess. (La. 2004). Yet, during a legislative discussion of the original bill, H.B. 368, there was concern a biological father with certainty of his paternity could be prevented from bringing an action, as he has no control over the marriage ending.[12] A representative noted that these restrictions were in place to protect the preservation of an intact family.[13]

Louisiana public policy maintains the intact family, or reunification of a previous family unit, as a foundational element. The Louisiana Children's Code article 101 states, "the people of Louisiana

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[12] See Floor Debate on Louisiana House of Representatives (4/7/2004), H.B. 368, available at http://house.louisiana.gov/H_VideoNideoArchivePlayer.aspx?v=house/2004/apr/0407_04_Day_7_2004RS (Time Code: 1:14:48-1:15:38)

[13] *Id.*

recognize the family as the most fundamental unit of human society; that preserving families is essential to a free society." The legislative record of the peremptive period exception of art. 198 evidences a presumption that preserving an intact family, namely a marriage, takes priority to determining whether a relationship between biological parent and child is in the child's best interest as specifically outlined in La. Civ. Code art. 134. La. Civ. Code art. 134, *see* p. 24 *infra*.

Louisiana is not alone in the country in codifying the use of the best interests of the child in parent-child relationships. La. Civ. Code art. 131. Article 131 of the Civil Code stipulates that the best interest of the child shall be the primary consideration of the court. *Id.*

IV. The Louisiana Legislature is not the proper entity to conduct a best interest of the child *analysis* for parent-child relationships; that role lies solely with the courts.

The Louisiana Legislature's peremptive period supplants the court's role in determining the fitness and ability of each parent to provide and care for the child. La. Civ. Code art. 131 ("In a proceeding for a divorce of thereafter, the court shall award custody of a child in accordance with the best interest of the child."). Not only did La. Civ. Code art. 198 preclude the court from determining Keith Andrews's fitness to parent or potential custody arrangements for G.J.K., but it also deprived the court of its analysis of the best interest of the minor child.

The peremptive period placed on fathers by La Civ. Code art. 198 impedes the best interest of the child standard, and the wide discretion courts have in assessing what is best for ***each*** child. The Louisiana Supreme Court stated, "our judicial system does not simply protect parental rights, but is required to protect the rights of children to thrive and survive." *State v. Everett*, 787 So. 2d 530, 535 (La. App. 2 Cir. 2001). Courts are in a unique position that allows them to determine parent-child relationships on a case-by-case basis. *Id.* Louisiana has adopted a policy which favors joint custody as the preferred custodial arrangement over a single parent having full custody. La. Civ. Code art. 132, Official Revision cmt. (b). In line with these policies, the Court may, when it is in a child's best interest, grant joint custody between three legal parents (a legal father, a biological father, and a mother) who together can provide as much care, custody, and support as two parents can. *Everett* at 535.

Unlike other United States jurisdictions, Louisiana recognizes a biological father's right to establish paternity of a child, even when there is a legal father to the child,[14] creating the unique right of dual paternity. However, with the stated goal of protecting children and families, the Legislature has employed peremptive periods to limit the time for such avowal actions. This is what happened in the present case. By the time Keith Andrews learned that he was the biological father of G.J.K., it was too late for G.J.K. to enjoy the benefit of dual paternity.[15]

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[14] La. Civ. Code art. 198.

[15] Pepe, Victoria L., *Conceiving Consistency: Giving Birth to a Uniform "Best Interests of the Child" Standard*, 50 Hofstra Law

Past jurisprudence relying on the *Michael H.* analysis is not applicable in this case as dual paternity was not available in California when it was decided. *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989). Louisiana allows for dual paternity, and had the matter occurred in Louisiana and a best interest of the child analysis conducted, custody and/or visitation may have been allowed between the three parents.

To date, Louisiana law and jurisprudence recognize that children have certain rights under the law, *inter alia,* the right to prove filiation/be filiated and the right to support, education, and direction. La. Civ. Code art. 197; La. Civ. Code art. 198; La. Civ. Code art. 224; *see also Smith v Cole*, 553 So.2d 847 (La. 1989). Federal case law also supports the assertion that children have an interest in knowing their biological parents, (*Adoptive Couple v. Baby Girl*, 570 U.S. 637, 686 (2013) (Sotomayer, J., dissenting) (noting "all children have the fundamental right to know their parents); *see also Michael H.* (Stevens, J., concurring)), an interest in preserving relationships that serve the child's welfare and protection, (*Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (noting that "to the extent parents and families have a fundamental liberty interest in preserving such intimate

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Review 467 (2022) (The development of the best interest of the child standard originated with mothers and fathers wanting to raise their children and states opting for "'cooperative'" or 'friendly parent' statutes" with the explicit understanding that "children ***do better*** when they are raised by ***both*** parents.") (Emphasis added). In no way is the presumption of paternity of G.J.K.'s father, Brandon Kinnett, called into question. Rather, G.J.K. is asking for the application of the best interest of the child standard to apply to parent-child relationships.

relationships, so too, do children have those interests")), and an interest in preventing erroneous termination of the relationship between biological parent and child. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982). Keith Andrews was barred from filiating to G.J.K. due to the one-year peremptive period provided in La Civ. Code art. 198. La. Civ. Code art. 198. Had this not happened, the court would have conducted a best interest of the child analysis to determine what is in G.J.K.'s best interest.

A. The Best Interest of the Child Movement - ensuring parent-child relationships are protected by courts.

Nationally, the governing standard for determining parent-child relationships became the best interest of the child. Timothy B. Walker, *Measuring the Child's Best Interests - A Study of Incomplete Considerations*, 44 Denv. L.J. 132 (1967). There is no uniform best interest of the child standard, but each State has enumerated their own factors.[16] Beginning in the 1980s,

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[16] Pepe, Victoria L., *Conceiving Consistency: Giving Birth to a Uniform "Best Interests of the Child" Standard*, 50 Hofstra Law Review 467 (2022). *See also* La. Civ. Code art. 134. A. Except as provided in Paragraph B of this Article, the court shall consider all relevant factors in determining the best interest of the child, including: (1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration. (2) The love, affection, and other emotional ties between each party and the child. (3) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child. (4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs. (5) The length of time the child

States began codifying their own best interest of the child standard, with Vermont being the last State to codify in 2011.[17] The best interest of the child standard has not only been used for determining parent-child relationship disputes between legal parents but also prospective guardians,

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has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment. (6) The permanence, as a family unit, of the existing or proposed custodial home or homes. (7) The moral fitness of each party, insofar as it affects the welfare of the child. (8) The history of substance abuse, violence, or criminal activity of any party. (9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody. (10) The home, school, and community history of the child. (11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference. (12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party. (13) The distance between the respective residences of the parties. (14) The responsibility for the care and rearing of the child previously exercised by each party. B. In cases involving a history of committing family violence, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, including sexual abuse, as defined in R.S. 14:403(A)(4)(b), whether or not a party has sought relief under any applicable law, the court shall determine an award of custody or visitation in accordance with R.S. 9:341 and 364. The court may only find a history of committing family violence if the court finds that one incident of family violence has resulted in serious bodily injury or the court finds more than one incident of family violence.

[17] *See generally* Child Welfare Information Gateway. (2020). *Determining the best interests of the child*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau.

grandparents, and other enumerated third parties. Pepe, Victoria L., *Conceiving Consistency: Giving Birth to a Uniform "Best Interests of the Child" Standard*, 50 Hofstra Law Review 467 (2022). *See also Troxel v. Granville*, 530 U.S. 57, 88 (2000).

Since the exact methodology is determinable by an individual state, courts have broad authority when applying the standard. Pepe, Victoria L., *Conceiving Consistency: Giving Birth to a Uniform "Best Interests of the Child" Standard*, 50 Hofstra Law Review 467 (2022). Even with differing standards and wide latitude given to judges, courts understand the impact their decisions have on families and children. *Id.* Courts have outlined the benefit of the best interest of the child standard, noting:

> The 'best-interest-of-the-child' standard is more than a statement of the primary criterion for decision or the factors to be considered; it is an expression of the court's special responsibility to safeguard the interests of the child at the center of a custody dispute because the child cannot be presumed to be protected by the adversarial process.[18]

The best interest of the child standard allows courts to assess what is best for the child on a case-by-case basis. Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the Child Standard,*

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[18] Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 University of Baltimore Law Review 85 (2011).

Judicial Discretion, and the American Law Institute's "Approximation Rule," 41 University of Baltimore Law Review 85 (2011). *See also Harvey v. Harper*, 358 So. 3d 988, (2023) (custody modification case whereby the Louisiana Court of Appeals reasoned, "the trial court sits as a sort of fiduciary on behalf of the child and must pursue actively that course of conduct which will be of the greatest benefit to the child.").

B. The best interest of the child standard is consistently applied by courts across the nation in cases involving a parent-child relationship.

States across the country regularly apply the best interest of the child standard in litigation involving a parent-child relationship. *See also McManus v. McManus*, 127 So. 3d 1093, 1099 (La. App. 3 Cir. 2013) (custody modification sought by father with the Court of Appeals supported the trial court's decision to hold off on designating a domiciliary parent until further evaluations of the mental and physical health of the mother could be made.); *Cox v. Hendricks*, 302 N.W.2d. 35, 37-38 (Neb. 1981) (paternity establishment and child support determination); *Boisvert v. Gavis*, 210 A.3d. 1, 15 (Conn. 2019) (third-party visitation with the Connecticut Supreme Court concluded the best interest of the child analysis to determine not visiting with maternal grandparents would cause "substantial harm" to a child since grandparents had a significant relationship with the child."); *In re T.K.*, 279 A.3d. 1010, 1031-1032 (Md. 2022) (ruled that juvenile courts ***do*** have the judicial discretion to

apply the best interest of the child standard.) The Louisiana Supreme Court in *Benny Council v. Livingston* held "the best-interest-of-the-child standard governs all child custody determinations, including the determination of whether to modify the domiciliary-parent designation." *Benny Council v. Livingston*, 364 So. 3d 410, 417 (La. App. 4 Cir. 2020). Despite the best interest of the child standard governing parent-child relationships across the country, Louisiana bypassed the best interest of the child analysis of a particular parent-child relationship– children born of extramarital affairs where the biological father is attempting to filiate to the child. Notably, in *Johns v. Johns*, when courts apply the best interest of the child standard, they have the distinct role of acting as fiduciaries for children and have a duty to act in the best interest of the child when making decisions. *Johns v. Johns*, 471 So. 2d 1071, 1075 (La. App. 3 Cir. 1985). Further, the Louisiana Court of Appeals concluded, "in its capacity as a lookout for the child, the court is obligated to consider additional factors . . . The trial court cannot rest on the legislative presumption to solve its case, but must become an active participant in the case." *Id.* at 1076.

In the present matter, a best interest of the child analysis was never conducted as between the parties on behalf of G.J.K. Keith Andrews ("Intervenor"), filed a *Petition to Establish Paternity and to Obtain Custody Rights*, pursuant to La. Civ. Code art. 198 on February 10, 2017. In his petition, Mr. Andrews alleged he was the biological father of the minor child, G.J.K. Pursuant to Intervenor's *Petition* and LA. R.S. 9:345, on March 23, 2017 the Loyola Law Clinic was appointed to represent the

best interests of the minor child, G.J.K., as attorney for the child.

Despite the best interest of the child standard governing parent-child relationships across the country, Louisiana bypassed the best interest of the child analysis of a particular parent-child relationship– children born of extramarital affairs where the biological father is attempting to filiate to the child. The resulting presumption of art. 198 is that an intact family and avoidance of litigation trump the best interest of the child. The validity of that presumption has failed in the present case. As jurisprudence has shown, consistently in parent-child relationships across the country, it is the duty of the court to determine the best interest of the ***child***. *McManus* at 1099.

CONCLUSION

For the foregoing reasons, Respondent and Interested Party, G.J.K., a minor child respectfully urge this Court to grant the Petition for Writ of Certiorari Before Judgment.

Respectfully submitted,

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No. 23-358

In The Supreme Court of the United States

KEITH ANDREWS,

Petitioner,

v.

JARRED BRANDON KINNETT, ET AL.,

Respondents.

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

APPENDIX

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APPENDIX TABLE OF CONTENTS

DISTRICT COURT

Judgement on Appointment of Attorney for the minor child pursuant to LA. R.S. 9:345, 24th Judicial District Court for the Parish of Jefferson State of Louisiana (March 23, 2017) A1

FILED: 03/23/2017

24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON STATE OF LOUISIANA

NUMBER 768-195 DIVISION "E"

KAREN COHEN KINNETT

VERSUS

JARRED BRANDON KINNETT

JUDGMENT

This matter came before Hearing Officer Paul Fiasconaro on Friday, February 24, 2017.

Based upon the facts and pleadings filed,

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to LSA-R.S. 9:345, the Stuart H. Smith Law Clinic and Center for Social Justice through Loyola University School of Law, 540 Broadway Street, New Orleans, Louisiana 70118, be and is hereby appointed to represent the minor child, GRANT KINNETT. The attorneys will be allowed to meet with the child without the parties present as the attorneys deem necessary, to conduct home visits as they deem necessary, to schedule appointments to meet with the minor children as they deem necessary, to access any and all medical records, including counselling or therapy records. to speak and interview the child's doctors, counsellors

and/or-therapists, and the parties themselves, as well as any other person the court appointed attorneys deem necessary. All parties are ordered to cooperate fully with the court-appointed attorneys for children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ramona Fernandez has agreed that the Stuart H. Smith Law Clinic and Center for Social Justice through Loyola University School of Law may be served with copies of all pleadings filed on behalf of any of the parties as of this date pursuant to certified mail.

JUDGMENT RENDERED AND SIGNED, this 23rd day of March, 2017, in Gretna, Louisiana.

/s/ Judge

APPROVED AS TO FORM AND CONTENT:

/s/ Jacqueline F. Mahoney (25779)

/s/ Tracy Glorioso Sheppard (25063)

/s/ Allison Nestor (27269)

/s/ Stephanie Fratello (29192)