NO. 23-358

In the Supreme Court of the United States

KEITH ANDREWS,

Petitioner,

v.

JARRED BRANDON KINNETT, ET AL.,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In reviewing the Opposition to Writ Application filed by Mr. Kinnett and Ms. Kinnett herein, Petitioner and his counsel planned to point out and explain in this Reply Brief every false assertion contained in that document. However, the Reply Brief limit of 3000 words would not be enough to complete such a task. Therefore, Petitioner will address herein only the biggest and most relevant of the incorrect statements of the Opposition. Petitioner first draws the Court's attention to the fact that the Kinnetts, despite arguing throughout the course of this extended litigation that they were still an intact family, on the same day that the Opposition filed its brief to this court, they also filed a second, re-urged petition for divorce that was granted three days later, on November 5, 2023.

I. Why Should Certiorari be granted?

Petitioner contends that La. C.C. Article 198's time limitation generally, as well as the application of the bad faith exception, as established by the Louisiana Supreme Court (hereinafter "LaSC") in Kinnett I, run afoul of due process protections, both substantive and procedural, as well as equal protection guarantees, as contained in the United States Constitution. The lack of notice to the potential biological father deprives the petitioner, and others similarly situated, of any meaningful opportunity to assert his rights. The duty of good faith of the mother must include a duty to investigate and to notify the potential father of the possibility of his paternity. Otherwise, the mother's silence works to deny the possible father notice and thereby

to deny him any meaningful opportunity to exercise his legal right to avow.

La. C.C. Article 198 violates Appellant's right to equal protection in two ways. As interpreted by the trial court and affirmed by the LaSC, there is a disparity in the standards of knowledge under the statute between what is attributed to the mother and to the biological father, and there is a disparity as to the respective duties placed upon the mother and the biological father that are not in any way reasonable or rational, all as highlighted in the joint Opposition to the Petitioner's writ application. Regardless of whether the states are free to set time restrictions on avowal actions, any such restrictions cannot run afoul of the Equal Protection Clause or due process.

Here, the mother's knowledge that there was a possibility that another man could be the father of her child but not disclosing it did not create bad faith on the part of the mother, and did not rise to the level of "knowledge" for purposes of the bad faith analysis, according to the LaSC's interpretation. Yet knowledge of the possibility of paternity on behalf of the father, created "knowledge" for determining when he knew or should have known of his paternity. This is particularly striking given that the mother had access to far more information than the biological father.

Likewise, the knowledge possessed by the mother did not create any additional duty for her to investigate further, i.e., through DNA testing. Yet, the mother is the one who had access to the children and could have commissioned such testing on a discrete basis. She ultimately did exactly this, but only after the one-year peremptory period had already run. This is contrasted with the trial court finding that while the biological

father may not have had actual knowledge, he was deemed to have knowledge under the statute because he did not investigate further. Thus, a duty was imposed upon the biological father to investigate further, despite the fact that he had no access to the children, and that any such investigation could have culminated in litigation. And litigation is exactly what the statute is supposedly trying to prevent. It should also be noted that the trial court's finding that he had knowledge of the possibility of his paternity was largely influenced by the trial court's incorrect finding that he had engaged in an ongoing and repeated sexual relationship with Ms. Kinnett.

If the LaSC had interpreted the article as suggested by the Petitioner and as interpreted by the Louisiana 5th Circuit Court of Appeal, there would be no grounds for this present constitutional claim. It is the flawed interpretation of the trial court, as affirmed by the LaSC that makes the article unconstitutional as violative of due process and equal protection.

Certiorari should be granted to rectify these constitutional violations and allow Mr. Andrews the opportunity to be heard as a potential caregiver of his own child, considering the child's best interests.

II. Why Is Louisiana Unique?

Louisiana, alone among the states, has a dual paternity regime specifically intended for situations such as the one presented herein.

The Opposition claims that Petitioner's reliance on the dual paternity regime in Louisiana is misplaced. Principally because, they point out, individual courts in several states have acknowledged a third parent under certain circumstances. However, none of those

cases concern a biological father avowing a child born of another man's marriage. Most of those cases are also not precedential, being tailored strictly to the facts of the individual matter. Some of the cases have to do with surrogacy, some with a long-time caretaker being acknowledged (such as a grandparent or guardian) and a few have to do with adoption by same-sex couples. However, none of them have to do with avowal by a biological father of a child born of another's marriage. The state of Maine has even codified the power of the Courts to make such determinations, but they do not include situations relevant to the present matter and Louisiana remains unique in this regard.

In Louisiana, when a man avows a child born of another man's marriage, the husband is not removed as the father of the child. Louisiana's dual paternity is designed to protect the rights of all parties as parent of a child and thereby the child itself. The right of avowal was originally created by the Louisiana Supreme Court which recognized both the constitutionally protected rights of a biological father and the inequity of Louisiana law allowing the child to filiate with his biological father for succession purposes upon death of the biological father, and allowing the child to obtain support from his biological father during life. *Smith v. Cole*, 553 So.2d 847, 854-55 (La. 1989). These justifications still apply, so that the corresponding right of the biological father to avow is subject to constitutional protections. While dual paternity is unique to Louisiana, as more third parents are being acknowledged in more and more scenarios, it would not be hyperbole to suggest that this case will ultimately have nation-wide ramifications.

III. Facts Established by the LaSC

The Opposition claims that the LaSC restored the factual findings of the trial court, including specifically that there was an ongoing and continuous relationship between Mr. Andrews and Ms. Kinnett. This is not true. The facts, as set forth by the LaSC are stated in its opinion [App.87a-88a]. Nowhere in that opinion does the LaSC state that there was an ongoing and continuous relationship. Despite the fact that all parties agreed at all post-trial stages of this litigation that there was no ongoing and continuous relationship, the Opponents now misrepresent the facts regarding the nature of the relationship between Ms. Kinnett and Mr. Andrews. The only testimony in this regard came from Mr. Andrews, who stated that the relationship was very sporadic, and became even more so at the end. Additionally, Mr. Andrews' phone records showed very little contact between Ms. Kinnett and Mr. Andrews in the months leading up their encounter which resulted in the conception of GJK. Nonetheless, counsel for Mr. Kinnett argued that the facts of *W.R.M. v. H.C.V.*, 06-0702, 951 So.2d 172 (La. 3/9/07) were strikingly similar to the facts of the instant case. Despite the fact that the trial court listened to testimony at trial and had no evidence or testimony to support such a conclusion, it adopted this aspect of *W.R.M.* and incorporated it into its reasons for judgment, finding that Mr. Andrews and Ms. Kinnett engaged in ongoing, repetitive and continuous sexual conduct. [App. 232a]

This is important because it is the primary reason that the trial court found that the case of *W.R.M.* (*Id.*) directly applied to the instant matter, and thus was highly persuasive. This led to the initial ruling against Mr. Andrews' avowal action being timely filed, and against Mr. Andrews' claim that Ms. Kinnett in bad faith deceived him as to his paternity. This error was a major reason for this continuing litigation because it made the article violative of the U.S. Constitutional protections of due process and equal protection, as more thoroughly briefed in the Petition for Writ of Certiorari.

IV. The Misapplication of *Michael H.*

Contrary to the assertions of the Opposition, Petitioner correctly states in his Petition that the LaSC relied on the plurality opinion in *Michael H. v. Gerald D.*, 87-746, 491 U.S. 110, 141, 109 S.Ct. at 2352, 105 L.Ed.2d at 118 (1989), writing in its opinion that,

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

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

Kinnett v Kinnett, 2023-CJ-00060, 366 So. 3d 25, (La. June 27, 2023). (*Kinnett II*) (App. 30a- 31a.)

Petitioner's analysis of the applicability of *Michael H*. is correct, and the LaSC's evisceration of the applicability of *T.D. v. M.M.M.*, 98-167, 730 So.2d 873 (La. 3/2/99), to the analysis of the applicability of *Michael H.* is an error on the part of the LaSC and the Opposition.

The LaSC stated that, because the effects of *T.D. v M.M.M.* have been abrogated by legislation (reforming the jurisprudential application of laches to avowal actions and creating La. C.C. art. 191, now art. 198) the case is no longer authoritative in determining the constitutionality of La. C.C. art. 198. However, this actually proves the point of the Petitioner.

The *Michael H.* opinion is a plurality only and should never have been used as binding precedent. The underlying California laws that gave rise to the case of *Michael H.* have all been repealed or replaced. In addition, as the LaSC had already noted in *T.D. v M.M.M.*, the laws of California and the laws of Louisiana were so completely divergent that the case could not apply in Louisiana. Yet, the LaSC stated that the facts of *Michael H.* were exactly the same as in the present matter. This is clearly incorrect.

This statement by the LaSC highlights the fundamental errors it made in analyzing the constitutionality of La. C.C. art. 198. First, although Louisiana may no longer apply laches to an avowal action, the reasoning of the court in *T.D. v M.M.M.* remains valid. That is, Louisiana (both then and today) has a very different

system of avowal and parental rights than California did when *Michael H.* was decided and therefore the case has no jurisprudential value in Louisiana. The LaSC claims that the opinion in *T.D. v M.M.M.* is stale and not binding authority because the law has changed, however, the court fails to acknowledge that *Michael H.* is even less authoritative, since it was never applicable in Louisiana at all, and all of the laws that it was based on have been repealed or replaced. *Michael H.* is a case that is just sitting out in the ether with no precedential value to this case, yet the LaSC improperly relied on it as authoritative law.

The LaSC stated that it was forced, just as the plurality of this Court stated that it was forced in *Michael H.*, to decide between the rights of the biological father and the presumptive father. This too is a fundamentally incorrect analysis. The LaSC was not forced to choose between the rights of the husband and the father, as the two fathers are not mutually exclusive, and the husband is not divested of his parental rights under Louisiana's dual paternity regime. The LaSC's balancing of the husband's versus the father's rights should not have occurred at all. The article is intended to protect the child from the upheaval of litigation when it is in an intact family, not to protect the husband from the embarrassment of having been cheated on, especially when the intact family no longer exists, as herein. In this case, the family was not intact, and litigation commenced prior to the filing of the avowal action by the filing of the initial petition for divorce. The Kinnetts lived separate and apart during the entire pendency of the proceedings, ultimately culminating in the judgment granting the Kinnett's

renewed petition for divorce, which the court entered on November 5, 2023.

It is worth noting that the issue of notice was never brought up in *Michael H.*, in *W.R.M.* or in *T.D. v M.M.M.* The lack of notice in this present matter gives rise, in part, to this constitutional challenge.

With the demise of the California laws giving rise to *Michael H.,* along with its improper use as binding precedent, the time is right to revisit its reasoning and holdings. The Petitioner invites the Court to do so herein.

Keith Andrews was denied his due process right to notice that he had a child and therefore was denied the opportunity to timely file his avowal action. This case is an opportunity for the court to clarify that *Michael H.* has no precedential value, where, as here, a state opens to door to avowal, it may not thereafter arbitrarily cut off those rights. Nor may the key to knowledge of the fact of paternity be held solely in the hands of another person (the mother), who may not be a neutral party. These are violations of due process and equal protection.

If the mother may remain silent as to the possible paternity of her child, then the article denies the biological father any meaningful opportunity to exercise his right to avow in a timely fashion. This is an issue firmly in the purview of this Court.

V. Facial Constitutional Challenge Not Waived

Contrary to the assertions of the Opposition, Petitioner did not waive his right to raise the issue that La. C.C. art. 198 is unconstitutional on its face. The opposition claims that the issue was not briefed

at the LaSC and therefore was waived. This is incorrect. First, because Petitioner did make constitutional arguments in both his opposition to writ application and the appellee original brief to the LaSC. Second, because the Petitioner, who was the Appellee at the LaSC, adopted and incorporated all of the law, arguments and reasoning set forth in the opinion of the La. 5th Circuit. This includes a thorough briefing of the constitutional issues, both facially and as applied. Third, the petitioner also adopted and incorporated by reference the brief to the LaSC filed on behalf of the minor child, GJK, by the Loyola University Family Law Clinic. That brief thoroughly set forth multiple arguments regarding the unconstitutionality of the code article both on its face and as applied. Finally, this appeal arises from both of the decisions of the LaSC, and, in his Opposition Briefs to both Mr. Kinnett and to Ms. Kinnett, at the LaSC in *Kinnett I*, your Petitioner adopted the full and complete reasoning of Judge Wicker in her Concurrence to that opinion in the 5th Circuit as his argument (*Kinnett I*).

Mr. Andrews has preserved the constitutional argument at every level in these proceedings and it is well within the authority of this Supreme Court to consider any and all arguments that it deems necessary and proper. In addition, when a constitutional matter is likely to never be brought to the Supreme Court due to the nature of the facts and law involved, but where such matter is 'capable of repetition, yet evading review,' the court may nevertheless take up that matter.

Therefore, considering these adoptions by reference, along with the arguments set forth in the briefs of the Petitioner, the issue of a both a facial and as applied constitutional challenge to the code article

have not been waived and is preserved for the purpose of jurisdiction of this Court.

CONCLUSION

This Court is presented with an opportunity to right a grave injustice. Keith Andrews has expended every available effort just to have the opportunity to have a relationship with his child. Mr. Andrews is trying to do the right thing by his child and he is asking this Honorable Court to enforce his constitutional rights and allow him the opportunity to do so.

This Application for Writ of Certiorari should be granted, and the court should reverse the decisions of the Louisiana Supreme Court.

Respectfully submitted,

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