

**Case No.:**

**IN THE SUPREME COURT OF THE UNITED STATES**

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**C.P. and J.P.**  
*Petitioners,*

VS.

**C.A.,**  
*Respondent,*

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**On Petition for a Writ of Certiorari to the Supreme Court  
of California**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

Does California's Family Code section 7612(c), granting third parties legal and physical custody rights to a minor child as a "third parent," regardless of a finding of unfitness of the child's two legal parents, impermissibly interfere with the parents' fundamental rights in the "care, custody and companionship" of their child under the Fourteenth Amendment to the United States Constitution?

Were Petitioners, a married couple raising three children in an intact and fit home, deprived of their constitutional right to care, custody and control of their youngest child when the court applied California's "third parent law" to require them to share legal and physical custody of her with a man with whom Mother had had an extramarital affair?

## **PARTIES TO THE PROCEEDING**

1.           **C.P. and J.P.:** Petitioners herein;  
Respondents below.

2.           **C.A.:** Respondent herein; Petitioner  
below.

Because this proceeding originates as a confidential matter under the California Uniform Parentage Act, the parties will be referred to by their initials only. Petitioners request their names and the names of all other parties to this proceeding remain confidential.

## **CORPORATE DISCLOSURE**

The parties to this proceeding are individuals; there are no publicly held or traded corporations involved.

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW .....	i
PARTIES TO THE PROCEEDING .....	ii
CORPORATE DISCLOSURE .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
I. PETITION FOR A WRIT OF CERTIORARI .....	1
II. OPINIONS BELOW .....	1
III. JURISDICTION .....	2
IV. CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE .....	3
V. STATEMENT OF FACTS AND CASE .....	4
VI. LEGAL ARGUMENT.....	8
A. The Application of California's Third Parent Law Violates Mother And Father's Constitutional Rights to Raise Their Children.....	8

B.	In Granting Parental Rights to a Third Party, Regardless of Whether the Child's Two Legal Parents Are Unfit, California's Third-Parent Law Is Unconstitutional .....	12
C.	Conclusion .....	19

## APPENDIX

California Supreme Court Denial of Petition For Review (January 23, 2019) .....	A-1
<u>C.A. v. C.P. et al.</u> , 29 Cal.App.5 <sup>th</sup> 27(2018) .....	B-1
Judgment, <u>C.A. v. C.P. et al.</u> , Placer County Superior Court case no. SDR-49126 .....	C-1
California Family Code section 7612 .....	D-1

## TABLE OF AUTHORITIES

### **Federal Cases**

<i>James v. Rowlands</i> , 606 F.3d 646 (9th Cir. 2010) .....	10
<i>Michael H. v. Gerald D.</i> 491 U.S. 110 (1989) .....	13-18
<i>Reno v. Flores</i> , 507 U. S. 292 (1993) .....	10
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982) .....	9, 10, 11
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972) .....	9, 10, 11
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000) .....	10, 11, 12
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997) .....	10

### **Federal Statutes**

28 U.S.C. §1257(a) .....	2
--------------------------	---

### **Federal Constitution**

U.S. Const., 14th Am., sec. 1 .....	3
U.S. Const., 5th Am. ....	3

## **California Cases**

*In re Marquis D.*, 38 Cal.App.4th 1813 (1995) ..... 9, 10

## **California Statutes**

California Family Code section 7612(c) ..... 3, 14, 15

## **I. PETITION FOR A WRIT OF CERTIORARI**

Petitioners respectfully petition for a writ of certiorari to review the published opinion of the California Court of Appeal for Third Appellate District, which the California Supreme Court declined to review.

## **II. OPINIONS BELOW**

The underlying opinion from which the instant petition for writ of certiorari is being taken is C.A. v. C.P. et al., California Supreme Court case no. S253163. It is included in Appendix A. (App A.) It is unreported.

The appeal underlying that opinion is C.A. v. C.P. et al., California Court of Appeal for the Third Appellate District, case no. C084473, reported at 29 Cal.App.5th 27 (2018). It is included in Appendix B. (App.B.)



The civil action underlying that appeal is C.A. v. C.P. et al., Placer County Superior Court case no. SDR-49126. (App C.) It is unreported.

### **III. JURISDICTION**

This petition seeks review of an order by the California Supreme Court denying review of a published decision issued by the California Court of Appeal. A copy of the California Supreme Court's order is attached hereto. (App. A.) The appellate decision sought to be reviewed was entered on November 13, 2018. (App.B.)

This Court has jurisdiction to review the California Supreme Court decision denying petitioner's petition for review because the issue on review was a federal constitutional issue regarding the validity of a state statute and due process rights. 28 U.S.C. §1257(a).

#### **IV. CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE**

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. Const., 14th Am., sec. 1. It further provides that no person shall "be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const., 5th Am.

California Family Code section 7612(c) provides, in relevant part, "In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child....A finding of detriment to the

child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.” The entirety of California Family Code section 7612 is reproduced and attached hereto in Appendix D.

## **V. STATEMENT OF FACTS AND CASE**

Petitioners herein are “C.P. et. al.,” a married couple residing in California, raising three children. They will be referred to as “Mother” and “Father.” The youngest of their children, born July 2012, is the subject of the instant proceeding, and will be referred to as “Child.” Because this is a confidential proceeding under the Uniform Parentage Act of California, the parties will be referred to anonymously.

Respondent herein is “C.A.,” a man with whom Mother had an extramarital affair. Genetic testing that was ordered by the California Superior Court when Child

was three years old has determined that "C.A." is Child's biological father. However, Child has at all times lived with Mother and Father, who at all times maintained an intact marriage. Father is listed as Child's Father on the birth certificate, and he is neither sterile nor impotent.

Even before Child was born, Mother told C.A. she believed he was the biological father. Although Mother remained married to and living with Father, she and C.A. continued their affair for another 21 months, and would visit C.A. with Child, sometimes overnight. Mother continued to allow C.A. to see Child even after the affair ended, and accepted child support from C.A.

In November 2015, when Child was almost 3½ years old, C.A. filed and served a Petition to Establish Parental Relationship, alleging he was Child's father, requesting legal and physical custody, and asking that Child's last name be changed to his.

Mother moved to quash the petition, asserting she was married to and living with Father at the time of conception, that Father was on Child's birth certificate, and that he is conclusively Child's father under California Family Code sections 7540 and 7541. She also ceased the visits between Child and C.A.

The Placer County Superior Court denied Mother's motion to quash and ordered genetic testing, which indicated C.A. was Child's biological father.

Following a trial on the merits on the issue of parentage, the Placer County Superior Court acknowledged that Father was conclusively Child's father under the law. But it held that under California's new "third-parent law," Child had three parents: Mother, Father, and C.A. It ordered that Child's name be changed to include C.A.'s surname, that Child's birth certificate be amended to add C.A. as a father, and

that all parties—Mother, Father, and C.A.—share legal and physical custody of Child. And the court ordered the immediate establishment of a parenting plan. Judgment was entered on March 14, 2017, attached to which was the court's November 29, 2016 Statement of Decision. (App C.)

Mother and Father appealed to the Third District Court of Appeal of the State of California. Among other things, they argued that California's "third-parent law" as applied was unconstitutional under both state and federal law as infringing on Mother and Father's—and particularly Father's—right to parent and to the care, custody, and control of their child.

On November 13, 2018, in a published decision, the Judgment was affirmed. (App. B.) Among other things, the court held that the application of the third-parent law was not unconstitutional because "[C.A.], too, is a

parent” and that “the fact defendant husband is conclusively presumed to be the child’s father does not exclude the possibility that she may have a second father.” (App. B-33.)

On December 21, 2018, Mother and Father filed a petition for review to the California Supreme Court. On January 23, 2019, this petition was denied. (App A.)

## **VI. LEGAL ARGUMENT**

### **A. The Application of California’s Third-Parent Law Violates Mother and Father’s Constitutional Rights to Raise Their Child**

In their appeal to the Third District Court of Appeal of the Judgment awarding parental status to C.A., Mother and Father raised this constitutional issue in their Opening Brief, stating,

Under both state and federal law, “[a] parent’s right to care, custody and management of a child is a fundamental liberty interest

protected by the federal Constitution that will not be disturbed except in extreme cases where the parent acts in a manner incompatible with parenthood." (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1828, citing *Santosky v. Kramer* (1982) 455 U.S. 745, 753 and *Stanley v. Illinois* (1972) 405 U.S. 645, 651.)

Under both state and federal law, [Father] has a fundamental right to parent [Child] as her father, and [Mother and Father] have a fundamental right to parent [Child] as her parents. These rights were disregarded and severely infringed upon when the trial court not only allowed [C.A.] to take a paternity test more than two years after [Child's] birth, but allowed him to be named an additional father, and to secure legal and physical custody of [Child]. This was not only a violation of state law; it was a violation of [Mother and Father's] constitutional rights.

They also raised this issue in their Reply Brief, stating,



As [Child's] parents, [Mother and Father] had every right, including a constitutional right, to determine who [Child] visited and contacted. (See *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1828, citing *Santosky v. Kramer* (1982) 455 U.S. 745, 753 and *Stanley v. Illinois* (1972) 405 U.S. 645, 651.)

Parents have a constitutionally protected interest in the companionship, care, custody, and management of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *James v. Rowlands*, 606 F.3d 646, 651 (9th Cir. 2010). This is a fundamental right that is thus necessarily subject to strict scrutiny. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U. S. 292, 302 (1993) [Fourteenth Amendment “forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the

infringement is narrowly tailored to serve a compelling state interest"].

A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where the parent acts in a manner incompatible with parenthood. *Santosky v. Kramer*, *supra* 455 U.S. at 753; *Stanley v. Illinois*, *supra* 405 U.S. at 651.

California's third-parent law necessarily infringes on this fundamental right. Because it does not require any sort of unfitness on the part of the two legal parents before allowing a third party to obtain and exercise parental rights, it necessarily violates the Fourteenth Amendment, as articulated in *Troxel v. Granville*, 530 U.S. 57 (2000).

**B. In Granting Parental Rights to a Third Party, Regardless of Whether the Child's Two Legal Parents Are Unfit, California's Third-Parent Law Is Unconstitutional**

Because California's third-parent law necessarily infringes upon fundamental rights to raise a child, it must pass strict scrutiny. As this Court stated in *Troxel, supra*, The liberty interest of parents in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel, supra* at 65. In *Troxel*, this Court held unconstitutional a state statute that permitted third parties, including grandparents, to obtain visitation of a minor child on a showing of "best interests of the child" where the child's parent was not unfit. 530 U.S. at 68. This Court found "important" the lack of any finding of unfitness on the part of the legal parent, noting "the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 68-69.

The instant case, to some extent, picks up where *Michael H. v. Gerald D.* 491 U.S. 110 (1989) left off. In *Michael H.*, as in this case, minor child was conceived as the result of an extra-marital affair, but born to a married couple, the husband of which was listed as the child's father on the birth certificate. *Id.* at p. 113. Thereafter, the mother continued sporadic relationships with both men and informed both her husband and Michael, the "boyfriend," that the latter was the child's biological father. *Id.* at p. 114. Both Michael and the child petitioned to the superior court in California to allow Michael visitation rights. The husband objected and sought judgment that he was the conclusively presumed father under California law and there were thus no competing paternity interests. *Id.* at p. 115. The superior court granted judgment in the husband's favor, finding

allowing such visitation rights would “impugn[] the integrity of the family unit.” *Id.* at p. 116.

Michael appealed unsuccessfully, and the California Supreme Court declined review. Michael then petitioned to this Court, which heard and decided the matter against him. Therein, this Court noted, “California law, like nature itself, makes no provision for dual fatherhood.” *Id.* at p. 118. The difference between when *Michael H.* was decided and present day is that California has since passed a law allowing a child to have, “in rare cases,” three parents. Cal.Fam.Code §7612(c). Thus, unlike nature itself, California law has now provided for “dual fatherhood.”

But that does not mean that it is constitutional. It is unconstitutional because it does not require a finding of unfitness on the part of one of the child's conclusively presumed parents, but instead allows for the creation of

a situation in which a married couple in an intact home may be forced to share legal and physical custody of their child with a third party.

In *Michael H.*, this Court further noted that were Michael successful in being declared the child's father, legal custody rights would follow, including “the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child;” and the right to teach the child moral standards and religious beliefs. *Id.* at pp. 118-119 [citation omitted]. It is precisely these rights that are being infringed upon by the application of Family Code section §7612(c) to require two conclusively presumed parents—in particular a married couple in an intact and fit household—to share the upbringing of their child with a third party. This includes a person whose genetic

material helped create the child in the context of an extramarital affair.

Even if said third party may be considered a parent, in the absence of a finding of unfitness of one of the parents, it is unconstitutional to allow said third party to exercise parental rights that conflict with those of the child's two legal, conclusively presumed, fit parents. Permitting anyone who could potentially assert a third-party parental relationship with a child—which could conceivably include step-parents, foster parents, and former guardians—unconstitutionally infringes upon the rights of legal parents to raise their children.

In *Michael H.*, this Court noted that California's conclusive presumption of fatherhood is a “‘substantive rule of law’” which “not only expresses the State's substantive policy but also furthers it, excluding inquiries

into the child's paternity that would be destructive of family integrity and privacy." *Id.* at pp. 119-120.

This Court went on to state,  
the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts. *Id.* at 124.

Permitting C.A. in this case to assert parental rights, including the right to make decisions regarding Child's



health, education and welfare, as well as where and how she spends her free time, is to deny Mother and Father those rights. *Id.* at p. 130 [“to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa.” Emphasis in original.] The application of California’s third parent law necessarily infringes upon Mother and Father’s fundamental right to raise their child. Yet, there is no compelling state need to deny a couple in an intact and fit home even a measure of their fundamental rights to raise their child. As such, the statute, which does not require a finding of unfitness as to either of the child’s conclusively presumed parents, is unconstitutional as applied in this case.

### **C. CONCLUSION**

Petitioner respectfully requests that this Court grant certiorari and hear this matter.

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Respectfully submitted,

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