Under circumstances from which this Petition arose, the applicable statute (Wis. Stat. § 48.415(6)) is unconstitutional as applied to Mr. XXXX. In a proceeding such as this, Mr. XXXX is entitled to all the due process protections of the U.S. and Wisconsin Constitutions. *See Brown County v. Shannon R.*, 2005 WI 160, ¶ 5, 286 Wis. 2d 278, 284-85, 706 N.W.2d 269. 273 (“The due process protections of the 14th Amendment apply in termination of parental rights cases.”).

Substantive due process[[1]](#footnote-1) rights protect against actions that are “arbitrary, wrong, or oppressive.” *Dane County Dep’t of Human Services v. P.P.*, 2005 WI 32, ¶19, 279 Wis. 2d 169. 694 N.W.2d 344 (internal citation omitted); *see also Kenosha County Dept. of Human Services v. Jodie W.*, 2006 WI 93, ¶39, 293 Wis. 2d 530, 554, 716 N.W.2d 845, 857 (Substantive due process principles protect against actions that are “arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair.”). To determine whether a party’s substantive due process rights are being deprived, a court must identify the constitutional interest at stake and compare that to “the conditions under which competing state interests might outweigh it.” *Washington v. Harper*, 494 U.S. 210, 220 (1990) (internal quotation and citation omitted). If an interest is fundamental, then the actions seeking to deprive someone of those interests must be so narrowly tailored as to only advance the compelling interest of protecting children from unfit parents. *See, e.g., Jodie W*., 2006 WI 93 at ¶55; *see also Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (noting that, absent a finding of unfitness, it is presumed that children are best served by remaining with their natural parents); *see also* Sheboygan County D.H.H.S. v. Julie A.B., 2002 WI 95, ¶ 22, 255 Wis.2d 170, 648 N.W.2d 402 (“[a] parent's desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’ (citations omitted)).

Here, Mr. XXXX’s interest is a fundamental one—the right to be a parent. *See, e.g., Shannon R.*, 2005 WI 160 at ¶ 5. As such, this Court must apply strict scrutiny to the application of the statute by which the aligned parties (XXXX and Ms. XXXX) seek to deprive Mr. XXXX of that fundamental interest. *See Jodie W.*, 2006 WI 93 at ¶55. Strict scrutiny requires the court to narrowly tailor the application of the statute to only go so far as to protect children from unfit parents. *Id.* at ¶¶39-41.

Relatedly, the *Jodie W.* court found that the grounds for termination of parental rights applicable in that case (Wis. Stat. § 48.415(2)) were unconstitutional as applied to the mother because, even though the court implemented the proper procedure for trying the case, the particular facts applicable to the mother rendered the statute unconstitutional as applied. *Id.* at ¶¶50-51. Specifically, in analyzing the statute, the conditions of return (in the context of the mother’s incarceration) rendered the statute unconstitutional as applied to the mother because the statute forced the court to consider the mother unfit by way of circumstances out of her control (she could not find housing because she was incarcerated). *Id.* Therefore, the statute did not help the trial court determine whether the mother was actually unfit as originally applied. *Id.* So, the Supreme Court of Wisconsin held that the statute was unconstitutional, as applied to the respondent mother. *Id.* at ¶¶50-56.

In this case, the aligned parties seek to terminate Mr. XXXX’s parental rights under Wis. Stat. § 48.415(6), which directs a factfinder to consider whether a parent has assumed parental responsibilities for a child. As the standard jury instructions direct, the factfinder in this case is to consider, among other things, whether a father supported the mother during her pregnancy and whether the father has neglected to provide care or support to the child. University of Wisconsin’s Continuing Legal Education for Wisconsin, *2015 Wisconsin Jury Instructions-Children 346, Involuntary Termination of Parental Rights: Failure to Assume Parental Responsibility -- § 48.415(6)(a)*, 2015 Wisconsin Jury Instructions-Children, (2015) (hereinafter, “*WI JI-Children 346*”). But, as described above, the aligned parties (XXXX and Ms. XXXX) have intentionally limited Mr. XXXX’s ability to undertake such support. Ms. XXXX lied, saying she aborted the child in January 2019. XXXX intentionally failed to provide Mr. XXXX with information that he could have used to declare paternal interest and, subsequently, seek placement and contact with XXXX, even over Ms. XXXX’s objections. Indeed, the aligned parties conspired to create a context of the case by which Mr. XXXX would face unnecessary barriers in attempting to establish a parental relationship with XXXX. In this way, the statute is not so narrowly tailored as to only protect XXXX from a potentially unfit parent; instead, the aligned parties are asking the Court to apply the statute in such a manner that the issue of unfitness is blurred by other circumstances unrelated to Mr. XXXX’s ability to parent his child—indeed, the unnecessary barriers cloud the issue, preventing the factfinder from determining whether Mr. XXXX is unfit or whether certain circumstances outside his control (just like in *Jodie W.*) are interfering with the inquiry of the factfinder.

While the process by which the aligned parties are using to do this might be legal (so, no procedural due process issue), the fairness of the situation, applying Wis. Stat. § 48.415(6) to this conspiracy, clearly runs afoul of Mr. XXXX’s substantive due process rights. As such, this case cannot proceed in a constitutional manner. The Court should dismiss the Petition because Wis. Stat. § 48.415(6), as applied to the situation in which the aligned parties put Mr. XXXX, is unconstitutional.

1. *But see, cf. State v. Laxton*, 2002 WI 82, ¶10 n. 8, 254 Wis. 2d 185, 647 N.W.2d 784 (procedural due process is different than substantive due process, whereby the former ensures a fair process, and the latter protects against actions that are arbitrary, wrong, or oppressive). [↑](#footnote-ref-1)