No. 17-1487

IN THE

Supreme Court of the United States

MELISSA KAY COOK, Individually and
MELISSA KAY COOK, as Guardian ad litem
of Baby A, Baby B and Baby C,
Petitioners,

vs.

CYNTHIA ANN HARDING, M.P.H., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTIONS TO QUESTION PRESENTED

Respondent, C.M., objects to the question presented. The proffered question incorrectly characterizes the state proceedings. Petitioners' (hereinafter "COOK"), contend that the state courts held that they lacked jurisdiction to decide federal questions and refused that undertaking. This is false. The record specifically reflects that the California state Court of Appeal, Second District, Division One, expressly and succinctly considered each and every federal constitutional issue raised by COOK. In applying issue preclusion, the federal Ninth Circuit Court of Appeal also found that the state court had thoroughly considered and discussed each of COOK's federal constitutional claims. Furthermore, COOK's presented question also inaccurately contends that the state courts failed and refused to allow for the presentation of relevant evidence. On the contrary, the state trial court conducted a hearing, allowed examination of witnesses, and received documentary evidence. COOK's objection is not that the court did not allow the presentation of evidence. Their issue is that the trial court perceived the additional evidence COOK sought to introduce was not pertinent. The federal Ninth Circuit Court of Appeals similarly observed that many of COOK's factual claims against C.M. were "legally irrelevant." (Pet.: 15a-16a.) The Court added that COOK's assertions were deeply disparaging allegations about C.M's ability, intellect, and socioeconomic status" and "are wholly inappropriate." *Id.*

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The opinion of the United States Ninth Circuit Court of Appeals (Pet.: 1a-16a) is reported at *Cook v. Harding* 879 F.3d 1035 (2017). The opinion of the district court granting defendants' motions to dismiss COOK's federal action (Pet.:17a-49a) is reported at 190 F.Supp.3d 921 (2016).

The opinion of the California Court of Appeal, Second District, Division One, (Pet.: 50a-88a) is reported at *C.M. v. M.C.* 7 Cal.App.5th 1188, 213 Cal.Rptr.3d 351 (2017).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2018. The petition for a writ of certiorari was filed April, 12, 2018 and placed on the Court's docket April 30, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

I. STATEMENT OF ACCURATE AND RELVENT FACTS

C.M. objects to Petitioners' ("COOK") factual presentation. It is inaccurate and omits all unfavorable evidence. COOK's biased presentation calls into question the entirety of their petition. An accurate factual recitation is as follows:

In 2014, COOK responded to a solicitation by C.M's., attorney and Surrogacy International Inc., seeking a gestational surrogate for their client, C.M. 3ER:314:¶44. COOK offered to serve as a gestational carrier for C.M. 3ER:314:¶44.[1] COOK represented that she had been a surrogate before and was aware of the various medical procedures and risks. 2CSER:409¶ 5.01. COOK also represented she had previously been pregnant five times. *Id*.

After making contact with C.M. COOK entered into a gestational carrier agreement (hereinafter "contract") with C.M. in the State of California. 3ER:302:305-306:¶12: ¶19-21. COOK was represented by an attorney chosen by her but C.M. was contractually obligated to pay the legal fees. 3ER:325:¶85; 2CSER:469-470¶30.01; Docket

[1] "ER" refers to Petitioners' excerpt of record filed in the U.S. Ninth Circuit Court of Appeal of which there are 4 volumes. The volume number precedes the "ER" designation. "CSER" refers to the excerpts of record filed in the U.S. Ninth Circuit Court of Appeal by the Los Angeles County defendants. There are 2 volumes. The numerical volume precedes the "CSER" designation.

#46-1; 1CSER:155. COOK had not met C.M. before entering into the contract nor spoken with him on the telephone. 3ER:315:¶45. The two communicated by email. COOK was aware that C.M. was a single male who lived in Georgia with his parents, (3ER:315:¶46) was deaf (3ER:315:¶47), and was employed as a postal worker. 3ER:315:¶48. COOK alleged she was only later informed that a home study was not performed on C.M., nor was his living accommodation assessed. 3ER:315-316:¶49. COOK never alleged she was earlier informed to the contrary.

The contract between C.M. and COOK contemplated embryos being transferred to COOK's uterus. The embryos were created using C.M.'s sperm with eggs/ova that had been anonymously donated to C.M. for his exclusive use. 3ER:316:¶50; 2CSER:407-408¶2.01; Docket #46-1.

In entering into the contract COOK represented to C.M. that she did not, and would not, have any parental rights as to any child or children conceived from the embryo transfer procedure. 3ER:316-317:¶51; 2CSER:409-410¶5.02; Docket #46-1. COOK also agreed C.M. would be the exclusive parent of any child born through the parties undertaking. 2CSER: 330. C.M. and COOK also agreed California would have exclusive jurisdiction over the matter (2CSER:477, ¶42.01), and that the parties' parental rights were to be governed by California laws, specifically *California Family Code,* § 7962, *Johnson v. Calvert* [5 Cal.4th 84, 19 Cal.Rptr.2d 494], 851 P.2d 776 (Cal. 1993) and *In re Marriage of Buzzanca*, [61 Cal.App.4th

1410, 72 Cal.Rptr.2d 280, (1998). 2CSER:406-407¶9-13 and 477: ¶43.01; 3ER:316:¶50.

After the parties executed the contract C.M.'s viable embryos were transferred to COOK's uterus. 3ER:320:¶64. Before the embryo transfer, COOK underwent a series of medical treatments involving hormone injections, taking prescribed medications, and undergoing medical exams. 3ER:317-319:¶54-¶62. COOK represented that as a result of her prior surrogacy and pregnancies, she knew about the medical procedures and risks involved. 2CSER:409¶5.01. Following the embryo transfer, COOK's pregnancy was confirmed on August 31, 2015. 3ER:320¶65. COOK averred that C.M. is the genetic father of the Children and was also listed as the Intended Parent in the contract between her and C.M. 3ER:305¶19.

Following the embryo transfer, COOK learned she was pregnant with triplets. 3ER:302¶12. Roughly a month after pregnancy was confirmed C.M. first mentioned the prospect of reducing the number of fetuses. 3ER:320-321:¶68. COOK alleged that thereafter C.M. began to express concerns with the pregnancy costs associated with a pregnancy of triplets. 3ER:321:lines 1-3]. The fertility clinic wrote to C.M. that the pregnancy is a high risk pregnancy and that more frequent medical visits were necessary. 3ER:321:¶69.

C.M. wrote to COOK expressing that he wanted COOK to reduce the pregnancy by one. 3ER:322-323:¶77. COOK responded, telling C.M.

she would not reduce the pregnancy. 3ER:323:¶78. COOK alleged that C.M. expressed that he wanted reduction because of his inability to pay for all of the children, 3ER:323:¶79, and also that reduction was due to health risk to COOK and the children. *Id*. C.M. expressed that his request for reduction was multi-faceted. He had consulted with physicians and was informed and understood that the risk to the children, as a whole and individually, was substantial and significant and included permanent disabilities for the children, inclusive of but not limited to, brain damage, major developmental disabilities, permanent physical disabilities, and the necessity of lifetime aid and assistance, as well as risks to COOK. 1CSER:89. COOK told C.M. in November 2016 that she would love to raise one of the children. 3ER:324:¶82.

COOK gave birth to the three children on February 22, 2016. 3ER:298¶:2. Based on the existing judgment establishing that COOK was not a parent and had no parental rights, the children were released to C.M., 3ER:301:¶8, and have been raised by C.M. since.

II. STATEMENT OF ACCURATE AND RELEVANT PROCEDURAL HISTORY

As with COOK's factual presentation, their procedural presentation is also fraught with inaccuracies. Respondent, C.M. is compelled to provide this court with a correct procedural portrayal.

On January 4, 2016, COOK first initiated a civil action on her behalf, and as the self-designated guardian ad litem of the unborn children, in the Los Angeles Superior Court. In that action she sought to be declared the parent of at least one of the children and sought to enjoin C.M. from pursuing his parental rights. 3ER:299-300:¶5; 1CSER:11-56/58-59; Docket #84. Her action was dismissed without prejudice because she filed it in the wrong court and she also failed to comply with procedural requirements for asking for her appointment as the guardian ad litem before filing. 2CSER:488-489.

On January 6, 2016 C.M.'s petition to establish and confirm his parental relationship as to all three children was filed in the Los Angeles Superior Court having jurisdiction over surrogacy matters. 2CSER:229-260; Docket #46-4. C.M.'s action was brought pursuant to *California Family Code* §7962 and existing case law, *Johnson v. Calvert* supra, 5 Cal.App.4th 84*; In Re Marriage of Buzzanca* 61 Cal. App.4th 1410 (1998). *Id.* Based on the parties' contract and conduct thereby, C.M. also sought an order that COOK was not a parent. *Id.*; 3ER:299-300:¶5; 2CSER:229-260.

Five days before the scheduled hearing in C.M.'s parentage action, COOK filed an Answer and Counter Claim in the state action. 3ER:299-300:¶5. She sought custody alleging C.M. would not and could not accept legal responsibility of the three children because he was deaf and a single male. 3ER:300:¶6. COOK asked the court to find

that *California Family Code* §7962 was unconstitutional. 2CSER:277:¶6.

On February 2, 2016, COOK filed her initial complaint in the federal district court. 3ER:420/Docket #1. That action was not served on C.M. nor was he a named party. *Id.* In this action, C.M. also sought her appointment as the unborn children's guardian ad litem without ever serving C.M. with the action or her application. See C.M.'s answering brief, filed 03/10/2017 in the U.S. Ninth Circuit Court of Appeal, ID: 10352356, DktEntry: 34, p. 5, fn. 3; see also U.S. District Court, Docket # 9, filed 02/10/16.

Seven days later C.M.'s state action proceeded. 2CSER:253-254. Contrary to COOK's assertions, this was a contested hearing before the state trial court where documentary evidence was presented and received into evidence, notably, correspondence from COOK's former counsel, emails, the declaration of C.M., 4ER 528-541, 2 CSER:231, item 2, declarations of C.M.'s attorney and the fertility specialist, 2CSER:231, items 6 & 7, a criminal background check on C.M., earlier lodged with the court, CSER:231, item 3), and a copy of the parties' surrogacy contract. CSER:231, item 2. COOK was present and testified, 1CSER:152-153. Her former attorney also testified. 2CSER:149-199, *Id*. At the conclusion of the hearing the Court found COOK had knowingly and voluntarily signed the gestational agreement and was represented by independent counsel. 1CSER:209,211-213. The court denied all of COOK's counter claims. COOK's efforts to

introduce evidence as to C.M.'s parental fitness were determined not to be relevant at that stage of the action – which focused on establishing parentage. 3 ER 412 , 1CSER 199 (transcript of hearing, 2/9/17; see also (Pet.: 78a-79a, 83a, citing *Calvert*, supra, 5 Cal.4th at pp. 93–94, fn. 10, 19 Cal.Rptr.2d 494, 851 P.2d 776.) The trial court observed that "I'm happy to hear your argument but if you start moving into areas that are not covered under 7962, for example, what is going to happen to these children, once they are handed over to [C.M.] that's none of my business." 3ER:412 [clarification added]. Nonetheless, during the hearing the court asked if COOK wished to offer any further evidence and COOK's attorney responded, **NO.** 1CSER:199, transcript of 2/9/16 hearing. The Court then found that C.M. was the sole and exclusive parent of the children and that COOK had no parental rights. 3ER:301¶7-8; 1CSER:211-218; 2CSER:241-253. COOK appealed this judgment. (Pet.: 50a, 59a.)

After the state court ruling COOK filed a first amended complaint in her federal action, adding new defendants and allegations to that action. 3ER:421/Docket #14. She filed a second amended complaint ("SAC") on March 11, 2016. 3ER:296-380,423/Docket #25. The SAC, for the first time, added C.M. and other defendants. 3ER:423/Docket #25.

On March 30, 2016, COOK filed a Petition for Writ of Supersedes with the California Court of Appeal and within her existing state court appeal. 2CSER:263-319/Docket #46-4.

COOK's writ sought, among other relief, that she be declared a parent and to enjoin C.M. from leaving California with his children. COOK also sought a stay of the Los Angeles Superior Court Judgment. *Id.* A temporary stay of the superior court order was issued which temporarily precluded C.M. from leaving California with his children. 2CSER:322. The writ was subsequently denied. (Pet.: 59a, fn. 3.)

During the pendency of the state appeal, each of the defendants in the federal action filed motions to dismiss COOK's federal case. 3ER:425-428/Docket #44,46,54,60. The motions were based on various grounds, including: 1) COOK's lack of standing; 2) Younger-Harris abstention; 3) Booker – Feldman abstention; (4) Burford abstention; 5) Colorado River abstention; and 6) Pullman abstention. The motions were heard on May 23, 2016 and on June 6, 2016 the Honorable Otis D. Wright, II granted the motions to dismiss, based on *Younger v. Harris* 401 U.S. 37, 91 S.Ct.746, 27 L.Ed.2d 669 (1971). (Pet.: 35a-49a.) The other grounds for which relief was sought were not addressed. *(Id.*). The court did not address COOK's standing. (*Id.*) On July 5, 2016 COOK filed a notice of appeal from the District Court's order. 1ER:2/Docket #93.

On January 26, 2017 the California Court of Appeal ruled on COOK's state appeal. (Pet.: 50a-88a.) The Court of Appeal heard, considered, and rejected each of COOK's federal constitutional

claims raised on her behalf, as well as the children. (Pet.: 71a-88a.) Specifically, the court observed:

> M.C. makes various constitutional arguments challenging the procedure for establishing a parent-child relationship under section 7962 and the legitimacy of surrogacy arrangements generally. It is important to note at the outset that our Supreme Court has already rejected constitutional challenges to surrogacy agreements and ruled that such agreements are consistent with the public policy of California. (See *Calvert*, supra, 5 Cal.4th at pp. 95, 98–100, 19 Cal.Rptr.2d 494, 851 P.2d 776.) Indeed, the Legislature's stated intent in enacting section 7962 was to codify the decisions in Calvert and Buzzanca, supra, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280. (See Assembly Analysis, supra, at p. 2 ["Case law in California makes clear that the intended parents are the natural parents and this bill clarifies and codifies that case law"]; Senate Analysis, supra, at p. 4 ["California case law establishes that even without a genetic link, the parties who intended to bring a child into the world are the child's legal parents [citing Calvert and Buzzanca]. This bill, with respect to surrogacy agreements, seeks to codify and clarify

> that case law by requiring parties to enter into surrogacy agreements, as specified, prior to the commencement of any medical treatment related to the surrogacy arrangement"].) (Pet.: 71a-72a.)

The State court of appeal went on to reject COOK's argument that the California Supreme Court in *Calvert* only applied to a contest between two women. "M.C.'s argument misses the broader implication of the holding in *Calvert*. The court held that it could give effect to the parties' intentions for the parentage of the child as expressed in their surrogacy contract because the agreement was "not, on its face, inconsistent with public policy." *Calvert*, supra, 5 Cal.4th at p. 95, 19 Cal.Rptr.2d 494, 851 P.2d 776.

COOK's argument that section 7962 denied her, and the children, procedural due process was also fully considered and addressed. The state Court of Appeal observed the trial court fully complied with the nature and scope of the hearing and provided COOK an opportunity to be heard. (Pet.: 78a-79a.) The Court observed that COOK's counterclaim did not challenge whether the parties Contract fulfilled the requirements of section 7962 or that the statue was complied with. Instead it was a broad based attack as to the legitimacy of surrogacy contracts in general. (Pet.: 79a., see also, 79a, fn.11.) To the extent COOK argued more was needed, the Court observed that COOK's further procedural due process claims are largely substantive due process contentions. (Pet.: 79a-

80a.) The court then proceeded to consider each substantive due process claim raised by COOK. (Pet.: 80a-87a.)

Among the many additional reasons in rejecting COOK's substantive due process arguments, was the state court's observation that COOK had personally elected to assist C.M. in having a child knowing she was not genetically the mother; that COOK had personally acknowledged she would have no parental rights and was entitled to contractually agree as she did. "M.C.'s argument fails in light of her own agreement surrendering any right to form a parent-child relationship with the Children. Her argument amounts to a claim that she either: (1) had no right to make such a promise; or (2) was permitted to later change her mind about that promise based upon the best interests of the Children." (Pet.: 80a.) That argument, the court observed, runs afoul of the public policy concerns expressed in *Calvert*. More important, the court observed that COOK's claims run afoul of the Calvert court's observation that "[t]he argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law." (Pet.: 81a, citing *Calvert*, 5 Cal.4th at pp. 97, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

Relevant to COOK's arguments that she, and the children, were denied a hearing as to C.M.'s fitness, the court observed that was not the focus of the trial court proceeding. That proceeding, held

pursuant to Family Code § 7962, was for the purpose of establishing C.M.'s parentage and that COOK had no parental rights. The Court of Appeal went on to explain that COOK confuses the issue of establishing parentage with custody. The two are not synonymous. "The determination of parentage is separate from the question of custody." (Pet.: 81a, 83a, citing *Calvert*, supra, 5 Cal.4th at pp. 93–94, fn. 10, 19 Cal.Rptr.2d 494, 851 P.2d 776.) "Whether a particular custodial arrangement is harmful to a child is a subject for the state's dependency laws, not for the law governing surrogacy contracts." (Pet.: 83a.)

The State Court of Appeal affirmed the California Superior Court's judgment. (Pet.: 88a.) On March 9, 2017, COOK filed a Petition for review in the California Supreme Court, Case No. S240517, seeking review of the Court of Appeal decision. (Pet.: 88a.) The state Supreme Court denied the petition on April 12, 2017. (Pet.: 88a, see also DKtEntry: 57.) COOK then filed a Petition for Writ of Certiorari with this court seeking review of the state court decisions, Supreme Court Case No. 17-129. This Court denied the Writ on October 2, 2017. Oct. 2, 2017 entry, case No. 17-129.

In an opinion issued January 12, 2018, the United States Ninth Circuit Court of Appeal affirmed the dismissal of COOK's federal action on the grounds of issue preclusion, in contrast to the district court's dismissal based on Younger abstention. (Pet.: 1a-16a.)

The U.S. Ninth Circuit Court of Appeal observed that abstention had earlier been extended to incorporate state family law matters but that more recent applications, as expressed in opinions of this Court and the Ninth Circuit Court of Appeal, had limited abstention to a narrower category of circumstances. "Abstention in civil cases "is appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *Id*. 1038, citing *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (citing *Sprint Commc'ns., Inc. v. Jacobs*, —— U.S. ——, 134 S.Ct. 584, 593–94, 187 L.Ed.2d 505 (2013). The Court then concluded that the matter did not satisfy the second prong, where the state proceedings were quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts.

Nevertheless, the federal Court of Appeal affirmed the dismissal based on issue preclusion. "Issue preclusion 'bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim." (Pet.: 11a-12a, citing *ReadyLink*, 754 F.3d at 760 and quoting *Taylor v. Sturgell,* 553 U.S. 880, 892, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008).)

The Ninth Circuit next observed that throughout the state Court of Appeal's "lengthy opinion, the Court of Appeal acknowledged the limits of Calvert before extending Calvert's reasoning to Cook's claims and completing its own constitutional analysis. See id. at 367–70. We thus find that all of Cook's constitutional claims were necessarily decided as well as actually litigated." (Pet.: 15a.)

Finally, the Ninth Circuit considered and concluded that preclusion in this case furthers public policy factors as to whether preclusion would be consistent with the 'preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." (Pet.: 15a, citing, *Readylink,* supra, 754 F.3d at 761, and quoting from *Lucido v. Superior Court*, supra, 5 Cal. 3d 335, 272 Cal.Rptr. 767, 795 P.2d at 1226 (Cal. 1990).) "Giving the state Court of Appeal's opinion preclusive effect is in the interest of both comity and consistency. See id., 272 Cal.Rptr. 767, 795 P.2d at 1229." (Pet.: 15a.) Preclusion furthers each of the public policy factors. *Id.*

III. ARGUMENT

A. THE PETITION FAILS TO SATISFY RUDIMENTARY GROUNDS FOR GRANTING CERTIORARI

COOK's petition fails to establish that the Ninth Circuit's application of issue preclusion conflicts with any other decision by a sister court,

or decided an important federal issue in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. *Fed. Rules of Court*, rule 10 (a). It also fails to demonstrate why issue preclusion was contrary to public policies or how granting certiorari in this matter would resolve a significant conflict in law or society.

1. Under State Law, Preclusion Was Required.

The Ninth Circuit was required to apply state law in the issue preclusion analysis. "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), this Court said: "Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so...." *Id.*, at 96, 101 S.Ct., at 415. Issue preclusion is an extension of the full faith and credit clause.

For purposes of issue preclusion, an issue is actually litigated "[w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *People v. Sims*, 32 Cal.3d 468, 186 Cal.Rptr. 77, 651 P.2d 321, 331 (1982). COOK has not cited a single case, California or otherwise, which reflects any conflict with this fundamental principle. This principle is exactly what the Ninth Circuit applied. (Pet.: 13a.)

The court observed:

> Cook's position is that her constitutional claims have never been directly addressed and decided. This is baseless in light of the Court of Appeal's thorough and well-reasoned opinion, which devotes over eight pages to addressing each of her constitutional challenges in turn. See *C.M.*, 213 Cal.Rptr.3d at 363–70. *Id.* at 1041.

2. Each of COOK's Federal Constitutional Claims Were Addressed By The State Courts.

Other than generalizations, nowhere does COOK demonstrate a single constitutional contention that she raised in the federal action that was not addressed by the state courts. She claimed the state proceedings denied her procedural due process. This was addressed by the trial court in conducting a hearing and further addressed by the state court of appeal. (Pet.: 57a-59a, 64a-66a, 78a-

79a.) COOK then argued that *Family Code*, 7962 and the trial court denied her substantive due process. Again, this was addressed at length by the state Court of Appeal, culminating in the court's conclusion that "[we therefore conclude that that the Agreement did not violate the constitutional rights of M.C. or the Children." (Pet.: 87a.) COOK further argued section 7962 denied the children procedural and substantive due process. Again, these were expressly considered and addressed by the state Court of Appeal. (Pet.: 80a-85a.) The Court specifically addressed each and every procedural and substantive due process, including Equal Protection, claims that were raised. (*Id.* at 80a-85a.)

3. COOK's Claim That Unconsidered Facts Prevented Application Of Issue Preclusion, Is Baseless.

COOK provides an asserted laundry list of facts that she claims the state courts may not have considered in rendering judgment and in the Court of Appeal affirming that judgment. COOK argues that her factual contentions, such as C.M.'s parental fitness, were pertinent but not litigated with respect to terminating her parental rights. Thus, she claims, preclusion would not apply. (Pet.: 22-25.) The facts she raises have no bearing or relevance to the parentage determination and her argument is premised on a baseless quantum leap contention that she is a parent. As a matter of California law, COOK had no parental rights. *Family Code*, 7962, *Johnson v. Calvert* supra, 5 Cal.4th at p. 97, 19 Cal.Rptr.2d 494, 851 P.2d 776.

COOK had contractually agreed she had no parental rights. In the constitutional analysis, the California Court of Appeal observed:

> a surrogate can permissibly contract to surrender whatever parental rights she has. The court held that the surrogacy contract in that case was consistent with public policy. The court rejected the argument that "a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents" as antiquated and dismissive of a woman's "equal economic rights." (Calvert, supra, 5 Cal.4th at p. 97, 19 Cal.Rptr.2d 494, 851 P.2d 776.) Here, as in Calvert, there is no suggestion that M.C., who had children of her own and had previously served as a surrogate, "lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract." (Pet.: 86a, citing Calvert, 5 Cal.4th at 97, 19 Cal.Rptr.2d 494, 851 P.2d 776.)

Furthermore, COOK's assertions as to how much money C.M. made each year is not determinative whether he is a parent nor does it give rise to COOK suddenly having parental rights; whether C.M. is deaf has no bearing on his parentage and does not confer parentage on COOK; whether C.M.'s parent(s) live with him is

immaterial as to whether C.M. is the sole and exclusive parent of the triplets. The day such claims raised by COOK become determinative of parentage will be the day of an abhorrent totalitarian government dictating which race, gender, or the socioeconomics of individuals, may bear children. A posture not dissimilar to what COOK is advocating.

COOK's factual contention that her purported bond with the children during pregnancy gave rise to a parental relation deserving of constitutional protection sufficient to deprive C.M. of his constitutional right of parentage is equally baseless. As with due process claims of a foster parent who has formed a parent-child bond through their care of a child over a substantial period, "[w]hatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." *Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 847, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

4. The U.S. Ninth Circuit Court of Appeal's Application of Issue Preclusion Is Consistent With Applicable Cases And Public Policies.

Discussed above, The Ninth Circuit Court of Appeal applied the correct law to issue preclusion and its application of issue preclusion is simply not at odds with any state or appellate decisions.

COOK has not shown otherwise. COOK and the children had a full and fair opportunity, and availed themselves of the same, to litigate the relevant legal issues raised.

Finally, public policy considerations compelled application of issue preclusion. COOK has litigated this case beyond the pale. She has taken this case through the entire state court system and then to this court. Having failed in those endeavors, she pursued all possible avenues through the federal system. Each court along the way denied her claims and her requested relief. Failure to stop COOK at this point would entirely undermine the integrity of the judicial system. One must recognize that from a legal and equitable point, COOK had expressly agreed, under penalty of perjury, to the California state Court having exclusive jurisdiction over the matter, that *Family Code* § 7962 would apply and govern the matter, and to a judgment being issued declaring C.M. the sole and exclusive parent of the triplets and also declaring COOK was not a parent. 2CSER:408¶2.01, 409,¶5.02, 444,¶9.01, 478,¶43.02. To not put a stop to COOK now would simply promote more endless vexatious litigation by COOK through her constant harassment. The Ninth Circuit saw what COOK was doing; her "legally irrelevant and deeply disparaging allegations about C.M's ability, intellect, and socioeconomic status throughout her pleadings are wholly inappropriate." (Pet.: 15a-16a.) Moreover, application of the Full Faith and Credit (Article IV, Section 1, of the U.S. Constitution Clause and implementing provision -- 28 U.S.C.A. § 1738) and

fundamental principles of comity required issue preclusion. "[T]he notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 41, 54, 91 S.Ct. 746, 27 L.Ed.2d 669, (1971).

B. CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: May 30, 2018

Respectfully Submitted,
JARRETTE & WALMSLEY, LLP
/s/ Robert R. Walmsley
ROBERT R. WALMSLEY
Attorney for Respondent, C.M.