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

POLLAK, VIDA AND BARER

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1.0. Introduction

Respondents Cynthia Ann Harding, M.P.H., Jeffrey D. Gunzenhauser, M.D., M.P.H., and Dean C. Logan (collectively, "County Defendants") submit this Opposition to Appellant Melissa Cook's Petition for Certiorari to advise the Court of two points. First, the factual premises for Cook's petition—particularly, that the California Court of Appeal's opinion in her state court case failed to address her arguments under the United States Constitution—are incorrect. Second, under the correct facts, Cook has failed to show any ground for granting certiorari. The County Defendants respectfully request that the Court deny the petition.

2.0. Discussion

2.1. Incorrect Facts Stated in Petition (Sup. Ct. R. 15.2)

2.1.1. Dr. Gunzenhauser Is a County Officer, Not a State Officer

At pages ii-iii of the Petition, Cook alleges that "Respondent Jeffrey D. Gunzenhauser, M.D., M.P.H. is sued in his official capacity as the Health Officer and Medical Director for the Los Angeles County Department of Public Health."

In the same paragraph, however, at page iii, Cook alleges that Dr. Gunzenhauser "is the *state* employee personally responsible for issuing birth certificates in Los Angeles County." (Emphasis added.) Cook appears to allege that Dr. Gunzenhauser is an officer of the State of California.

He is not. As the other allegations show, Dr. Gunzenhauser is an officer of the County of Los Angeles, not the State of California.

2.1.2. The Constitutional Claims to Which the Ninth Circuit Applied Issue Preclusion Were Actually Litigated in the California Court of Appeal's Decision

The central foundation for Cook's certiorari petition is her argument at pages 26-31 of the petition that the published opinion in The Court of Appeal of the State of California, Second Appellate District, Division One in *C.M. v. M.C.*, B270525, 7 Cal. App. 5th 1188, 213 Cal. Rptr. 3d 351 (Cal. Ct. App. 2017) did not decide the constitutional claims Cook raised in that proceeding. Cook asserts that none of her constitutional claims "were actually litigated or directly decided." (Pet.:26.) She argues that the claims were not "necessarily decided" in the state court proceeding. (Pet.:26-27.) She represents that "all the state appellate court did was hold that the statute was consistent with

California's public policy as previously stated in *Johnson v. Calvert*, 5 Cal. 4th 846 (1993)" and that "*Johnson* did not decide any of the constitutional issues advanced by Cook." (Pet:27.) She asserts that "[t]he state court held it had no jurisdiction to decide Cook's claim." (Pet.:36.) She further represents that "[t]he 9th Circuit refused to examine the basis for the Court of Appeal's decision . . . ." (Pet.:28.)

A review of the appendices to Cook's petition will reveal that all of these assertions are incorrect.

Appendix C to the petition sets forth the *C.M. v. M.C.* state appellate court decision. At page 71a of Appendix C appears the heading, "**M.C.'s Constitutional Challenges Fail**". Under that heading, the appellate court notes that Cook, named in the decision as M.C., "makes various constitutional arguments challenging the procedure for establishing a parent-child relationship under [Cal. Fam. Code § 7962] and the legitimacy of surrogacy arrangements generally." (Pet.:71a.) The decision then notes that the California Supreme Court "has already rejected constitutional challenges to surrogacy agreements" in *Johnson v. Calvert*, 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P. 2 776 (Cal. 1993). (*Id.* at Pet.:71a.) After discussing the holding in *Johnson* (Pet.:72a-73a) and Cook's attempt to distinguish *Johnson* (Pet.:73a-74a), and holding that Cook has standing to assert constitutional claims on behalf of the Children at issue (Pet.:74a-77a), the decision

"proceed[s] to the merits of M.C.'s constitutional claims." (Pet.:78a.)

The *M.C.* decision then devotes several pages to addressing Cook's constitutional claims—and rejecting them. (Pet.:78a-87a.) The decision ultimately "conclude[s] that the" surrogacy agreement between Cook and C.M., the father of the children "did not violate the constitutional rights of M.C. or the Children." (Pet.:87a.)

As the Ninth Circuit's stated in its opinion—set forth in Appendix A to the Petition—"the Court of Appeal's thorough and well-reasoned opinion. . . devotes over eight pages to addressing each of her [Cook's] constitutional challenges in turn." (Pet.13a.) On the basis of the *M.C.*'s decision's "language and the Court of Appeal's analysis," the Ninth Circuit reasoned, "there is no question that any and all constitutional claims were necessarily decided in the state court proceeding." (Pet.:14a.) The Ninth Circuit "f[ound] that all of Cook's constitutional claims were necessarily decided as well as actually litigated." (Pet.:15a.) The Ninth Circuit therefore rejected Cook's argument otherwise as "baseless . . . ." (Pet.:13a.)

Equally baseless is Cook's representation that "the California Court of Appeal rendered a decision affirming the family court's determination that it lacked jurisdiction under California law, to consider the constitutional issues they [sic] raised . . . ." (Pet.:19; *see also* Pet.:25, 31, 33, 34, 36.)

Nowhere in *C.M.* decision does the California Court of Appeal hold that it does not have jurisdiction to consider Cook's constitutional claims. Nowhere does it hold that the trial court did not have jurisdiction to consider those claims. The word "jurisdiction" does not appear anywhere in Appendix C to the petition.

Cook also represents that at 3ER:392-396, the state trial court held that it had no jurisdiction to entertain the constitutional claims. (Pet.:16.) Nowhere in the cited pages does the trial court rule that it lacked jurisdiction to rule on the constitutional claims. Instead, it ruled on those claims, by denying them. (3ER:394.) The trial court held that the issue of whether surrogacy agreements are constitutional "has already been determined" and that it did need to, and should not, "revisit a higher court's ruling." (3ER:392.) That is not a ruling that there is no jurisdiction. It is a ruling that stare decisis governs the court's exercise of its jurisdiction.

And in fact California state courts do have jurisdiction to adjudicate federal constitutional claims. *Tafflin v. Levitt*, 493 U.S. 455, 458-459 (1990) (presumption of concurrent federal and state court jurisdiction to determine claims under federal law); *In re Estevez*, 165 Cal. App. 4th 1445, 1460, 83 Cal. Rptr. 479 (Cal. Ct. App. 2008) (jurisdiction to adjudicate claims arising under the United States Constitution). The California Court of Appeal's extensive discussion of Cook's constitutional claims in *M.C. v. C.M.* rebuts any contention that the

Court of Appeal believed it lacked jurisdiction over those claims.

The *C.M.* decision is published. It is binding on California trial courts. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 369 P.2d 937 (Cal. 1962). It has therefore established California law governing the constitutional claims Cook raised.

Cook's argument that the *C.M.* decision did not decide her constitutional claims is therefore contrary to reality. So is her argument that the Ninth Circuit refused to examine the basis for the state court's decision. Both arguments disrespect the efforts of this Court's state and circuit court colleagues.

2.2. Without Her Incorrect Characterization of the State Court Decision, Cook's Grounds for Review Evaporate

In her petition, Cook asserts that the Ninth Circuit's decision below conflicts with this Court's decisions concerning issue preclusion, because those cases hold that issue preclusion applies only where the question put in issue is "directly determined" by the first court to address the question. (Pet.:22-23, citing *Taylor v. Sturgill*, 553 U.S. 880, 893 (2008), *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001), *Montana v. United State*,

440 U.S. 147, 153 (1979), and *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897).)

As explained above, the California appellate court did directly determine the constitutional questions Cook posed.

Cook also argues that the Ninth Circuit's decision conflicts with this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-332 (1979) (barring collateral estoppel where applying it would be "unfair") because the state court purportedly had no jurisdiction to determine her constitutional claims. (Pet.:25-26.) As explained above, the state court *did* have jurisdiction over her constitutional claims. That argument fails as well.

Cook fails to show how the Ninth Circuit's decision here conflicts with existing law, or otherwise requires a place on this Court's limited docket.

3.0. Conclusion

Cook attempts to manufacture a basis for review by mischaracterizing both the California Court of Appeal's decision and the Ninth Circuit's interpretation of that decision. Her petition should be denied.

Respectfully submitted,

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