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,

v.

CYNTHIA ANN HARDING, M.P.H.; JEFFREY D. GUNZENHAUSER, M.D., M.P.H.; DEAN C. LOGAN; EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA; KAREN SMITH, M.D., M.P.H., ALL IN THEIR OFFICIAL STATE CAPACITIES; C.M., AN ADULT MALE BELIEVED TO BE THE GENETIC FATHER OF BABIES A, B AND C; KAISER FOUNDATION HOSPITAL, PANORAMA CITY MEDICAL CENTER, AND PAYMAN RASHAN, SENIOR V.P. AND PATIENT ADMINISTRATOR OF PANORAMA CITY MEDICAL CENTER,

Respondents.

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

REPLY BRIEF

MICHAEL W. CASPINO
BUCHALTER
18400 Von Karman Avenue,
Suite 800
Irvine, CA 92612
(949) 760-1121

HAROLD J. CASSIDY
Counsel of Record
JOSEPH R. ZAKHARY
THOMAS J. VIGGIANO, III
DEREK M. CASSIDY
THE CASSIDY LAW FIRM
750 Broad Street, Suite 3
Shrewsbury, NJ 07702
(732) 747-3999
hjc@haroldcassidy.com

Counsel for Petitioners

281363

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES AND OTHER AUTHORITIES

REPLY TO RESPONDENTS' LEGAL ARGUMENTS AND WHY CERTIORARI SHOULD BE GRANTED

As the petition explains, review should be granted because: (1) Petitioner was never afforded a hearing on the federal claims brought on behalf of the children and herself in either the state or federal cases; (2) the district court committed reversible error by abstaining; (3) the federal claims were never fairly or fully litigated in either the state or federal courts; (4) the California Court of Appeal held that the family court was correct in refusing to consider the federal constitutional claims; and (5) the decision of the California Court of Appeal did not resolve the federal claims such that the Ninth Circuit was precluded, and the federal court should have decided this case on its merits.

Respondents-Defendants Harding, Gunzenhauer and Logan argue that: (1) the California State courts have jurisdiction to decide federal constitutional issues; and (2) the California State Court of Appeal actually and directly decided the federal constitutional claims after Petitioner Cook was given a full and fair opportunity to be heard. See Harding Opp. 22-26.

Respondent C.M. makes the same arguments. *See* C.M. Opp. i, 17-18.

Respondents are incorrect in both contentions.

A.

The California Court of Appeal Affirmed the Family Court's Construction of the Surrogacy Statute Holding the Court Had No Authority or Obligation to Consider the Federal Claims

In fact, the California family court held that California's surrogacy statute, Cal. Fam. Code §7962, precluded the family court from entertaining a counterclaim, from considering the federal constitutional claims, and from taking any testimony or hearing any legal argument concerning those claims. See Pet. 12-17.

The Harding respondents argue that the California State courts have jurisdiction to decide federal constitutional issues, citing *Tafflin v. Levitt*, 493 U.S. 455, 458-459 (1990), and *In re Estevez*, 165 Cal. App. 4th 1445, 1460 (2008). As a general proposition, of course, the state courts do have jurisdiction to decide federal constitutional claims, and petitioner has never taken a position otherwise. But respondents' contention misses the point. Despite the state court's general power to decide federal claims, in this case the California family court specifically construed California's surrogacy statute to limit the court's authority and to prohibit the family court from considering the counterclaim that set forth the federal issues.

Because the California Superior Court has jurisdiction to decide such federal issues, petitioner Cook had filed her original complaint setting forth the federal claims in that court. However, the Superior Court dismissed the complaint *sua sponte*, forcing Cook to file her

constitutional claims in a counterclaim in the family court case which C.M. had filed after Cook had already filed her complaint in the Superior Court. It was that dismissal of Cook's initial complaint which compelled her to file her federal claims in the federal district court.

While the Superior Court of California had jurisdiction to entertain the federal claims, that court refused to exercise its jurisdiction and forced Cook to file the federal claims in the family court which construed the California surrogacy statute to prohibit the family court from considering any of the federal issues Cook raised. See Pet. 11-17.

The family court's holding that Cal. Fam. Code §7962 precluded the litigation of the federal constitutional claims, depriving it of jurisdiction to entertain them, was affirmed by the California Court of Appeal. The California Court of Appeal agreed with the family court that the statute authorized a very limited hearing and Cook was barred from raising the federal constitutional issues.

> "The record shows that the trial court gave M.C. the hearing that Section 7962 contemplates ... Section 7962 specifies that the only showing necessary to obtain an order ... extinguishing claims of parental rights by a surrogate is 'proof of compliance with this section.' (§7962 subdivision (f)(2).) Upon such a showing, the judgment or order 'shall terminate any parental rights of the surrogate ... *without further hearing or evidence* ... Thus, section 7962 does not leave room for litigating challenges to the parental rights of intended parents on any basis

> beyond the circumstances and content of the surrogacy agreement itself.
>
> The trial court therefore properly denied M.C.'s counterclaim under section 7962, subdivision (f)(2) without further proceedings. ... [the counterclaim] asserted broad claims challenging the legitimacy and constitutionality of surrogacy agreements ... Under Section 7962 subdivision (f)(2), no 'further hearing or evidence' was required to consider such claims." Pet. App. 78-79 (emphasis in original).

The California family court did not decide whether or not the surrogacy statute violated the constitutional rights of the children or Melissa Cook. The court held that it was powerless to consider them. Consequently, the court took no testimony pertaining to the as-applied claims and went so far as to state that under the statute, as the court construed it, the court could not consider the claim on behalf of the children that their placement with an unfit "intended parent" violated their equal protection rights.

This construction of the statute was affirmed by the California Court of Appeal: the family court gave the only "hearing" required and authorized by the statute. *Ibid.*

In effect, the California Courts construed Cal. Fam. Code §7962 to mean that the statute could not be subjected to constitutional scrutiny.

The Harding respondents complain that the California Court of Appeal never used the word "jurisdiction." That the court did not use the term is irrelevant. The

California Court of Appeal agreed with, and affirmed, the family court's holding that it had no authority or power to consider or decide the federal claims, and the family court refused to consider the federal issues. That lack of authority and power is the essence of the lack of jurisdiction. Jurisdiction is the authority by which courts can take cognizance of and decide cases.

"Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgment. … [It is] [t]he legal right by which judges exercise their authority." (citations omitted). BLACK'S LAW DICTIONARY 853 (6th ed. 1990). "It is the authority, capacity, power or right to act." BLACK'S LAW DICTIONARY 991 (Rev. 4th ed. 1968) (and numerous cases cited therein). BOUVIER'S LAW DICTIONARY 1760 (8th ed. 1914) defines jurisdiction as follows: "[t]he authority by which judicial officers take cognizance of and decide causes ... the power to hear and determine a cause."

As the United States Supreme Court put it:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought." *General INV. Co. v. New York Cent. R. Co.*, 271 U.S. 228, 230 (1926).

B.

The California Court of Appeal Could Not, and Did Not, Actually and Directly Decide the Federal Claims in Such a Manner That It Precluded the Federal Court From Deciding Them

The California Court of Appeal's affirmance of the California family court cannot have any preclusive effect on the federal constitutional claims when the family court never addressed those claims and issues; never rendered an opinion on any of them; never held a hearing on them; and held that it was without authority to consider them.

As Cook pointed out in her petition, in *Shaw v. California Dept. of ABC*, 788 F.2d 600 (9th Cir. 1986) the Ninth Circuit previously and persuasively held "that a state appellate decision did not preclude the federal court from deciding a federal issue addressed by the state appellate court, where the lower tribunal had limited jurisdiction." Pet. 30.

Shaw held that it is irrelevant that the appellate court had full jurisdiction of the contested issues because the federal court must look to the jurisdiction of the court that conducted the original hearing or trial. *Shaw* at 607.

Without the required jurisdiction and authority in the trial court, subsequent state court proceedings cannot preclude a federal court from deciding federal issues.

Neither the Harding respondents nor C.M. ever cited the *Shaw* case or attempted to distinguish it.

The trial court never considered the constitutional issues and never made a ruling on them. The California Court of Appeal affirmed the family court's determination that it had no authority under the surrogacy statute to consider the federal issues.

The California Court of Appeal, therefore, ruled that the family court was correct in never holding a hearing, refusing to consider the constitutional issues, and determining that the California statute did not permit consideration of the federal issues. But if the statute precluded the family court from considering those issues, there was nothing for the California Court of Appeal to review and confirm concerning the federal issues.

When a California trial court does not address a particular legal issue and thereby fails to make a factual record relevant to it, the California Court of Appeal cannot reach the merits of that legal issue on appeal because the inadequacy of the record makes a decision on the merits premature. *Wimsatt, et al. v. Beverly Hills Weight Loss Clinics International, Inc., et al.*, 32 Cal. App. 4th 1511, 1524 (Ct. App., 4th Dist., 1995).

Moreover, findings of facts are a necessary component of the actual litigation required for preclusive effect. Pet. 29-30.

In this case, Cook submitted numerous sworn declarations which set forth facts essential to a determination of the constitutional claims. While Cook's verified answer and counterclaim filed in the family court asserted those facts, they were never the subject of a hearing or findings of fact, leaving the California Court of

Appeal without a record of any kind, making it impossible for the California Court of Appeal to adequately decide the federal issues.

Respondents assert that despite all of that, the California Court of Appeal's illusory attempt to address the federal issues – despite the lack of a record, a hearing or decision of the family court on the issues, and the lack of that court's authority to decide them – precludes the federal court from discharging its obligation to provide Melissa Cook and the three children a full and fair opportunity to litigate the federal claims.

It is in that context, that what statements the California Court of Appeal made concerning the "constitutionality" of the statute must be judged.

Respondents assert that the California Court of Appeal did, in fact, directly decide the federal issues, despite the fact the family court refused to consider the federal claims at all. They point out that the Ninth Circuit relied upon the California appellate court's assertion that it decided the federal issues.

The Ninth Circuit's uncritical acceptance of the California Court of Appeal's assertions ignore two basic realities which prevent the state court's decision from precluding the federal court from deciding the federal issues.

That is, the California Court of Appeal could not, and did not, directly decide the federal issues.

That court could not decide and affirm the federal issues because the trial court refused to consider the issues and never rendered an opinion on the federal claims. The family court held that it could only decide the precise issues identified by §7962 and that its authority in the hearing under that statute was limited to a determination of "parentage. That's it." 3C.A. E.R. 392 [2/9/16 Tr. 28]. The California Court of Appeal, as previously noted, agreed that the family court could not entertain the constitutional claims.

The jurisdiction and role of the state appellate court was to review the rulings of the trial court, and as to the federal issues, there was nothing to review. See, *e.g.*, *Wimsatt* at 1524. Except that the family court held that the surrogacy statute foreclosed review of the federal issues and, on that decision of the family court, the California Court of Appeal agreed and affirmed.

Since the family court was not required to consider the federal claims, had no authority to decide them, and did not conduct a fact-finding hearing pertaining to either Cook's federal "as-applied" claims unique to her and the three children, or the facial challenges, the California Court of Appeal could not address those issues either.

That total lack of a hearing and the refusal of the family court to consider and address the federal claims, is totally fatal to the suggestion that the state court's ruling precludes the federal court from discharging its obligation to decide the federal claims and issues.

So is the fact that the California Court of Appeal did not, in fact, actually decide the federal claims despite its assertion that it did so.

The California Court of Appeal asserted that it would decide the federal issues despite the fact it held that the family court was not required to consider them and the statute did not permit the family court to entertain the counterclaim.

However, the California Court of Appeal never conducted an analysis of the federal constitutional law. The court resolved the federal issues based solely on California state law. That court relied entirely upon a single California State Supreme Court case, *Johnson v. Calvert*, 5 Cal. 4th 84 (1993), and in every instance simply stated that the surrogacy contract was consistent with California law and policy. See Pet. 27-28.

The constitutional issues raised by Cook were not raised before the *Johnson* court (decided some 20 years before the California surrogacy statute was passed), and the *Johnson* case did not decide the federal constitutional issues.[1]

---

1. None of the twelve constitutional issues presented in this case were decided by *Johnson v. Calvert*. For instance, the constitutional right of the child not to be treated as a commodity was not raised or addressed in *Johnson*, and the policy consideration under California state law embodied in the prohibition of exchange of money in connection with an adoption, was not pertinent and certainly not controlling to the constitutional issues presented in this case. See *Johnson* at 95-96.

Nor did *Johnson* involve the Equal Protection rights of the child. This case presents important issues pertaining to the best interests of the children, and the Equal Protection rights of the children to be placed based upon what is in their best interests.

In fact, the Equal Protection rights of Melissa Cook, raised in this case, were not raised in *Johnson*. *Id.* at 98.

Clearly, under all of the circumstances, the decision of the California Court of Appeal did not operate to preclude the Ninth Circuit from deciding Cook's federal claims in this case. See Pet. 21-31. Application of issue preclusion, in this case, subverts the very policies the doctrine seeks to further and promote. See Pet. 31-36. Respondents fail to explain how those policies are promoted by the federal court refusing to discharge its obligation to decide the federal claims in this case.

The *only* federal constitutional issue raised in *Johnson* concerned Anna Johnson's argument that she had a Fourteenth Amendment Due Process liberty interest which would be violated if the contract, in that case, was enforced. However, in that case, as the *Johnson* Court explained, there were two women who "each presented acceptable proof of maternity." *Id.* at 93. Thus, the *only* reason the *Johnson* Court looked to "intent" was because there were two women with "acceptable" proof of their claims, and under the law, the child could have only one legal mother. *Ibid.*

That is not the case here. Melissa Cook is the only mother pressing her claim.

Anna Johnson pressed her constitutional claim in the teeth of Mrs. Calvert having been found to be the legal mother of the child who possessed her own constitutional rights. *Id.* at 98-99. *Johnson* pointed out that Anna Johnson's constitutional argument rested upon her being found to be the legal mother of the child, which the court found she was not. *Ibid.*

That holding is irrelevant here, and the rights of a mother in the position of Melissa Cook was not determined in *Johnson*, and her constitutional challenge was not decided. Thus, the one federal constitutional issue *Johnson* did decide has no application to Melissa Cook's claims. The California Court of Appeal ignored that reality despite the fact that Melissa Cook pointed out that *Johnson* did not decide a single constitutional issue raised by Cook. See, *e.g.,* Cook Reply Brief, Calif. Court of Appeal, 18-21.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Michael W. Caspino
Buchalter
18400 Von Karman Avenue,
Suite 800
Irvine, CA 92612
(949) 760-1121

Harold J. Cassidy
Counsel of Record
Joseph R. Zakhary
Thomas J. Viggiano, III
Derek M. Cassidy
The Cassidy Law Firm
750 Broad Street, Suite 3
Shrewsbury, NJ 07702
(732) 747-3999
hjc@haroldcassidy.com

Counsel for Petitioners