No. 17-

IN THE

# Supreme Court of the United States

T.B. AND D.B.,

*Petitioners,*

*v.*

P.M. AND C.M.,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Is a pregnant mother's interest in her actual relationship with the child she carries during pregnancy and after birth protected as a substantive due process liberty under the Fourteenth Amendment whether or not she is genetically related to the child?

2. Does a state's enforcement of a surrogacy contract violate a woman's liberty interest to be free from state enforced exploitation or her equal protection rights guaranteed by the Fourteenth Amendment?

3. Is a woman's constitutional right to be free from state-enforced exploitation, like the right not to be subject to slavery or involuntary servitude, unwaivable?

4. Does a surrogacy contract executed by a woman before the child she carries is conceived, operate to waive the federal constitutional claims of the child or her own constitutional claims in a subsequent action to enforce the contract?

## PARTIES TO THE PROCEEDINGS

T.B. are the initials of the petitioner who signed a surrogacy agreement, carried twin girls, and gave birth on August 31, 2016.

D.B. are the initials of her husband.

T.B. and D.B. were appellants below.

P.M. are the initials of a fifty-year-old man who donated genetic material for conception of embryos transferred to T.B.

C.M. is the wife of C.M. who is not genetically related to the children.

P.M. and C.M. were appellees below.

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## INTRODUCTION

This case implicates some of the most fundamental intrinsic rights guaranteed by the Fourteenth Amendment. It presents issues of broad public importance which affect women and children throughout the nation. This case highlights the systemic refusal of state and lower federal courts to decide the substantive due process and equal protection rights of both children born to a "surrogate" mother, and those of the mothers themselves.

The exploitive practice of so-called "gestational surrogacy" grows while the courts refuse to provide meaningful due process for these women and children.

Ever since the controversial practice of surrogacy was first introduced in the mid-to-late 1980's it has raised moral and ethical issues about exploitation of women and commodification of children. *See,* e.g. *Morrissey v. United States*, 871 F.3d 1260, 269 (D.C. Cir. 2017). As a result, virtually every European country has criminalized gestational surrogacy and the European Union has declared that "gestational" surrogacy is a human rights violation which exploits women. *See*, European Parliament's Annual Report on Human Rights, Nov. 30, 2015, p. 16.

Intrinsic to all surrogacy arrangements is the deliberate planned destruction of the mother-child relationship, a relationship which has always been the touchstone and core of all civilized society.

Over the past nineteen years, approximately 4,000,000 children, on average, are born in the United States each

year (www.CDC.gov). On average, about 1,229 children were born each year as a result of surrogacy agreements, but the number of such births is increasing each year. CDC.gov ("Art and Gestational Carriers"); Perkins, K.M. et al, "Trends and Outcomes of Gestational Surrogacy in the United States," Fertility and Sterility, vol. 106, No.2 August, 2016, pp. 435, 438; *see also,* Cohen, Deborah L., "Surrogate Pregnancies on Rise Despite Cost Hurdles," Reuters, March 18, 2013, showing 738 children born in 2004, rising to 1,593 by 2011.

Despite the magnitude of the rights at stake, and the fact the conduct conflicts with traditional moral values of the culture, the practice continues to spread while the courts refuse to consider the constitutional rights of the children and women.

At issue is whether surrogate mothers will be given their day in court to litigate their federal constitutional rights and those of the children, including the children's right to have a relationship with the only mother they have and bonded with, the mother's right to maintain her actual relationship with her child, the right of a woman to be free from state promoted and enforced exploitation, the children's right to be free from state enforced commodification and sale, the children's equal protection right to be placed based upon what is in their best interests, and the mother's equal protection rights.

T.B. gave birth to Baby H and Baby K on August 31, 2016, by emergency C-section, 14 weeks prematurely. T.B. took up residence at the hospital as the babies were admitted to the Neonatal Intensive Care Unit. Born at one pound, nine ounces, Baby K died at seven days following

birth. Baby H, born at one pound, ten ounces, had to undergo surgery, and T.B. stayed with her twelve hours a day for eleven weeks, providing breast milk and later breastfeeding the baby.

Iowa has no surrogacy enabling statute, and there was no Iowa case law concerning whether the state would enforce such an arrangement. A written contract memorializing the planned intent of the parties was drafted by P.M.'s attorney, but P.M.'s attorney and the parties all believed that the arrangement was controlled by existing Iowa statutes governing voluntary termination of the mother's rights following birth and the adoption statutes.

Two months following Baby H's birth – without T.B. receiving notice that P.M. and C.M. had filed a complaint – the Iowa district court issued an order obtained *ex parte* which effectively terminated T.B.'s parental rights and the rights of Baby H.

The court denied T.B.'s application to vacate that injunction and the Iowa district court, refusing to permit any discovery, granted P.M. summary judgement denying all of Baby H's claims for violation of her substantive due process and equal protection rights and holding that T.B. had no rights under Iowa law because she was not genetically related to the child. The court refused to hold a fact-finding hearing relevant to the federal claims, including the scientific and medical evidence offered by T.B.'s four experts, or consider the actual biological relationship between T.B. and Baby H, contrary to *Glona v. American Guar. & Lib., Ins. Co.*, 391 U.S. 73 (1968), and *Lehr v. Robertson*, 463 U.S. 248 (1983).

The Supreme Court of Iowa granted T.B. direct review. That court assumed that T.B. had requisite standing, under the controlling cases issued by this Court, to litigate the federal due process and equal protection rights of Baby H, but refused to consider the child's claims, holding that T.B. "waived" her right to raise the constitutional claims of the child by signing the surrogacy contract before the child was conceived and before the child had any rights to waive.

The Supreme Court of Iowa held that by signing a surrogacy agreement before the children were conceived, T.B. had "waived" all of her future due process and equal protection rights, including her right to be free from state-promoted and state-enforced exploitation, her right to maintain her relationship with her child, and her right to the equal protection of the law. The court, however, went on to decide those federal constitutional issues based, not on federal constitutional law, but on what the Supreme Court of Iowa announced was Iowa state public policy and in contravention of this Court's holdings, including *Glona*, that states must decide the federal constitutional rights of a mother based upon her biological relationship with the child, not upon a state's legal fiction a relationship never existed. *See Id.*, at 75-76.

## OPINIONS BELOW

The opinion of the Supreme Court of Iowa is reported at 907 N.W. 2d 522 (Iowa 2018) *(*App., *infra*, 1a-48a). The opinion of the Iowa District Court is unreported *(*App., *infra*, 49a-114a). The initial order of the Iowa District Court issuing an *ex parte* injunction dated October 31, 2016, is unreported *(*App., *infra*, 115a).

## JURISDICTION

The Supreme Court of Iowa issued its opinion and final judgment on February 16, 2018. On May 16, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to, and including, May 31, 2018. *See*, No. 17A 1266. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Section One of the Fourteenth Amendment of the United States Constitution is set forth in Appendix D found at 117a.

## STATEMENT OF THE CASE

### A. Nature of the Action

The constitutional claims brought by T.B. on behalf of Baby H, and on her own behalf, arise in the context of respondents' action to enforce a surrogacy contract. After the embryo transfer, T.B. learned new facts that showed that turning custody over to P.M. would be detrimental to the welfare of Baby H. T.B. sought a trial on the medical, scientific and other facts relevant to Baby H's claims that Iowa's enforcement of the contract violated her 14th Amendment due process rights to be free from commodification and sale, Baby H's right to maintain her relationship with the only mother she has and knew, and her equal protection right to be placed, like all other children, based upon what is in her best interests.

T.B. also sought to vindicate her own right to be free from state enforced exploitation, her right to keep and maintain her relationship with Baby H, and her right to enjoy the equal protection of her rights.

This lawsuit was filed by P.M., in secret, on October 24, 2016, and the court order obtained on October 31, 2016, effectively terminating the rights of Baby H and T.B. was served on November 1, 2016.

T.B. filed an answer and counterclaim asserting all of the federal constitutional claims on behalf of herself and Baby H. The appeal to the Supreme Court of Iowa followed.

## B. Statement of Facts

Twin baby girls, Baby K and Baby H, were born thirteen weeks prematurely to T.B. on August 31, 2016. R.216. Immediately after their birth, T.B. resided at the hospital and spent twelve hours a day with the babies while they were in the neonatal intensive care unit. R.218. Because of extreme prematurity and low birth weights (1 pound 9ozs. and 1 pound 10ozs.) the babies' lives were in danger. T.B., as the mother of the babies, listed as such on their birth certificates, made medical decisions for the children in consultation with the NICU medical team. Baby K died at the age of seven days, and Baby H needed surgery. R.217.

### 1. General Background

T.B. and P.M. met after T.B. happened upon a "Craig's List" ad posted by P.M. seeking a woman to act as a surrogate. R.198.

P.M. was 50 years old and his second wife a year younger. Both were divorced and P.M. had two adult children with his first wife. C.M. had four adult children with her first husband.

When they married three years earlier, they knew they could never have a child together because C.M. had had a hysterectomy. Tr.237-238.

T.B. never knew anything about surrogacy or anyone who had been a surrogate. R.198-199.

T.B. did not consult an attorney, a doctor, or any other professional before she entered into an agreement with P.M. No licensed agency or other professional managed the arrangement. A199-200. Thus, there was no home study of the M's and no counseling for T.B.

They agreed to a plan for P.M. to obtain ova from an anonymous woman, have the ova fertilized with P.M.'s sperm and have a double embryo transfer using IVF techniques for T.B. to carry the two babies to term and give birth. R.52.

The fertility clinic insisted on a written contract between the parties as a condition for the transfers. R.200.

The M's hired a lawyer in Iowa to draft the contract. When T.B. signed the contract, she had no counseling of any kind, and no one explained the medical risks for her and the babies. She understood she had parental rights based upon what the M's lawyer told her, and what was in the contract. A200.

### 2. Pertinent Contract Provisions

The contract recited that the M's would pay T.B. $13,000, but payment was conditioned upon T.B. voluntarily surrendering custody of a child following birth and voluntarily submitting to the termination of her parental rights. Payment was clearly in exchange for the child and termination of T.B.'s parental rights. R.53. ("However, upon *surrendering* custody of the child to the intended parents *and termination*, if any, of parental rights the gestational carrier and her husband, all consideration for services and expenses will be paid.") (Emphasis added.) R.55. These conditions were never met, and T.B. was never paid.

The contract stated that the M's would pay for all costs associated with C.M.'s adoption of the babies, costs associated with the termination of T.B.'s parental rights and costs of T.B.'s adoption counseling mandated by Iowa law. R.54.

The contract seeks voluntary surrender of the babies to P.M. even if such surrender is not in the children's best interests. R.148.

All of the parties recognized that as the woman who carried the children, T.B. was, in fact, the mother of the children, and that T.B. was the legal mother, requiring her to submit voluntarily to termination of her rights (and those of the children) for C.M. to adopt. Both Lori Klockau, the M's attorney and C.M. told T.B. those facts. R.201-202; R.281-282. T.B. understood that that was why the contract, drafted by Klockau, recited the provisions for termination and adoption. *Id.*

### 3. The Scientific and Medical Facts Relating to the Inherent Dangers and Exploitive Nature of "Gestational" Surrogacy.

While the District Court granted summary judgment, relevant scientific and medical evidence was only provided by T.B., including the very fact on which the Iowa courts based their entire legal analysis under state and federal law – the fact she is the biological mother.

The "gestational" surrogacy agreement is an intentional plan to deprive the child of the only mother she has and knew and strip the child of all of the essential benefits that the mother-child relationship provides the child. R.296-312; R.326-331; R.121.

To achieve this planned separation, IVF procedures and drug regimens are employed which place both the children and the mothers at significant increased risk for physical and psychological harm.

#### (a) Health Risk to the Mothers and Children

The drug regimen to which the gestational surrogate is subjected is inherently dangerous and painful to her. R.398-399; R.123-124; R.203-204.

The *in vitro* techniques used in gestational surrogacy subject the children to far greater risks for birth defects and anomalies than normal reproduction. R.396-397. The birth mother is subjected to greater risks than in normal pregnancy. In addition, the deliberate transfer of multiple embryos in an older women, such as T.B., poses special risks. R.397. Resultant premature birth, common

in multiples, cause significant risk of serious illness to the child. R.296-297. In this case, the two baby girls were born fourteen weeks premature. Baby K died a week after birth. Baby H was in the NICU for 100 days, and underwent risky surgery.

### (b) Pregnancy is the Basis for a Life-Long Loving Relationship; the Bonding Between Mother and Child is Physiological and Psychological Regardless of Whether there is a Genetic Relationship

Pregnancy, and the relationship between a mother and her child during pregnancy, plays an important and essential role in forming the basis for a life-long loving relationship between a mother and her child, and the continued contact that a baby has with her birth mother after birth is extremely important for the child's physical and mental well-being. R296-312; R326-331; New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care, State of New Jersey, "After Baby M: The Legal, Ethical and Social Dimensions of Surrogacy," p.99 (1992).

The bonding process between the pregnant mother and the children during pregnancy is the same physical process and experience, whether or not the mother is genetically related to the children. As the body secretes particular hormones during pregnancy, a woman's psychological reaction may differ decidedly from her initial intention.

Oxytocin, a nanopeptide hormone, has been frequently described as "the love and bonding hormone." Rising

oxytocin levels are associated with human mother-child bonding. Maestripieri, D. (2001), Biological Basis of Maternal Attachment, Current Directions in Psychological Science, 10: 79-83. The number of oxytocin receptors in the expectant mother's brain multiplies dramatically in response to rising estrogen levels across pregnancy. R.301; R.329-331. In 2007, *Psychological Science* published results demonstrating the biological basis for maternal psychological responses to the fetus. Women whose bodies were secreting more oxytocin early in the pregnancy were more psychologically attached to their infants. Stronger attachment involved positive energy directed towards the child, and maintenance of constant affectionate and stimulating bodily contact with the child. Mothers who had high oxytocin levels were also more preoccupied by thoughts of the infant, focusing on safety, and the infant's future, and providing maternal responses. Feldman, R., Weller, A., Zagoory-Sharon, O. Levine, A. (2007), Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother-Infant Bonding, Psychological Science, 18:11, 965-970; Levine, A., Zagoory-Sharon, O., Feldman, R., Weller. A. (2007), Oxytocin During Pregnancy and Early Postpartum: Individual Patterns and Maternal-Fetal Attachment, Peptides, 28: 1162-1169.

It is now known that pregnancy causes significant long-lasting physical changes in the regions of the mother's brain structure which subserve social cognition. Hoekzema, E., Baba-Müller, E., et al, "Pregnancy Leads to Long-Lasting Changes in Human Brain Structure," *Nature Neuroscience*, pp.1-10, Dec. 19, 2016. Those changes provide support for the adaptive process serving

the transition into motherhood. *Id.* at 2. There is no difference in the changes of the brain in women who are not genetically related to the child and women who are genetically related to the child. *Id.* at 3. Changes in the brain structure alone can accurately determine that a woman had undergone pregnancy. *Id.* at 7. These changes prepare the mother for her special role in responding to the needs of her child. *Id.*, at 8.

Biologically, the developing fetus depends upon the mother who carries her, and is shaped by prenatal experiences in ways that profoundly influence the child's life after birth. Fetal growth and development is partially guided by genetic blueprints but is entirely dependent on maternal factors during the pregnancy. R.296-307; R.326-331; R.334-336, R.352-354; R.415-417.

Pregnancy involves a mother-child relationship and not the housing of embryos and fetuses. R.348-354. In the history and tradition of this nation, it was always the fact that a mother carried and bonded with the child which distinguished her as mother.

There is no question that T.B. is a biological mother of Baby H as a matter of scientific and medical fact (R.415-417; R.296-312; R.328-338), and that her relationship with the child is of special and critical importance and provides benefits to the child she carries. R.303-312; R.332-338.

The use of the mother as a form of incubator, and the disregard for the mother's love and bond with the child she carries, is exploitive of the mother and child. R.354-358.

### 4. Facts Leading to T.B.'s Conclusion that Surrender of Baby H to P.M. was Not in the Baby's Best Interest

On April 7, 2016, C.M. stated the M's couldn't afford to pay for T.B.'s medical bills as originally agreed. T.B. was 37 years old in a high-risk pregnancy and the M's going back on their promises planted the beginnings of mistrust. R.204-206.

Eleven days later, T.B. began to bleed and went to the hospital for treatment. A sonogram confirmed she was carrying viable twins. She reported the news to the M's. C.M. told T.B. she could not seek medical treatment without first getting *permission* from C.M. R.206-207.

Thereafter, the M's told T.B. what she could or could not do, as if T.B. was their property. The M's ordered D.B. not to video any event concerning the pregnancy, and demanded that T.B. stop seeing her doctor and only use the doctor at Midwest Fertility. R.207.

On April 13, C.M. confirmed T.B.'s worst fears when C.M. wrote to her stating: "We are in charge. We hired you..." R.207. Three days later, C.M. demanded that T.B.'s husband no longer accompany her to her doctor's visits. R.208. C.M.'s debasing behavior continued. On April 30, C.M. wrote to T.B. stating: "A carrier...should be saying 'Yes Ma'am whatever you guys want to do.'" R.208.

Because of these mean-spirited statements and demands, T.B. suggested that communications should go through attorneys. R.209. C.M. responded with even nastier statements and taunts, saying T.B. had

mental disorders. T.B. retained a lawyer in order for communication to go through attorneys and reduce the stress she was experiencing, while in a high-risk pregnancy. R.209.

All through June into mid-August, while the communications went through the attorneys, T.B. made it clear that she intended to surrender the children to P.M. following birth. R.209-212.

Then, on August 19, P.M. sent a profane, hateful, racist statement about T.B.'s husband to D.B.'s sister:

> "I didn't reaize [*sic*] ur [*sic*] brother was a dirty Mexican....He is a Dirty Fuken Mexican." R.212.

T.B. feared that such hateful comments evidenced that P.M. would not be a good custodial parent and no child should be taught such hatred. R.212.

On August 24, C.M. sent a lengthy hateful email to T.B. T.B. found all of this very stressful. She called C.M. to discuss it and became upset. In that conversation, C.M. called T.B., an African American, the"N" word racial slur. R.212-213. It was that day that T.B. thought that it was probably not in the children's best interest that the M.'s be given custody of the babies. Yet, she was still ambivalent, and when she called P.M.'s attorney that day, she was still planning to turn the babies over. T.B. and the M's attorney discussed how delivery of custody could be achieved. Klockau told T.B. that T.B. was the legal mother of the babies. R.214.

T.B. believed that she had a moral obligation to the babies, and later that day, told Klockau she decided it was not in the children's interest to turn custody over to the M's. R.215.

Probably in part because of the stress created by the M's, the children were born a week later, 14 weeks premature, by emergency C-section. T.B. loved the babies, and Baby H would remain in the NICU for three and a half months. The promises T.B. made in the contract were important to her, but she concluded it was more important to discharge her moral obligations to the children she carried, and to do what was best for them. R.216.

Her immediate concern was for the medical treatment for the babies. T.B. decided that the last thing the babies needed was to be thrown immediately into a court fight. The babies needed peace, stability, and a loving mother to help care for them. She decided to exercise her rights as their mother to do what was best for them. Baby K died suddenly when she was seven days old. T.B. was grief stricken and cried for days. She felt guilty for feeling sad because she still had Baby H. When she felt joy with Baby H, she felt guilty because they had lost Baby K. R.216-217.

T.B. stayed at the hospital from August 31 to November 7. She was in the NICU from 6:00 AM to 6:00 PM every day, provided the baby with breast milk, and when the baby was able, she breast fed her. R.218-219.

## C. Procedural History and Ruling Under Review

### 1. Proceedings in the Iowa State Trial Court

P.M. and C.M. filed a petition in the Iowa district court seeking to terminate the rights of, and relationship between, T.B. and Baby H. R.41. T.B. did not know the petition was filed until she was served, on November 1, 2016, with an *ex parte* injunction, dated October 31, 2016, effectively terminating the rights of T.B. and Baby H. R.63; R.217.

The preliminary injunction prohibited T.B. "from acting inconsistently with the terms of the gestational carrier agreement."

As a result, T.B. was forced to leave the hospital and Baby H was left without her mother or anyone to make medical decisions for a baby born 14½ weeks premature.

T.B. filed an answer, defenses and counterclaim asserting the substantive due process and equal protection rights of Baby H and those of T.B. On November 23, 2016, the court denied T.B.'s motion to vacate the injunction.

On November 28, 2016, the district court ruled that T.B. had no rights, ignored the constitutional issues and announced that the court must award custody to P.M. unless he was proven to be unfit. Tr. 14, 23-25, 17.

On December 7, 2016, the District Court ruled that: (1) T.B. was not a legal parent of Baby H under Iowa law because she was not genetically related to the child; and (2) sole custody be awarded to P.M. R.174.

On February 21, 2017, the court granted P.M.'s motion for summary judgment. R.427.

### 2. Decision of the Supreme Court of Iowa

The Supreme Court of Iowa granted direct review, bypassing the Iowa Court of Appeals. The Iowa legislature has never passed a statute to enforce a gestational surrogacy contract, and the courts had never addressed the issue. There remained complete uncertainty about whether such contracts could be enforced under Iowa law.

T.B. argued all of the federal constitutional claims brought on her own behalf and on behalf of Baby H throughout the entire case.

On February 16, 2018, the Supreme Court of Iowa declared that T.B. was not the legal mother of Baby H under Iowa law. The court ruled that Baby H had no legal mother under Iowa law, and the contract was enforceable.

The Supreme Court of Iowa refused to consider whether enforcement of the contract violated any of Baby H's substantive due process and equal protection rights guaranteed by the Fourteenth Amendment. That court assumed that T.B. satisfied all of the Article III and prudential considerations to establish requisite standing, as set forth in *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989), but held that T.B. "waived" her standing to litigate the child's rights when she signed the surrogacy contract. N.W. 2d at 544; App., *infra*, 47a.

The contract had no provision which acted as such a "waiver," and, in effect, the Supreme Court of Iowa

held that T.B. waived the rights of the child – an act undoubtedly beyond her power – at a time when the child did not exist and when the child's rights had not yet come into existence.

The Supreme Court of Iowa also held that the contract operated as a waiver of T.B.'s own constitutional rights. *Id.*, at 543-44; App., *infra*, 45-47a.

> "T.B. thereby contractually waived her right to raise her own constitutional claims and claims on the child's behalf." *Id.* at 544; App., *infra*, 47a.

Thus, the decision of the Supreme Court of Iowa implicates the question whether any agreement, executed before the conception of the child, can act as an irrevocable waiver of the constitutional rights of either T.B. or the child. The agreement contained no clause or provision which stated that she waived standing to litigate the child's rights or waived her own rights. The contract, to the contrary, recited that she had to voluntarily terminate her rights following the birth of the child and M's attorney unequivocally advised T.B. that she was the legal mother of Baby H, despite the contract.

While this case presents the first time this Court would address the question of whether the mother's relationship is protected under the Fourteenth Amendment when the mother who carries the child is not genetically related, that question must be answered as a matter of federal constitutional law, not as a matter of interpretation of a state statute as Iowa did in this case.

Likewise, the Supreme Court of Iowa failed to decide the question of whether T.B.'s Fourteenth Amendment right to be free from state promoted and state enforced exploitation was violated, based upon federal law, instead ruling entirely upon its holding that the exploitation did not violate Iowa public policy. *Id.* At 343; App., *infra*, 45a.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

This petition presents an ideal and timely opportunity for this Court to resolve important issues necessary for vindication of the constitutional rights of children and their mothers throughout the nation, and for much needed guidance to the states and lower federal courts on recurring federal constitutional issues of grave importance.

### I. The Supreme Court of Iowa's Decision That T.B.'s Signing the Surrogacy Contract Waived the Constitutional Rights of the Child and Her Own Constitutional Rights, Decided Important Questions of Federal Constitutional Law That Have Not Been, but Should Be Decided by this Court, and its Reasoning Conflicts with the Controlling Precedent of this Court on an Important Federal Question.

T.B. brought constitutional claims on behalf of Baby H, including the child's substantive due process liberty interest in not being commodified by her purchase and sale, Baby H's substantive due process right to maintain her relationship with the mother who carried her and with whom she bonded, and her equal protection rights to have

her custody placed based upon her best interests, like the state of Iowa does in all other instances.

T.B. asserted case and controversy jurisdiction and prudential standing to litigate the rights of Baby H. The Supreme Court of Iowa adopted the federal standard announced by this Court in *Caplin & Drysdale*, 491 U.S. at 623 n.3, and the cases cited therein, for purposes of determining T.B.'s standing to litigate the federal claims of Baby H. 907 N.W. 2d at 544; App., *infra,* 47-48a.

The Supreme Court of Iowa assumed "that T.B., as Baby H's birth mother, would have standing to raise constitutional claims of Baby H," citing *Caplin & Drysdale, supra.* However, the Iowa court ruled that Baby H's constitutional rights were effectively irrevocably waived by T.B., because, the court reasoned, T.B. waived her rights to assert claims on behalf of Baby H by signing the surrogacy agreement. *Id.*

That court also ruled that by signing the surrogacy contract T.B. waived her own rights, stating "T.B. thereby contractually waived her right to raise her own constitutional claims or claims on the child's behalf." *Id.*

In reaching those conclusions, the Supreme Court of Iowa relied exclusively on Iowa state law, not the cases of this Court dealing with the principles governing waiver of a federal constitutional right. The contract which the court asserted operated as a waiver of all of the constitutional claims contained no language that constitutional rights were being expressly waived. There was only a promise of a future voluntary waiver *after* all facts were known on which a decision could be made. The M's promise of

payment was made contingent upon that future waiver following birth.

When the contract was signed, there was no Iowa statute or prior case law which informed the parties that these promises would be enforced, even if subsequent facts revealed that termination of the mother-child relationship was not in the best interest of the child or mother. The Supreme Court of Iowa announced that Iowa will enforce these provisions in this case for the first time.

The Supreme Court of Iowa did not attempt to apply the principles governing waiver of a federal constitutional right announced by this Court. The contract indicated that statutory law of Iowa dealing with voluntary termination of parental rights following birth and adoption would apply. That was the understanding of all of the parties, and P.M.'s attorney who drafted the contract explained to T.B. that T.B. was the legal mother of the children, that T.B.'s name would be placed on the children's birth certificates as the legal mother, and her rights could be terminated only if she voluntarily submitted to termination and adoption after the birth of the children. R. 55; R. 53; R. 201-02; R. 281-82.

As a general matter, this Court has held "that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights ..." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389 (1936)). A waiver is ordinarily an intentional relinquishment of a known right. *Id.* The requirement that a waiver of a fundamental constitutional right is voluntary and fully informed is part of the substantive right itself. *Id.*, at 464-65. Since the right for

a waiver to be voluntary and fully informed is part of the right itself, it is clear that federal law dealing with waiver of such a right is controlling, not state law as the Iowa court ruled.

In *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), this Court cited *Johnson v. Zerbst* for the proposition that this Court "always set high standards of proof for the waiver of constitutional rights" and "reaffirmed" those standards.

While this Court has never addressed the precise question presented here – can the signing of a surrogacy contract operate as an irrevocable waiver of all future constitutional rights of the child and the birth mother – the applicable principles decided by this Court are well established.

This Court has stated:

> "Whether a particular right is waivable; whether the [party] must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano et al.*, 507 U.S. 725, 733 (1993).

The rights at stake in this case are among the most important and sacred, and two are undoubtably "unwaivable." The child's substantive due process liberty interest to be free from state promoted and state enforced purchase and sale, and commodification cannot be waived by any human being and certainly not by a third party.

This right of the child, while different in kind, is akin to the sale prohibited by the 13th Amendment, and surely the rights and protections guaranteed under the 13th Amendment, are unwaivable.

The United Nations has concluded that surrogacy agreements involve the sale of children. *See*: U.N. Convention on the Rights of the Child, "concluding observations on the report submitted by India under Article 12, par. 7, of the optional protocol to the convention on the rights of the child or the sale of children, child prostitution and child pornography" ¶23(F),¶29, U.N. Doc. CRC/C/OPSC/IND/Co/1 (June 13, 2004); *infra*, note 271; *see also*, Smolin, David, "Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children, Pepperdine Law Review, vol. 43, p. 265 (2016).

This case directly involves T.B.'s due process liberty interest to be free from state enforced exploitation. The nature and contours of that right, especially when the exploitation is gender specific, needs to be defined by this Court at this time. It is one of those rare rights which cannot be waived. That is to say, a state – as was done in this case – can never use as an excuse to enforce and involve itself in the exploitation of a woman, the claim, thereby, that she somehow "waived" her rights, and thus agreed to the state's complicity in her being exploited.

Because of the importance of the issues and the critical need for this Court to address these matters now, the Court should grant certiorari to decide whether T.B.'s right to be free from state enforced exploitation is unwaivable; whether the child's right to be free from

commodification is unwaivable; whether a mother who is unrepresented by counsel can irrevocably waive all of her future due process and equal protection rights with respect to her relationship with her child; and whether the signing of the contract before the children even existed, can act as an irrevocable waiver of the child's future rights.

Further, this Court needs to decide whether the act of a mother, in this circumstance, can ever operate to waive the child's rights, whether the waiver is cast in terms of "waiver" of her "standing" or otherwise. When it comes to waiving the rights of third parties, there are special considerations. *See*, e.g. *Stoner v. State of California*, 377 U.S. 940 (1964).

## II. By Ruling That T.B. Has No Substantive Due Process Liberty Interest in Her Relationship with Baby H, the Supreme Court of Iowa Decided an Important Federal Constitutional Question That Has Not Been, but Should Be, Settled by this Court; the Iowa Decision Conflicts with Relevant Applicable Principles of Federal Constitutional Law as Set Forth in *Glona v. American Guarantee & Liability Ins. Co.,* 391 U.S. 73 (1968) and *Lehr v. Robertson,* 463 U.S. 248 (1983).

The Supreme Court of Iowa held that T.B. did not possess a due process liberty interest in her relationship with Baby H only because she was not 'genetically related" to the child. 907 N.W. 2d at 542; App, *infra*, 42a.

This ruling is the result of the Iowa court's interpretation of the state's statute that gives legal status to a person "who has been a biological party to the procreation of the child." I.C.A. §600 A.2(3). The

Supreme Court of Iowa ruled that the fact T.B. was the greatest contributor to the procreation of the child, and her relationship with the child during pregnancy and after birth was all irrelevant in determining the legal status of T.B. as parent. The court equated the word "biological" in the statute with the word "genetic." 907 N.W. 2d at 540-41; App, *infra*, 39-40a.

Relying upon that interpretation of Iowa statutory law which resulted in the fiction that T.B. was not a "biological party to the procreation of the child" and therefore not a "legal" mother, the Supreme Court of Iowa ruled against T.B. on the federal question of whether T.B.'s actual unique and irreplaceable biological relationship between T.B. and Baby H during pregnancy and the two months following birth was protected as a liberty under the 14th Amendment.

> "That (14th Amendment) liberty interest belongs to P.M. ... by contract, T.B.'s constitutional claims rest on an incorrect premise – that she has parental rights in Baby H without being the child's genetic mother." *Id.* at 542; App., *infra,* 42a.

By deciding that T.B. did not possess a 14th Amendment due process liberty interest in her actual intimate relationship with Baby H, because they were not "genetically related," the Supreme Court of Iowa decided a critical question of federal law which this Court has never directly addressed.

The Iowa court assumed this Court's decisions in *Lehr v. Robertson*, 463 U.S. 248 (1983) and *Tuan Anh*

*Nguyen, et al v. Immigration and Naturalization Service*, 533 U.S. 53 (2001), held that the mothers who gave birth in those cases had 14th Amendment liberty interests in their relationships with the children they bore, was *only* because they were genetically related.

This holding of the Supreme Court of Iowa requires a resolution by this Court for two separate reasons.

First, this Court has never stated that genetics was the only, or even any factor which establishes whether a mother who carries a child to term, gives birth and cares for the child following birth, has a protectable due process liberty under the 14th Amendment.

Actually, the opposite is true. It was always the actual relationship between a parent and child which was protected as a liberty, not genetics alone.

The relationship between parents and their children has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual; not rights conferred by government. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore, supra*. This is an interest in the "companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The entitlement to protection of this right is self-evident. *Lehr*, 463 U.S. 248; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Since the interest protected is the interest in the relationship itself, the mother's interest in her relationship with her child is always protected as fundamental, which would logically include the relationship during pregnancy. The majority in *Lehr*, adopting the reasoning of Justice Stewart's dissent in *Caban v. Mohammed*, 441 U.S. 380, 398-99 (1979), and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr* at 259-60; 260 n.16. *Lehr* thus recognized the mother's protected interest because during pregnancy the mother has an actual relationship with her child.

If Iowa's holding that a mother who carries a child and gives birth has no 14th Amendment liberty interest is upheld, it would work absurd and unjust results in many instances.

For one example, if a married couple were to find that the husband and wife could not conceive using the wife's ova, and the wife carried the child having used the ova of an anonymous donor, and the couple separated after the mother gave birth, under Iowa's interpretation of the 14th Amendment, she would have no protectable liberty only because she was not genetically related.

This Court has never held that the mother's relationship is *not* a protected liberty if she is not genetically related to the child she carries.

In contrast to the birth mother, the genetic father does not always enjoy constitutional protection. The mere fact that a man is genetically related does not give rise to a

liberty interest under the Fourteenth Amendment. Rather, it is the strength of the relationship which determines whether a father has a protected liberty interest. *See and compare, Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammod*, 441 U.S. 380 (1979); *Quilloin v. Alcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983). The difference in the reproductive roles of the mother who carries the child and a person who "fathers" the child not only distinguish how their reproductive rights can be established, but justifies different treatment under the Fourteenth Amendment. *See*, e.g. *Tuan Anh Nguyen*, 523 U.S. at 62-73 (2001) (citing *Lehr v. Robertson*, *supra*); *see also,* Hendricks, J.S., "Essentially a Mother," 13 Wm. & Mary J. Women & L. 429 (2007).

Thus, this Court has held that a genetic relationship alone does not establish a protectable liberty in a relationship with a child. The issue presented to this Court is whether the absence of a genetic contribution by a mother who carries the child renders the actual unique and vital relationship between mother and child unprotectable under the 14th Amendment.

The second reason why this Court should decide this question is because the ruling of the Iowa court appears to be in direct conflict with the decision of this Court in *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968).

*Glona* was an equal protection case, but the relevant point made in *Glona* has equal application in this case: for purposes of determining whether a relationship between a mother and her child enjoys legal protection under the 14th Amendment, it is the actual biological relationship

between the mother and child which controls, not the legal fictions created by the laws of a state.

> "To say that the test of Equal Protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." *Id.* at 75-76.

The Supreme Court of Iowa completely ignored the fact that T.B. had a biological relationship with the child which was the most unique, most important and most worthy of protection. Although the mother and child are two separate persons, their relationship is so intimate that the unique bond between them, created in utero, establishes a human relationship which may be the most rewarding in all of human experience.

T.B. offered scientific and medical evidence which outlined all of the physiological ways in which the mother provides essential needs and benefits to the child during pregnancy, the physiological based bonding between them, and the dramatic ways in which their physical interaction affects the physical and psychological development and well-being of both. R. 289-313; 324-339; 394-400; 409-417.

The Iowa court ignored the very fact emphasized by this Court in determining that a mother always had a protected liberty interest in her relationship with her child: "The mother carries and bears the child..." *Lehr*, at 260, n.16.

Throughout our history, what has distinguished a mother from a father and that which made a woman the mother of a child, was that very fact that she carried and bonded with the child.

Across the nation in every state but two, the fact that a particular woman gave birth is treated as proof that she is the biological mother of the child born to her, and she is given legal status as mother. This is true even in states like California, which enforce gestational carrier agreements. There isn't a single state that requires a woman to prove that she is genetically related to her child in order to have legal status as the mother, except for Iowa as a result of the opinion in February, 2018.[1]

While the Supreme Court of Iowa ruled that T.B.'s 14th Amendment equal protection rights were not violated by enforcement of a contract signed before the children were conceived, in every other instance in Iowa no contract or other writing signed by a mother before birth, which expresses an intention to give up her constitutional rights to her relationship with her child, is enforced. Only waivers of that right signed more than 72 hours after birth are enforced. I.C.A. §600 A.4(f)(4)(g). Even then, a mother has four days thereafter to revoke the consent, I.C.A. §600 A.4(f)(4) and even has thirty days after a judgement of termination to move to vacate such order. I.C.A. §600 A.9(2).

1. A survey of state statutes and administrative codes was attached as Addendum A to T.B.'s brief filed in the Iowa district court in resistance to P.M.'s motion for summary judgment.

## III. By Ruling That Its Enforcement of the Surrogacy Contract Did Not Violate Petitioner's Fourteenth Amendment Due Process Liberty Interest to Be Free from State Enforced Exploitation, the Iowa Supreme Court Decided an Important Question of Federal Constitutional Law That Has Not Been, but Should Be, Decided by this Court.

T.B. argued that enforcement of the contract would violate her 14th Amendment liberty interest in being free from state enforced exploitation. The Supreme Court of Iowa dismissed this argument in one sentence, without critical analysis: "As discussed above, we are not persuaded by this argument." 407 N.W. 2d at 543; APP., *infra*, 45a.

By "as discussed above," the court was referencing its statement that the contract does not violate Iowa's public policy. In reaching that conclusion, the Supreme Court of Iowa explained that "T.B. entered into the surrogacy agreement voluntarily." *Id*., at 539; APP., *infra*, 35a. That court then cited a disingenuous passage from a California decision:

> "The 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 preferred status under the law." *P.M. v. T.B.*, 907 N.W. 2d at 539, quoting *Johnson v. Calvert*, 851 p. 2d 776, 785 (Cal. 1993).

That statement and that reasoning requires this Court to address the nature and contour's of a woman's constitutional right to be free from state enforced exploitation.

First, the argument made by Iowa, is that to make a promise unenforceable somehow insults the intelligence of T.B. It is illogical. It would mean, if adopted, that every promise made by a woman must be enforced – no matter how exploitive or harmful because doing otherwise insults her intelligence. Thus, every contract that has been held to be unenforceable would have to be enforced because failure to enforce it insults the litigant before the court asking for relief.

In fact, it would mean that every waiver of a mother's fundamental right to her relationship with her child – no matter how uninformed or how exploitive the circumstance – would have to be enforced, as long as it could be said to be "voluntary." That would include a promise by a birth mother who has constitutional rights who makes an uninformed decision to waive her rights before the child was born. It would even suggest that a sale of a child would have to be enforced, since otherwise, it would insult the mother's intelligence that she can't make a decision for herself. It also ignores the fact that the welfare of children are involved, and P.M. has asked the people of Iowa to join him in his conduct by using the power of the court to compel T.B. to submit to termination when she has made the intelligent decision that it is not in the child's best interest.

Actually the creation of a class of women to bear children for men, throws the culture back to the day when

a woman's role was seen as that of a bearer of children for men.[2]

It is this lack of critical analysis which requires this Court to decide this issue.

The Supreme Court of Iowa refused to hold a trial, consider the evidence provided by T.B. on this point, and make findings of fact. *See*, R. 345-417. The exploitation of the women included subjecting the women of advanced years to high-risk pregnancy involving twins and triplets just to advance the interests of the men who donate sperm. *See*, R. 394-408.[3]

Surrogacy agreements, if enforced embody deviant societal pressures, the object of which is to use the woman, and destroy her interests as a mother to satisfy the desires of third parties. Surrogacy exploits women by treating the mother as if she is not a whole woman. It assumes she can be used much like a breeding animal and act as though she is not, in fact, a mother. It demands that she detach herself from her experiences and her bond, love, and sense of duty to herself and her child. It expects a

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2. Dr. Barbara Katz Rothman, a leading feminist professor and author on women's studies, women's issues with an emphasis on issues relating to pregnancy, motherhood and the mother-child relationship, was an expert who provided testimony on behalf of T.B., who emphasized that it was the patriarchal system in which the role of women was seen as one to bear children for men.

3. Dr. Anthony Caruso, a physician with a specialty in reproductive endocrinology, performed embryo transfers in surrogacy arrangements. He testified that he stopped doing the procedure because of the exploitive nature of it and the inherent physical risks to the mothers and children. R. 394-409.

mother to prevent the bonding process despite the fact that this natural process is both physiological as well as psychological. It uses the mother as an object without regard for the harm it can cause her or her child. It uses the woman as a commodity. It allocates all of the risk, guilt, physiological and psychological pain to her and isolates her in her distress. *See*, Rothman, R. 354-358; *see, also*, European Parliament's Annual Report on Human Rights, Nov. 30, 2015 at P. 16.

The state of Iowa has no interest of any kind, let alone a legitimate or compelling one to provide women to a 50 year old man who has adult children of his own, just because he decided he would like another child. Exploitation implies an unfairness in the use of a person, an element of selfishness, and using someone wrongly. R. 356.

This Court should grant certiorari to address the nature and contours of a woman's liberty interest to be free from state enforced exploitation; to determine whether that 14th Amendment liberty is unwaivable; and to apply those principles to surrogacy contracts like the one in this case.

## IV. The Decision of the Supreme Court of Iowa Creates a Direct Conflict Between Two State Courts of Last Resort on the Question of Whether a Child's 14th Amendment Rights and Those of Her Birth Mother Are Waived by a Surrogacy Contract Before the Child Is Conceived.

The Supreme Court of Iowa adopted the federal criteria announced by this Court in *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3, to determine whether

a birth mother who is not genetically related to the child she bears has standing to litigate the constitutional rights and claims of the child. The court assumed that T.B. possessed such standing.

The court, however, ruled that the child's rights were effectively waived by her birth mother, T.B., when she signed the surrogacy agreement before the child was even in existence. The court ruled that T.B. "waived her rights to assert the child's constitutional claims," and waived her own constitutional rights. 907 N.W. 2d at 544; APP. *infra*,47a.

This Court should determine whether the mother even has the power to waive the child's right at all, especially before the child and her rights are not yet in existence. *See*, Point I, *supra*.

This holding of the Supreme Court of Iowa is in conflict with the holding of another state court of last resort. In *C.M. v. M.C.*, 7 Cal. App. 5th 1188 (Ct. of Appeal 2017), the California Court of Appeal held that a gestational carrier had the standing to assert the constitutional claims on behalf of triplets she bore, and the gestational surrogacy agreement did not waive her standing to litigate the constitutional rights of the children, and she did not waive her own constitutional rights by signing the surrogacy contract.[4]

The California court applied state law of waiver and standing to arrive at its conclusion, while the Supreme

4. While the California Court decided waiver and standing, that court did not directly decide the substantive constitutional issues.

Court of Iowa employed federal principles on standing. However, the question of whether or not T.B. waived her own constitutional rights is a federal question in both instances because it is a federal right and the federal standard to determine waiver is part of the right itself. *See*, Point I, *supra*. Likewise, where the child's federal rights are concerned, whether a third party can waive the child's rights or the mother's "standing" to litigate the child's claims under these circumstances are federal questions relating to important 14th Amendment rights.

The conflict in the reasoning and in the result, counsel for this Court to grant this Petition for Certiorari.

## CONCLUSION

T.B.'s Petition for Certiorari should be granted.

Respectfully Submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE SUPREME COURT OF IOWA, FILED APRIL 20, 2018**

IN THE SUPREME COURT OF IOWA

No. 17-0376

P.M. AND C.M.,

*Appellees,*

vs.

T.B. AND D.B.,

*Appellants.*

Filed February 16, 2018
Amended April 20, 2018

Appeal from the Iowa District Court for Linn County, Christopher L. Bruns, Judge.

Surrogate mother and her husband appeal rulings of district court enforcing gestational surrogacy contract, terminating their presumptive parental rights, and awarding legal and physical custody of the child to the biological father. **AFFIRMED.**

**WATERMAN, Justice.**

In this appeal, we must decide a question of first impression: whether gestational surrogacy contracts are

enforceable under Iowa law. The plaintiffs, the intended parents, are a married couple unable to conceive their own child. They signed a contract with the defendants, the surrogate mother and her husband, who, in exchange for future payments of up to $13,000 and medical expenses, agreed to have the surrogate mother impregnated with embryos fertilized with the plaintiff-father's sperm and the ova (eggs) of an anonymous donor. The defendants agreed to deliver the baby at birth to the intended parents. The surrogate mother became pregnant with twins, but after demanding additional payments, refused to honor the agreement. The babies were born prematurely, and one died. The intended parents sued to enforce the contract and gain custody of the surviving child. The district court, after genetic testing, ruled the contract is enforceable, terminated the presumptive parental rights of the surrogate mother and her husband, established paternity in the biological father, and awarded him permanent legal and physical custody. The defendants appealed, and we retained the case.

For the reasons explained below, we affirm the rulings of the district court. We hold this gestational surrogacy contract is legally enforceable in favor of the intended, biological father against a surrogate mother and her husband who are not the child's genetic parents. The intended parents would not have entrusted their embryos to the surrogate mother, and this child would not have been born, without their reliance on the surrogate's contractual commitment. A contrary holding invalidating surrogacy contracts would deprive infertile couples of the opportunity to raise their own biological children

and would limit the personal autonomy of women willing to serve as surrogates to carry and deliver a baby to be raised by other loving parents. The district court properly established paternity in the biological father based on the undisputed DNA evidence and terminated the presumptive parental rights of the surrogate mother and her husband. The district court correctly awarded permanent custody of the child to the biological, intended father.

## I. Background Facts and Proceedings.

P.M. and C.M. were high school sweethearts but parted ways when P.M. joined the Navy upon graduation. After marrying and divorcing other spouses, they reconnected and married each other in 2013. They now live in Cedar Rapids. P.M. had two children from his first marriage, and C.M. had four children from hers. The Ms were nearing age fifty and wanted to have a child together. C.M. was no longer able to conceive, so the Ms placed an advertisement on Craigslist in 2015 seeking a woman willing to act as a surrogate mother.

T.B. and D.B. married each other in January 2009 and live in Muscatine. T.B. has four children from a prior marriage; D.B. has no children and had never been married. The Bs want to have children together. In 2010, T.B. had a tubal pregnancy which was life-threatening and incapable of leading to the birth of a viable child, so she surgically terminated the pregnancy. T.B. and D.B. continued to try to conceive without success. The Bs realized they would need the services of a reproductive

endocrinologist in order to have a child. T.B. learned that the Bs' insurance would not cover infertility treatment or in vitro fertilization (IVF). They decided they needed to supplement D.B.'s income to pay for assisted reproduction procedures.

T.B responded to the Ms' Craigslist advertisement. The four met for dinner in Coralville and got along well at first. They agreed that T.B. would gestate two embryos fertilized in vitro with P.M.'s sperm and the eggs of an anonymous donor. The Ms selected Midwest Fertility Clinic (Midwest) in Downers Grove, Illinois, to perform the IVF and embryo transfers. Midwest required a written contract between the parties, so the Ms hired a lawyer to draft the agreement. Its stated purpose was "to enable the Intended Father [P.M.] and the Intended Mother [C.M.] to have a child who is biologically related to one of them." In exchange for the gestational service, the Ms agreed to pay up to $13,000 for an IVF procedure for T.B. to enable her and D.B. to conceive their own child. This payment was conditioned upon T.B. surrendering custody of a live child upon birth.

> The Intended Parents [the Ms] agree that after the Gestational Carrier [T.B.] has delivered a live child pursuant to this contract for the Intended Parents, the Intended Parents will pay for an IVF (Invitro Fertilization) cycle for the Gestational Carrier and her husband up to the amount of $13,000.

The contract also provided that the Ms would pay T.B.'s pregnancy-related medical expenses. At T.B.'s request, an additional term was included stating that "[i]n the event the child is miscarried or stillborn during the pregnancy, the amount of $2,000 will be paid to the Gestational Carrier." The four adults signed the final "Gestational Carrier Agreement" (the Surrogacy Agreement) on January 5, 2016.

The Surrogacy Agreement provided that T.B.

> understands and agrees that in the best interest of the child, she will not form or attempt to form a parent-child relationship with any child or children she may carry to term and give birth to pursuant to this agreement.

T.B. and D.B. "agree[d] to surrender custody of the child to the Intended Parents immediately upon birth" and "agree[d] that the Intended Parents are the parents to be identified on the birth certificate for this child." The Surrogacy Agreement further provided,

> In the event it is required by law, the Gestational Carrier and her husband agree to institute and cooperate in proceedings to terminate their respective parental rights to any child born pursuant to the terms of this agreement . . . .

The Surrogacy Agreement also stated that

> each party has been given the opportunity to consult with an attorney of his or her own choice concerning the terms [and] legal significance of this agreement, and the effect it has upon any and all interests of the parties.

T.B. and D.B. did not exercise their right to consult a lawyer before the Surrogacy Agreement was signed by all four parties. But each person acknowledged in writing

> that he or she has carefully read and understood every word in this agreement and its legal effect, and each party is signing this agreement freely and voluntarily and that neither party has any reason to believe that the other party or parties did not understand fully the terms and effects of this agreement, or that the other party did not freely and voluntarily execute this agreement.

On March 27, Midwest implanted two embryos into T.B.'s uterus. The embryos were the ova of an anonymous donor fertilized with P.M.'s sperm. On April 4, blood testing confirmed T.B.'s pregnancy. The parties' relationship soon began to break down over their disagreement as to payment of medical expenses.[1] All four attended the first

1. The Surrogacy Agreement provided,

> The Intended Father and the Intended Mother will pay expenses incurred by the Gestational Carrier, more specifically defined as follows:
>
> . . . .

ultrasound, which D.B. videotaped. The Ms later objected to his videotaping and to T.B. posting information about the baby on social media.

Their relationship worsened after the women exchanged text messages on April 13. They were discussing whether T.B. could attend a doctor's appointment scheduled by the IVF coordinator when C.M. wrote, "Well we have to go next Thursday [because the coordinator] made the [appointment] and this is our journey not anyone else's. She said you have to end with [a doctor's] exam in Chicago and [a] couple more ultrasounds . . . . " T.B. replied, "I'm not going through this with you today. She just called me." C.M. replied, "We are in charge we hired you so just let us be parents and enjoy this ok!"

A second ultrasound confirmed that T.B. was carrying viable twins. T.B. shared that news with the Ms, but the relationship remained rocky. In late April, C.M. texted this to T.B.:

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> B. Pregnancy-related medical care received by the Gestational Carrier or the minor person during the pregnancy or delivery of the minor person and for medically necessary postpartum care for the Gestational Carrier and the minor person.

The Agreement gave the Ms the option "to pay expenses from time to time during the course of the pregnancy and delivery" while requiring them to pay all consideration for services and expenses "upon surrender of custody of the child to the Intended Parents and termination, if any, of parental rights of the Gestational Carrier and her husband."

> Every time we question you or try to make a decision (as we should be able to) we are paying you, we hired you, and we are in charge, you get mad and upset and blow up. A carrier shouldn't act like that as the doctors told me they should be saying yes ma'am Whatever you guys want to do. But you can't stand not being in charge and you have some mental disorder for sure but yet you blame everything on us . . . . So if you wanna say u have it bad try feeling how we feel. This is our baby not yours and imagine how U would feel. I know u don't care but just for a moment stop blaming us and look what U have done to us only cuz we have ask[ed] u to do something. Compare the two and u will see we have NEVER did u wrong. This is a nightmare.

When T.B. replied, "You're crazy," C.M. wrote back, "Oh really that's what everyone says about u[.]" T.B. then stated that "everything can be handled through attorneys from here[.]" The Bs retained an attorney to speak for them and cut off direct communication with the Ms, who nevertheless persisted in trying to reach them for updates on the pregnancy.

In a May 20 letter from her attorney, T.B. sought more money from the Ms beyond the $13,000 agreed to in their contract so she could use a costlier clinic for her own IVF. T.B. wanted to replace Midwest because it insisted she use her own medical insurance and because C.M. told her Midwest employees said T.B. was crazy. The clinic T.B. wanted to use charged over twice as much—$30,000—for

IVF. T.B. insisted that the Ms pay the higher cost for her to continue to serve as a gestational carrier.

On August 19, P.M. sent Facebook messages to D.B.'s sister, using racial slurs and profanity to insult D.B. D.B.'s sister shared the communication with T.B. On August 24, C.M. sent an email to T.B. and T.B.'s attorney, triggering a lengthy exchange, during which C.M. called T.B. the "N" word. That statement, along with the comments P.M. sent to D.B.'s sister, convinced T.B. that the Ms were racist. T.B. then called the Ms' attorney. When T.B. expressed concern that the Ms would not pay her, the Ms' attorney assured T.B. that the money for the Bs had already been set aside. The Ms' attorney attempted to make payment arrangements with T.B. and arrange P.M.'s listing on the birth certificate, but those matters remained unresolved. Later that day, T.B. decided that she would not turn over the babies to the Ms.

Twin babies were born thirteen weeks prematurely on August 31. T.B. did not tell the Ms about the birth. The babies were placed in the neonatal intensive care unit. One died eight days after birth. T.B. did not inform the Ms about the baby's illness or death. The Bs unilaterally arranged for the deceased baby's cremation.

On October 24, the Ms, still unaware of the birth, filed a petition for declaratory judgment and temporary and permanent injunction. On October 31, the Ms filed a motion for an emergency ex parte injunction, alleging their belief that the babies had been born. The same day, the district court entered an order granting a temporary injunction

that ordered T.B. and D.B. to surrender custody of "Baby H" to the Ms. The order prohibited T.B. and D.B. from acting inconsistently with the terms of the Surrogacy Agreement. The Ms have had physical custody of Baby H since that date.

On November 1, the Bs informed the court they would be filing an answer and counterclaim. The next day, the hospital filed a motion to appoint an interim medical decision-maker for Baby H. The Ms joined the hospital's motion, arguing that P.M., as the biological father, should make the medical decisions. The Bs filed a resistance and cross-motion requesting that the court vacate the October 31 injunction. The district court conducted an emergency hearing on November 4 and ruled the temporary injunction would remain in effect. The court appointed a guardian ad litem (GAL) to represent Baby H's interests and to make medical decisions for the child. The court ordered all parties to undergo genetic testing.

The Ms filed an amended petition, requesting a declaratory judgment enforcing the Surrogacy Agreement and a temporary and permanent injunction barring the Bs from interfering with the Ms' right to raise Baby H. The Ms also requested that the court disestablish D.B.'s paternity and T.B.'s maternity and establish P.M. as Baby H's father and C.M. as Baby H's mother. The Bs responded by filing an answer and counterclaim. The Bs sought a declaration that T.B. is the biological and legal mother of the babies and that D.B. is the legal father of the babies. The Bs also sought a declaration that P.M. has no legal right to a relationship with the surviving baby and that

the Surrogacy Agreement is unenforceable under Iowa law and the United States Constitution.

The next hearing was held on November 16. The Bs filed a request to dissolve the temporary injunction and requested an order awarding temporary custody of the baby during the litigation and permanent custody to the Bs. The Ms resisted. On the same day, the Bs filed a motion to dismiss and motion for summary judgment. The Bs claimed T.B. was the mother of the baby and the legal mother on the baby's birth certificate. They supported their motion for summary judgment with expert medical affidavits describing T.B.'s biological connection with the child from gestating and giving birth. The Bs argued that the Surrogacy Agreement is unenforceable as violating the constitutional rights of T.B. and the baby and Iowa statutes and public policy. The Bs sought permanent physical and legal custody of the baby.

The Ms filed a notice with the results of the genetic testing, which indicated a 99.99% probability that P.M. is the baby's biological father, excluded D.B. as the biological father, and excluded T.B. as the biological mother.

The district court denied the Bs' motion to vacate the injunction, which precluded the Bs from contact with the baby. The Ms resisted the Bs' dispositive motions and filed their own cross-motion for summary judgment, arguing that the Surrogacy Agreement is enforceable and that Iowa law favors biological (genetic) parents.

*Appendix A*

After an evidentiary hearing on November 28, the district court entered a ruling on December 7 denying the Bs' application for temporary custody. At the hearing, the GAL expressed hesitation about agreeing to a shared care arrangement based on her inability to learn more about one of T.B.'s children aging out of foster care and the lack of a custodial arrangement with T.B.'s other children. The district court concluded that P.M., as the biological father, has the superior constitutional right to raise the baby. The court awarded sole legal custody to P.M. pending final resolution of the case. The court also determined this was in the best interest of Baby H, stating,

> [P.M.] is divorced from his first wife but has successfully parented children from his prior marriage. He has a good relationship with his minor son. He has a somewhat strained relationship with an adult daughter. That strained relationship is primarily a product of his divorce. [P.M.] is gainfully employed and has stable employment. The GAL reported that all indicators pointed toward [P.M.] being a good, able father and a suitable parent for Baby H.

The Bs resisted the Ms' motion for summary judgment. The Bs argued that T.B. is the biological and legal mother of Baby H, having given birth to her. The Ms responded, arguing that P.M. is the only genetic parent the law recognizes. The Ms also claimed that Iowa public policy supports gestational carrier agreements. The Ms argued that the Bs should be estopped from stating a constitutional claim on the basis of the emotional bond

established between T.B. and Baby H because the Bs hid the birth of Baby H from the Ms in violation of their contract.

On December 28, the Ms filed an application to establish birth certificates. The Bs resisted the application. The court delayed ruling on the application because dispositive motions were pending and could impact the resolution of the birth certificate issues.

The Bs filed a petition for writ of certiorari or, alternatively, an application for interlocutory review with this court. On January 11, 2017, we denied the petition for writ of certiorari and the application for interlocutory appeal. We issued procedendo on January 28 directing the district court to proceed as if there had been no appeal.

The district court then issued its ruling on the dispositive motions and on Ms' request for an order regarding the babies' birth certificates. The court found that T.B. is *not* the biological or legal mother of the babies and that D.B. is not the legal father. The court found that P.M. has a legal right to a relationship with Baby H and is entitled to permanent custody. The court concluded that the Surrogacy Agreement was enforceable as a matter of law. The court denied the Bs' motion to dismiss and motion for summary judgment and granted the Ms' cross-motion for summary judgment. The court ruled that P.M. is the biological father of the babies and directed the Iowa Department of Public Health (DPH) to amend the babies' birth certificates accordingly.

The Bs appealed, and we retained the case.

## II. Standard of Review.

We review an order granting summary judgment for correction of errors at law. *Estate of Gray ex rel. Gray v. Baldi,* 880 N.W.2d 451, 455 (Iowa 2016). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Plowman v. Fort Madison Cmty. Hosp.,* 896 N.W.2d 393, 398 (Iowa 2017) (quoting *Barker v. Capotosto,* 875 N.W.2d 157, 161 (Iowa 2016)). "We . . . view the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Id.* (quoting *Baldi,* 880 N.W.2d at 455). "Summary judgment is appropriate if the only conflict concerns the legal consequences of undisputed facts." *Id.* (quoting *Peppmeier v. Murphy,* 708 N.W.2d 57, 58 (Iowa 2005)).

"We generally review . . . termination of parental rights proceedings de novo." *In re J.C.,* 857 N.W.2d 495, 500 (Iowa 2014). But our review of issues of statutory interpretation on parental rights is for correction of errors at law. *Id.* "Our review of constitutional claims is de novo." *Callender v. Skiles,* 591 N.W.2d 182, 185 (Iowa 1999).

## III. Analysis.

We must decide whether the district court erred by enforcing the gestational surrogacy contract, terminating the presumptive parental rights of the surrogate mother

and her husband, and placing permanent custody of Baby H with the biological father. We begin with an overview of the law governing gestational surrogacy arrangements. We next determine whether this gestational surrogacy contract is enforceable under Iowa law. We then address the respective legal rights of the parties. We conclude the district court correctly enforced the contract.

**A. Overview of Gestational Surrogacy Arrangements.** "In general terms, surrogacy 'is the process by which a woman makes a choice to become pregnant and then carry to full term and deliver a baby who, she intends, will be raised by someone else.'" *In re Paternity of F.T.R.*, 833 N.W.2d 634, 643 (Wis. 2013) (quoting Thomas J. Walsh, *Wisconsin's Undeveloped Surrogacy Law*, 85-Mar. Wis. Law. 16, 16 (2012) [hereinafter Walsh]). The woman who carries the child is the "surrogate mother." An "intended parent" is "an individual . . . who manifests the intent . . . to be legally bound as the parent of a child resulting from assisted or collaborative reproduction." *Id.* (quoting Model Act Governing Assisted Reprod. Tech. § 102(19) (Am. Bar Ass'n Proposed Act Feb. 2008)). Surrogacies are categorized as "traditional" or "gestational." *Id.*

> In a traditional surrogacy, the surrogate is the genetic mother of the child and is artificially inseminated with the sperm of the intended father or a sperm donor. In a gestational surrogacy, the surrogate is not genetically related to the child; instead, "sperm is taken from the father (or from a donor) and an egg is taken from the mother (or from a donor),

> fertilization happens outside the womb (called *in vitro* fertilization), and the fertilized embryos are then implanted into the surrogate mother's uterus."

*Id.* (citation omitted) (quoting Walsh, 85-Mar. Wis. Law. at 17). This case involves a gestational surrogacy because T.B. is not genetically related to the child. T.B. is the surrogate mother, while P.M. and C.M. are the intended parents.

The law regarding surrogacy agreements has evolved with advances in medically assisted reproductive science.

> IVF, egg donation, and gestational surrogacy are decidedly modern phenomena. Indeed, not all that long ago, IVF was still (literally) the stuff of science fiction. *See* Aldous Huxley, *Brave New World* 1 (1932) ("'And this,' said the Director opening the door, 'is the Fertilizing Room.'"). The first IVF-assisted human birth didn't occur until 1978, and it wasn't until the mid to late 1980s that doctors began to use gestational surrogates in conjunction with IVF procedures.
>
> To be sure, IVF and other assisted reproductive technologies represent revolutionary biomedical advances; they have enabled countless couples to conceive who otherwise couldn't have had children biologically. But these advances are not without their complexities. IVF-assisted

> reproduction involving (as it does here) third-party egg donors and gestational surrogates "raise moral and ethical issues" that can affect multiple, and often divergent, interests—among them, those of biological fathers, egg donors, surrogate mothers, and the resulting embryos. Not surprisingly, the States have tackled IVF- and surrogacy-related issues in very different ways.

*Morrissey v. United States*, 871 F.3d 1260, 1269 (11th Cir. 2017) (citations omitted); *see generally* George L. Blum, Annotation, *Validity of Surrogate Parenting Agreement*, 19 A.L.R. 7th 179 (2017) (describing how different states have addressed the validity of surrogacy agreements). "The ability to create a family using [assisted reproductive technology] has seemingly outpaced legislative responses to the legal questions it presents, especially the determination of parentage." *In re Paternity of F.T.R.*, 833 N.W.2d at 644.

A majority of states lack statutes addressing surrogacy. *Id.* As a result, "cases often involve ad hoc procedures attempting to effectuate the parties' intent by analyzing surrogacy issues under the state's statutes for [termination of parental rights], adoption, custody and placement, and the like." *Id.* Courts adjudicating disputes over the legality of surrogacy agreements in such states "are forced to confront issues of the most difficult nature." *Id.* at 645.

In the minority of states with statutes specifically addressing surrogacy, the enactments generally impose greater restrictions on traditional surrogacies, and most of the statutes can be grouped into three categories:

> First, some states have legislatively prohibited all surrogacy contracts, declaring their terms unenforceable and, in some instances, imposing criminal penalties for those who attempt to enter into or assist in creating such a contract. *See, e.g.*, D.C. Code §§ 16-401(4)(A)-(B), -402(a) (prohibiting all "[s]urrogate parenting contracts" as defined by statute); Mich. Comp. Laws Ann. §§ 722.851-.863 (declaring surrogate parentage contracts, as defined by statute, to be "void and unenforceable" and imposing criminal penalties for participation in a "surrogate parentage contract for compensation" or a surrogacy contract involving a surrogate who is an unemancipated minor or who has "a mental illness or developmental disability"). A second category of states prohibit only certain types of surrogacy contracts—typically those involving a traditional surrogacy. *See, e.g.*, Ky. Rev. Stat. Ann. § 199.590(4) (prohibiting traditional surrogacy contracts, as defined by statute, without addressing gestational surrogacies); N.D. Cent. Code §§ 14-18-05, -08 (declaring traditional surrogacy agreements void but allowing gestational surrogacies by providing that "[a] child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the

> gestational carrier's husband, if any"). Finally, states in the third category authorize both traditional and gestational surrogacy contracts, subject to regulation and specified limitations. *See, e.g.,* N.H. Rev. Stat. Ann. §§ 168-B:1 to -B:32 (generally permitting traditional and gestational surrogacy agreements subject to certain conditions, including a traditional surrogate's right to revoke the agreement within seventy-two hours of birth); Va. Code Ann. §§ 20-156 to 20-165 (generally permitting surrogacy contracts, as defined by statute, and providing a multi-step process for judicial pre-approval of such contracts); Wash. Rev. Code Ann. §§ 26.26.210-.260 (generally permitting traditional and gestational surrogacy agreements but prohibiting compensation beyond reasonable expenses and agreements involving a surrogate who is "an unemancipated minor female or a female diagnosed as having an intellectual disability, a mental illness, or developmental disability").

*In re Baby,* 447 S.W.3d 807, 819-20 (Tenn. 2014).[2] "Tennessee has a unique surrogacy statute" that defines

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2. *See also* Cal. Fam. Code § 7962 (West, Westlaw current through ch. 2 of 2018 Reg. Sess.) (enacted by 2012 Cal. Legis. Serv. ch. 466 (A.B. 1217) (West)) (regulating surrogacy contracts); N.Y. Dom. Rel. Law § 122 (McKinney, Westlaw current through L. 2018, ch. 1) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); Douglas NeJaime, *The Nature of Parenthood,* 126 Yale L.J. 2260 app. at 2376 (2017) (cataloging statutes addressing gestational surrogacy).

surrogacy for adoption purposes but states, "Nothing [herein] shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the [G]eneral [A]ssembly." *Id.* at 820-21 (quoting Tenn. Code Ann. § 36-1-102(48)(C) (2014)). The Tennessee Supreme Court held that the public policy of that state "does not prohibit the enforcement of traditional surrogacy contracts" yet concluded many contract terms were unenforceable, including compensation "contingent upon the termination of the surrogate's parental rights." *Id.* at 840 (adjudicating claim of surrogate birth mother who was the biological, genetic mother). The *In re Baby* court called for the state "General Assembly to follow the lead of other state legislatures that have enacted statutes to address the fundamental questions related to surrogacy." *Id.*

There are two "commonly cited model acts dealing with surrogacy agreements[:] the American Bar Association Model Act Governing Assisted Reproductive Technology (2008) and article 8 of the Uniform Parentage Act (2002), drafted by the National Conference of Commissioners on Uniform State Laws." *Id.* at 820 n.6.

> Both of these model acts fall into the third category of surrogacy statutes, allowing traditional and gestational surrogacy contracts subject to extensive regulation that includes judicial pre-approval, limits on compensation, and provisions concerning the revocation rights of the parties to the agreement.

*Id.* The 2017 Uniform Parentage Act (UPA) imposes greater restrictions on traditional surrogacy agreements based on the birth mother's status as a genetic parent:

> As was true of UPA (2002), Article 8 of UPA (2017) regulates and permits both genetic (often referred to as "traditional") and gestational surrogacy agreements. But UPA (2017) differs in the way that it regulates these two types of surrogacy agreements. UPA (2002) set forth a single set of requirements that applied equally to genetic and gestational surrogacy agreements. While UPA (2017) continues to permit both types of surrogacy, UPA (2017) imposes additional safeguards or requirements on genetic surrogacy agreements. . . . This differentiation between genetic and gestational surrogacy is intended to reflect both the factual differences between the two types of surrogacy as well as the reality that policy makers view these two forms of surrogacy as being quite different. Of the states that permit surrogacy, most permit *only* gestational surrogacy agreements.

Unif. Parentage Act art. 8 cmt. at 72 (Unif. Law Comm'n 2017).

The Ohio Supreme Court held *gestational* surrogacy contracts are enforceable in the absence of enabling legislation. *J.F. v. D.B.*, 879 N.E.2d 740, 741-42 (Ohio 2007) ("[N]o public policy is violated when a gestational-

surrogacy contract is entered into, even when one of the provisions requires the gestational surrogate not to assert parental rights regarding children she bears that are of another woman's artificially inseminated egg."). And the California Supreme Court enforced a gestational surrogacy contract in favor of the biological parents and rejected constitutional challenges by the gestational surrogate before that state enacted legislation regulating surrogacy contracts. *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993) (en banc). The *Calvert* court concluded,

> It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.

*Id.* at 787; *see also In re Baby* S., 128 A.3d 296, 306-07 (Pa. Super. Ct. 2015) ("The legislature has taken no action against surrogacy agreements despite the increase in common use . . . . Absent an established public policy to void the gestational carrier contract at issue, the contract remains binding and enforceable against [the intended mother]."). The Wisconsin Supreme Court held that a traditional surrogacy contract was enforceable without enabling legislation "unless enforcement is contrary to the best interests of the child." *In re Paternity of F.T.R.*, 833 N.W.2d at 638. But the New Jersey Supreme Court held that a traditional surrogacy contract was unenforceable without legislative authorization. *In re Baby M,* 537 A.2d 1227, 1264 (N.J. 1988).

The only Iowa legislation specifically mentioning surrogacy exempts traditional "surrogacy arrangements" from the criminal statute that prohibits selling babies. *See* Iowa Code § 710.11 (2017). Against this backdrop, we turn to the issue of whether the Surrogacy Agreement at issue is enforceable under Iowa law.

**B. Whether the Surrogacy Agreement Is Enforceable Under Iowa Law.** T.B. argues the Surrogacy Agreement is unenforceable under Iowa law as inconsistent with statutory provisions and public policy. We first examine whether this contract between consenting adults is "prohibited by statute, condemned by judicial decision, [or] contrary to the public morals." *Dier v. Peters,* 815 N.W.2d 1, 12 (Iowa 2012) (quoting *Claude v. Guar. Nat'l Ins.,* 679 N.W.2d 659, 663 (Iowa 2004)). We find no such statutory or judicial prohibition in our state. To the contrary, the Iowa legislature tacitly approved of surrogacy arrangements by exempting them from potential criminal liability for selling children. "Also, we need to consider the public policy implications of an opposite ruling." *Id.* Banning gestational surrogacy contracts would deprive infertile couples of perhaps the only way to raise their own biological children and would limit the contractual rights of willing surrogates. We join the better-reasoned cases from other jurisdictions rejecting arguments that gestational surrogacy contracts are void against public policy.

1. *Whether the Surrogacy Agreement is inconsistent with statutory provisions.* Iowa Code section 710.11 expressly exempts surrogacy arrangements from criminal liability for selling children and provides,

> A person commits a class "C" felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section *does not apply to a surrogate mother arrangement.* For purposes of this section, a "*surrogate mother arrangement*" means an arrangement whereby a female agrees to be artificially inseminated with the semen of a donor, to bear a child, and to relinquish all rights regarding that child to the donor or donor couple.

Iowa Code § 710.11 (first emphasis added). This provision was enacted in 1989, 1989 Iowa Acts ch. 116, § 1, one year after extensive national publicity over the decision of the New Jersey Supreme Court invalidating a surrogacy contract as contrary to that state's adoption statutes, including its "baby selling" prohibition on payment of money to adopt a child. *In re Baby M,* 537 A.2d at 1250 & n.10. Importantly, the *Baby M* court stated, "[O]ur holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts." *Id.* at 1235. The Iowa legislature did just that for our state in its next session—expressly exempting surrogacy arrangements from the criminal prohibition on selling babies. The Iowa enactment tracked the surrogacy arrangement at issue in *Baby M.*

In *Baby M,* a married couple, William and Elizabeth Stern, wanted to raise a child, but Elizabeth feared her medical condition rendered pregnancy a serious health risk. *Id.* Mr. Stern's family had perished in the Holocaust,

and as the "only survivor, he very much wanted to continue his bloodline." *Id.* He responded to the advertisements of a fertility clinic. *Id.* at 1236. So did Mary Beth Whitehead, who was motivated by "her sympathy with family members and others who could have no children (she stated that she wanted to give another couple the 'gift of life'); she also wanted . . . $10,000 to help her family." *Id.* Stern and Whitehead entered into a surrogacy contract. *Id.* "The contract provided that through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead would become pregnant, carry the child to term, . . . [and] deliver it to the Sterns" for $10,000 to be paid after the child's birth. *Id.* at 1235. Whitehead agreed in the contract to "do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child." *Id.* The artificial insemination was successful, and Whitehead gave birth to Baby M after an uneventful pregnancy. *Id.* at 1236. Whitehead, however, had developed a strong emotional attachment. *Id.* When the Sterns arrived at the hospital to see the baby, Whitehead "broke into tears and . . . talked about how the baby looked like her other daughter." *Id.* She made clear to the Sterns that she was unsure she could give up the child. *Id.* Three days after the birth, she turned the baby over to the Sterns, who "were thrilled with their new child." *Id.* But their legal battle ensued over custody and contract rights, with the New Jersey Supreme Court ultimately invalidating the surrogacy contract, awarding custody of the child to the Sterns, and allowing Whitehead visitation. *Id.* at 1234, 1263. While concluding that New Jersey's "present laws do not permit the surrogacy contract used in this case[,]" the court held "the Legislature remains free to deal with

this most sensitive issue as it sees fit, subject only to constitutional restraints." *Id.* at 1264.

We conclude, based on the timing of the enactment of Iowa Code section 710.11, the very next legislative session, that our state's general assembly chose in 1989 to allow surrogacy arrangements, not prohibit them. Section 710.11 specifically mentions artificial insemination of the birth mother (who is the genetic or biological mother, as in *Baby M),* but we decline to infer the legislature intended to allow only traditional surrogacy when the birth mother is the genetic mother and yet criminalize gestational surrogacy arrangements. IVF, allowing implantation in the surrogate mother of embryos from donor eggs, was then in its infancy and had not been the subject of a court decision of national prominence. As other courts have noted,[3] a gestational surrogacy in which the birth mother lacks a genetic connection to the child raises

3. *See In re Marriage of Moschetta,* 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994) (pointing out that for a "traditional" surrogacy, "[t]he resulting offspring . . . is genetically related to the 'intended' father and the '*un*intended' mother" and acknowledging that problems arise because "the so-called 'surrogate' mother is not *only* the woman who gave birth to the child, but the child's *genetic* mother as well"); *J.F.,* 879 N.E.2d at 742 ("[W]e would be remiss to leave unstated the obvious fact that a gestational surrogate, whose pregnancy does not involve her own egg, may have a different legal position from a traditional surrogate, whose pregnancy does involve her own egg. This case does not involve, and we draw no conclusions about, traditional surrogates and Ohio's public policy concerning them."); *cf.* Unif. Parentage Act art. 8 cmt. at 72 (imposing greater restrictions on traditional surrogacy contracts based on the birth mother's status as the genetic mother of the child).

fewer concerns than the traditional surrogacy expressly mentioned in section 710.11. The legislature's decision to allow traditional surrogacy arrangements can be taken as a signal that it would also allow gestational surrogacy arrangements. We conclude that neither traditional nor gestational surrogacy contracts are prohibited under section 710.11.

Our conclusion is reinforced by the regulations adopted by the DPH that specifically contemplate IVF gestational surrogacy agreements. The regulations are entitled "Establishment of new certificate of live birth following a birth by gestational surrogate arrangement." *See* Iowa Admin. Code r. 641—99.15. These regulations enjoy a presumption of validity with the force of law. *See Brakke v. Iowa Dep't of Nat. Res.,* 897 N.W.2d 522, 533 (Iowa 2017) (noting that "[a]n agency rule is 'presumed valid unless the party challenging the rule proves "a 'rational agency' could not conclude the rule was within its delegated authority."'" (quoting *Meredith Outdoor Advert., Inc. v. Iowa Dep't of Transp.,* 648 N.W.2d 109, 117 (Iowa 2002))); *Davenport Cmty. Sch. Dist. v. Iowa Civil Rights Comm'n,* 277 N.W.2d 907, 909 (Iowa 1979) (stating "[t]he valid rule of an authorized agency has the force and effect of law" and recognizing "the burden of proof lies on the person or entity challenging the administrative rule due to the presumption of validity supporting such rules").

The DPH regulations provide for establishment of a new certificate of live birth following a birth by gestational surrogate arrangement. Iowa Admin. Code r. 641—99.15(2). When a child is born pursuant to a gestational surrogacy agreement, the person who files the

record for registration must indicate that the birth mother does not have custody of the child and must inform the intended parents of the procedures to obtain a new birth certificate with their information. *Id.* r. 641—99.15(3). These regulations expressly provide for court orders disestablishing the surrogate mother and her legal spouse as the legal parents and establishing the intended father and mother as the legal parents. *Id.* r. 641-99.15(4)—(10). When the intended mother is not the egg donor, she may replace the birth mother on a new certificate of live birth through a formal adoption. *See id.* r. 641—99.15(6)(*f*) ("Adoption laws shall be followed to reestablish the certificate of live birth by establishing the nonbiological parent on the certificate of live birth pursuant to Iowa Code chapter 600."). The DPH presumably would not have promulgated these regulations if gestational surrogacy agreements were illegal. *See In re Baby S.,* 128 A.3d at 306-07 (relying in part on regulations of department of health placing intended parents on birth certificate to reject claim that gestational surrogacy contract was void as against public policy).

Another reason the Surrogacy Agreement does not violate Iowa Code section 710.11 is because the Ms' payment was for T.B.'s gestational services rather than for her sale of a baby. The Surrogacy Agreement states,

> The consideration of this agreement is compensation for services and expenses as limited by law and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for consent to surrender the child for adoption.

The California Supreme Court held under equivalent circumstances that the contractual payment is for gestational services, not for the sale of a baby. *See Calvert*, 851 P.2d at 784 (explaining that the payments to the surrogate mother "were meant to compensate her for her services in gestating the fetus and undergoing labor"). We reach the same conclusion.

T.B. relies on Iowa Code section 600A.4, which requires parents to wait seventy-two hours after a child's birth before signing a release of custody for an adoption. *See* Iowa Code § 600A.4(2)(g) ("[A release of custody s]hall be signed, not less than seventy-two hours after the birth of the child to be released, by all living parents. The seventy-two-hour minimum time period requirement shall not be waived."). T.B. claims that the safeguards established in section 600A.4 are violated by the Surrogacy Agreement. We disagree because T.B. is not the genetic mother of Baby H, and section 600A.4 is therefore inapplicable. We agree with other courts that recognize the difference between surrogacy arrangements and giving up one's own genetic child for adoption:

> There is no doubt but that [the statute prohibiting baby selling] is intended to keep baby brokers from overwhelming an expectant mother or the parents of a child with financial inducements to part with the child. But the central fact in the surrogate parenting procedure is that the agreement to bear the child is entered into *before* conception. The essential considerations for the surrogate mother when she agrees to the

> surrogate parenting procedure are *not* avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing. On the contrary, the essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring.

*Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong,* 704 S.W.2d 209, 211-12 (Ky. 1986), *superseded by statute,* Ky. Rev. Stat. Ann. § 199.590(4) (West, Westlaw through 2017 Reg. Sess.); *see also Calvert,* 851 P.2d at 784 ("Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when [the surrogate mother] entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring."); *In re Paternity of F.T.R.,* 833 N.W.2d at 646 ("[A]doption is distinctly different than surrogacy. Adoption often occurs in circumstances where the parent cannot or will not care for the child. Substantial court oversight is necessary in a voluntary-[termination-of-parental-rights]-and-adoption scenario to ensure that the biological parents have consented to the [termination of parental rights] after being informed of the consequences thereof. In contrast, surrogacies are planned, and the intended parents want the child and are willing and able to care for the child." (Citation omitted.)).

When a child is born under a surrogacy agreement, the intended parents "affirmatively intended the birth of the child[] and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist." *Calvert,* 851 P.2d at 782.[4]

This is not a situation in which T.B. is choosing to give up her own genetically related child in order to avoid the consequences of an unwanted pregnancy or the burdens of childrearing. Instead, T.B. agreed to carry a child for the Ms after responding to their advertisement on Craigslist. But for the acted-on intention of the Ms, Baby H would not exist. *See id.* The Ms would not have entrusted their embryos fertilized with P.M.'s sperm to T.B. if they thought she would attempt to raise the resulting child herself.[5]

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4. The California legislature subsequently enacted statutory provisions regulating gestational surrogacy agreements. *See* Cal. Fam. Code § 7962 (enacted by 2012 Cal. Legis. Serv. ch. 466 (A.B. 1217) (West)).

5. The legislature is free to impose conditions on gestational surrogacy contracts or ban them altogether. Such policy choices are for the elected branches. As the Kentucky Supreme Court concluded in *Armstrong,* courts should defer to the legislature "to articulate public policy regarding health and welfare." 704 S.W.2d at 213. As that court elaborated,

> The courts should not shrink from the benefits to be derived from science in solving these problems simply because they may lead to legal complications. The legal complications are not insolvable. Indeed, we have no reason to believe that the surrogate parenting procedure in which SPA participates will not, in most

We hold that the adoption statute is inapplicable and the Surrogacy Agreement is not inconsistent with Iowa statutes on termination of parental rights.

2. *Whether the Surrogacy Agreement is against public policy.* T.B. also claims enforcement of the Surrogacy Agreement violates Iowa's public policy. We disagree based on the freedom of contract enjoyed by consenting adults. We start with the presumption that under Iowa law a "contractual agreement is binding on the parties." *Water Dev. Co. v. Lankford,* 506 N.W.2d 763, 766 (Iowa 1993). "The power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt." *Thomas v. Progressive Cas. Ins.*, 749 N.W.2d 678, 687 (Iowa 2008) (quoting *Grinnell Mut. Reins. v. Jungling,* 654 N.W.2d 530, 540 (Iowa 2002)). The party claiming the contract is contrary to public policy bears the burden of proof. *Walker v. Gribble,* 689 N.W.2d 104, 111 (Iowa 2004). We reiterate that "[t]o strike down a contract on public policy grounds, we must conclude

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> instances, proceed routinely to the conclusion desired by all of the parties at the outset—a woman who can bear children assisting a childless couple to fulfill their desire for a biologically-related child.
>
> We agree with the trial court that if there is a judgment to be made outlawing such a procedure, it is a matter for the legislature. The surrogate parenting procedure as outlined in the Stipulation of Facts is not foreclosed by legislation now on the books.

*Id.* at 213-14 (rejecting challenges to traditional surrogacy contract).

that 'the preservation of the general public welfare . . . outweigh[s] the weighty societal interest in the freedom of contract.'" *In re Marriage of Witten,* 672 N.W.2d 768, 780 (Iowa 2003) (alteration in original) (quoting *Jungling,* 654 N.W.2d at 540).

In *Witten,* we addressed the enforceability of a contract executed by a married couple, Trip and Tamera Witten, and the University of Nebraska Medical Center that stored their frozen embryos. *Id.* at 772-73. "Because Tamera was unable to conceive children naturally, they had eggs taken from Tamera artificially fertilized with Trip's sperm." *Id.* at 772. The couple later divorced, and the contract "did not explicitly deal with the possibility of divorce." *Id.* at 772-73. Tamera sought "custody" of the embryos to have them "implanted in her or a surrogate mother in an effort to bear a genetically linked child." *Id.* at 772. Trip argued the district court should enforce the contract, which required mutual consent of the parties for any use of the embryos. *Id.* at 773. The district court ruled the contract controlled and enjoined both parties from using the embryos without the written approval of the other party. *Id.* Tamera appealed, and we affirmed, holding that neither party could use the embryos without the contemporaneous con sent of the other. *Id.* at 773, 783.

Our decision was consistent with the terms of the contract signed by the Wittens. But we stated a broader holding

> that agreements entered into at the time in vitro fertilization is commenced are enforceable

> and binding on the parties, "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo."

*Id.* at 782 (quoting *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001)). We concluded that "judicial enforcement of an agreement between a couple regarding their future family and reproductive choices would be against the public policy of this state." *Id.* (emphasis omitted). But we concluded the embryo dispositional agreement remains enforceable as between the donors and the medical facility. *Id.* ("Within this context, the medical facility and the donors should be able to rely on the terms of the parties' contract.").

We see important differences between an embryo disposition agreement signed by the egg and sperm donor during their marriage and the gestational surrogacy agreement at issue here. The former addresses disposition of the parties' own genetic material and assumed the marriage will continue. *See id.* (noting "embryos are originally created as 'a mutual undertaking by [a] couple to have children together,'" but the mutual undertaking may end upon their divorce (alteration in original) (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L. Rev. 55, 83 (1999))). We noted the judicial reluctance to compel procreation of a biological son or daughter after one donor changed his mind. *See id.* at 777-78 (surveying authorities). By contrast, the surrogate mother, T.B., is not the genetic or biological mother of Baby H. All parties

sought the birth of Baby H. We conclude the public policy limitations in play in that case are inapposite. We turn to cases specifically adjudicating challenges to gestational surrogacy contracts.

T.B. argues a surrogacy agreement violates public policy against the exploitation of women, and contends,

> Surrogacy agreements, if enforced embody deviant societal pressures, the object of which is to use the woman, and destroy her interests as a mother to satisfy the desires of third parties. Surrogacy exploits women by treating the mother as if she is not a whole woman. It assumes she can be used much like a breeding animal and act as though she is not, in fact, a mother.

Yet T.B. entered into the Surrogacy Agreement voluntarily. She had given birth to four children of her own before signing the Surrogacy Agreement and was no stranger to the effects of pregnancy. T.B. does not allege she signed the Surrogacy Agreement under economic duress or that its terms are unconscionable.

The California Supreme Court rejected a similar exploitation argument in *Calvert:*

> Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts

> exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it . . . .
>
> The 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. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.

851 P.2d at 785. California courts continue to reject the view that surrogacy agreements unfairly exploit women. *See C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 370 (Ct. App. 2017) (relying on *Calvert,* 851 P.2d at 785). We reach the same conclusion.

T.B. alternatively argues the Surrogacy Agreement violates the state's public policy favoring families. We have repeatedly acknowledged Iowa's public policy "promoting the sanctity and stability of the family." *Tyler v. Iowa Dep't of Revenue,* 904 N.W.2d 162, 168 (Iowa 2017) (quoting *Callender,* 591 N.W.2d at 191). T.B. characterizes surrogacy agreements as deliberately destroying the surrogate mother-child relationship (a relationship, we note, that would not exist but for the Ms' contribution of their embryos in reliance on T.B.'s willingness to serve as a gestational carrier). We conclude that gestational surrogacy agreements *promote* families by enabling infertile couples to raise their own children and help bring new life into this world through willing surrogate mothers. We agree with the Wisconsin Supreme Court that

> [e]nforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child's life.

*In re Paternity of F.T.R.,* 833 N.W.2d at 649-50. T.B. has failed to show the Surrogacy Agreement violates the public policy of our state.

For these reasons, we hold the Surrogacy Agreement is enforceable under existing Iowa law. We emphasize that T.B.'s legal attack is on surrogacy agreements

in general. We do not foreclose the possibility that a surrogacy agreement in a particular case could be subject to specific contract defenses, such as fraud, duress, or unconscionability.

**C. Whether T.B. Is the "Biological" Mother of Baby H Under the Iowa Code.** T.B. claims that as the birth mother she is the legal and biological mother of Baby H and that she therefore is entitled to custody of Baby H unless and until she is proven unfit by clear and convincing evidence. Iowa law establishes a rebuttable presumption that the birth mother who delivered the infant and her spouse are the legal parents of the child. *See Gartner v. Iowa Dep't of Pub. Health,* 830 N.W.2d 335, 344 (Iowa 2013); *see also* Iowa Code § 144.13(2), *held unconstitutional in part on other grounds under Gartner,* 830 N.W.2d at 354; Iowa Admin. Code r. 641—99.15(1). As noted, the DPH regulations governing births by surrogacy arrangements provide for court orders disestablishing the gestational surrogate and her spouse as lawful parents and establishing the intended father/ sperm donor as the lawful father of the child. Iowa Admin. Code r. 641—99.15(9). The district court, relying on genetic tests, ruled that T.B. is not the genetic or biological mother of Baby H and disestablished her presumptive parental rights. We must determine T.B.'s parental rights as a gestational surrogate birth mother. This is a question of statutory interpretation.

"[O]ur starting point in statutory interpretation is to determine if the language has a plain and clear meaning within the context of the circumstances presented by

the dispute." *McGill v. Fish,* 790 N.W.2d 113, 118 (Iowa 2010). "We give words in statutes their common, ordinary meaning in the context within which they are used unless the words are defined in the statute or have an established legal meaning." *In re J.C.* , 857 N.W.2d at 500. "When the legislature has defined words in a statute—that is, when the legislature has opted to 'act as its own lexicographer'-those definitions bind us." *Id.* (quoting *State v. Fischer,* 785 N.W.2d 697, 702 (Iowa 2010)).

Iowa Code chapter 232 defines "parent" as

> a *biological or adoptive mother or father* of a child; or a father whose paternity has been established by operation of law due to the individual's marriage to the mother at the time of conception, birth, or at any time during the period between conception and birth of the child, by order of a court of competent jurisdiction, or by administrative order when authorized by state law. "Parent" does not include a mother or father whose parental rights have been terminated.

Iowa Code § 232.2(39) (emphasis added). Chapter 600A governing private actions to terminate parental rights defines "parent" as "a father or mother of a child, whether by birth or adoption." *Id.* § 600A.2(14). "Biological parent" is defined as "a parent who has been a biological party to the procreation of the child." *Id.* § 600A.2(3). Chapter 600 governing adoptions incorporates the definitions

in chapter 600A. *See id.* § 600.2(1).[6] T.B. argues that "biological parent" should include a gestational carrier as "a biological party to the procreation of the child." That is a question of law. Chapter 600A fails to separately define "biological party" or "procreation." It is undisputed that P.M. (not D.B.) is the biological father of Baby H, as confirmed by DNA testing; and it is undisputed that the embryos implanted in T.B. came from the ova of an anonymous woman, not T.B., as confirmed by DNA testing. We agree with the district court's interpretation.

> [I]n using the term biological party, the Iowa Legislature was referencing a party connected by direct genetic relationship. In using the term procreate, the legislature was referencing the act of begetting a child. Thus, a biological parent is a parent whose egg or whose sperm was used to beget a child. Only such a person would have a direct genetic relationship to procreation of the child.

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6. A "putative father" is "a man who is alleged to be or who claims to be the biological father of a child born to a woman to whom the man is not married at the time of birth of the child." Iowa Code § 600A.2(16). While the legislature has not expressly defined "established father," the statutes make clear that "it refers to paternity which has been established by some means authorized by law." *Callender,* 591 N.W.2d at 185 (citing Iowa Code § 600B.41A(1)); *see, e.g.,* Iowa Code § 144.13(2) ("If the mother was married at the time of . . . birth, . . . the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered by the department.").

This interpretation fits with the dictionary definitions of "biological" and "procreate." *See Biological, Black's Law Dictionary* (10th ed. 2014) (defining "biological" as "genetically related" in the context of biological parents); *Biological father, Black's Law Dictionary* (defining "biological father" as "the man whose sperm impregnated the child's biological mother"); *Biological mother, Black's Law Dictionary* (defining "biological mother" as "[t]he woman who provides the egg that develops into an embryo"); *Procreate, Merriam-Webster's Collegiate Dictionary* (11th ed. 2014) (defining "procreate" as "to beget or bring forth offspring").

We hold the statutory definition of "biological parent" of Baby H does not include a surrogate birth mother who is not the genetic parent. The ordinary meaning of "biological parent" is a person who is the genetic father or mother of the child. That is also the established legal meaning of "biological parent." It makes sense that the legislature and department of health used the term "biological parent" in the commonly understood and established legal meaning of those terms.

As noted, our interpretation is supported by the regulations for birth certificates following a birth pursuant to a gestational carrier agreement. *See* Iowa Admin. Code r. 641—99.15. Subsection 4 addresses the situation in which "the intended mother is the egg donor and the intended father is the sperm donor to the child being carried by the gestational surrogate." *Id.* r. 641—99.15(4). This subsection refers to the intended parents-not the surrogate mother-as the biological parents of the child.

*Id.* Nowhere in the regulations or Iowa Code is "biological parent" defined to include a gestational surrogate who is not the genetic mother.

T.B. also mischaracterizes these regulations by stating that "when the husband of the 'intended couple' donated sperm, but the 'intended' wife is not genetically related, it is possible for the 'intended' husband to disestablish the mother's husband as father *only* if the mother agrees and voluntarily completes a parenting affidavit." The regulations are mandatory, not permissive. The regulations provide,

> If the surrogate birth mother is married and the intended father is the sperm donor, the married surrogate birth mother and the intended father *shall* by court order disestablish the surrogate birth mother's legal spouse as the legal parent and may complete a Voluntary Paternity Affidavit form pursuant to Iowa Code section 144.13.

*Id.* r. 641—99.15(6)(*b*); *see also Kopecky v. Iowa Racing & Gaming Comm'n,* 891 N.W.2d 439, 443 (Iowa 2017) (explaining that "shall" implies a mandatory duty while "may" is usually permissive). Under this regulation, the district court correctly disestablished D.B. as Baby H's legal father.

T.B. argues her emotional bond formed from acting as Baby H's mother for the two months she had physical custody after birth gives her greater legal rights than

Baby H's biological father, P.M. We rejected an established father's emotional bond argument in *In re J.C.,* 857 N.W.2d at 508. Daniel married Khrista while she was incarcerated and pregnant. *Id.* at 498. They both knew Daniel was not the child's biological father, but Daniel cared for the child on his own for over two years until Khrista was paroled. *Id.* Despite his involvement in raising the child, we concluded that Daniel, who was the child's "established father" based on his marriage to the birth mother, was not a necessary party to either the child-in-need-of-assistance proceedings involving the child or termination proceedings involving Khrista and the child's biological father. *Id.* at 508. Similarly, the emotional bond formed while T.B. took care of Baby H does not give her legal status superior to P.M., the child's biological father.

We next address T.B.'s constitutional claims.

**D. Whether Enforcement of the Surrogacy Agreement Violates T.B.'s Substantive Due Process and Equal Protection Rights.** T.B. claims that she has a fundamental liberty interest in the parent-child relationship. "The United States Supreme Court has consistently recognized that a parent's 'care, custody, and control' of a child is a fundamental liberty interest given the greatest possible protection." *F.K. v. Iowa Dist. Ct.,* 630 N.W.2d 801, 808 (Iowa 2001) (quoting *Troxel v. Granville,* 530 U.S. 57, 65-66, 120 S. Ct. 2054, 2060 (2000)). That liberty interest belongs to P.M., the only party in this case who is a biological parent of Baby H. By contrast, T.B.'s constitutional claims rest on an incorrect premise—that she has parental rights in Baby H without

being the child's genetic mother. Any constitutionally protected interest she may have as the surrogate birth mother is overcome by P.M.'s undisputed status as the biological and intended father of Baby H , *See In re J.C.* , 857 N.W.2d at 506 (noting due process rights of biological parents); *Callender,* 591 N.W.2d at 190 (same).

T.B. relies on *Lehr v. Robertson,* in which the United States Supreme Court stated, "The mother carries and bears the child, and in this sense her parental relationship is clear." 463 U.S. 248, 260 n.16, 103 S. Ct. 2985, 2992 n.16 (1983) (quoting *Caban v. Mohammed,* 441 U.S. 380, 397, 99 S. Ct. 1760, 1770 (1979) (Stewart, J., dissenting)). In *Lehr,* the Court adjudicated whether an unmarried biological father who never supported the child and had rarely seen the child since her birth had "an absolute right to notice and an opportunity to be heard before the child [could] be adopted." *Id.* at 249-50, 103 S. Ct. at 2987. *Lehr* dealt not with a surrogate mother but, rather, with a "traditional" mother—the child's genetic parent. *Lehr* is distinguishable for that reason. The same is true for *Tuan Anh Nguyen v. I.N.S.,* in which the Court stated,

> The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

533 U.S. 53, 62, 121 S. Ct. 2053, 2060 (2001). Again, the United States Supreme Court was considering the respective rights of an unwed father and mother who conceived a child by traditional means and were the child's genetic parents. *Id.* at 57, 121 S. Ct. at 2057. We agree with the California Supreme Court that such cases "do not support recognition of parental rights for a gestational surrogate." *Calvert,* 851 P.2d at 785. To the contrary, those cases based the constitutional rights on the father's biological connection to the child, which here is superior to any parental interest claimed by the gestational surrogate. *See id.* at 786.

T.B. claims she has a fundamental liberty interest in not being exploited. As discussed above, we are not persuaded by this argument. T.B. also raises an equal protection claim, claiming she is treated differently from other women in Iowa who promise to surrender their parental rights before birth. She relies on provisions of the Iowa Code governing the voluntary release of parental rights. *See, e.g.,* Iowa Code § 600A.4. Again, this argument fails because T.B. is not a biological (genetic) or adoptive parent and therefore lacks parental rights as to Baby H.

T.B. was provided sufficient procedural due process. She cannot claim lack of notice. She was provided with several evidentiary hearings and an adequate opportunity to develop a factual record.

In any event, based on the Surrogacy Agreement, we conclude T.B. waived any parental rights she may have had as a gestational surrogate. The California Court of Appeal

recently rejected a gestational surrogate's constitutional challenges:

> M.C. argues that the termination of her claimed parental rights . . . violates the Children's liberty interest in: (1) their relationship with their mother; and (2) freedom from "commodification." . . .
>
> M.C.'s argument fails in light of her own agreement surrendering any right to form a parent-child relationship with the Children.

*C.M.*, 213 Cal. Rptr. 3d at 367. We reach the same conclusion here. In the Surrogacy Agreement, T.B. specifically agreed to:

> not form or attempt to form a parent-child relationship with any child or children she may carry to term and give birth to pursuant to this agreement[,]
>
> . . . .
>
> . . . to surrender custody of the child to the Intended Parents immediately upon birth[, and] to institute and cooperate in proceedings to terminate [her] parental rights to any child born pursuant to the terms of this agreement.

T.B. acknowledged that

> each party has been given the opportunity to consult with an attorney of his or her own choice concerning the terms [and] legal significance of this agreement, and the effect it has upon any and all interests of the parties.

Further, she acknowledged that

> she has carefully read and understood every word in this agreement and its legal effect, and each party is signing this agreement freely and voluntarily and that neither party has any reason to believe that the other party or parties did not understand fully the terms and effects of this agreement, or that the other party did not freely and voluntarily execute this agreement.

T.B. thereby contractually waived her right to raise her own constitutional claims or claims on the child's behalf.

**E. Whether Enforcement of the Surrogacy Agreement Violates Baby H's Substantive Due Process and Equal Protection Rights.** T.B. claims that enforcement of the Surrogacy Agreement would violate the substantive due process and equal protection rights of Baby H. T.B. relies on third-party standing, claiming her status as a surrogate birth mother confers standing to assert Baby H's constitutional rights because the child has no ability to assert her own rights.

> When a person . . . seeks standing to advance the constitutional rights of others, we ask two

> questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations . . . point to permitting the litigant to advance the claim? . . .
>
> . . . To answer [the second] question, [we look] at three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests.

*Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 623 n.3, 109 S. Ct. 2646, 2651 n.3 (1989). T.B. asserts her standing based on the relationship between her and Baby H. We assume without deciding that T.B., as Baby H's birth mother, would have had standing to raise constitutional claims of Baby H. But as noted above, T.B. waived her rights to assert claims on behalf of Baby H in the Surrogacy Agreement. *See C.M.,* 213 Cal. Rptr. 3d at 367.

**IV. Disposition.**

For these reasons, we affirm the rulings of the district court.

**AFFIRMED.**

## APPENDIX B — DECISION IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY, FILED FEBRUARY 21, 2017

IN THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY

NO. EQCV086415

P.M. AND C.M.,

*Plaintiffs,*

vs.

D.B. AND T.B.,

*Defendants.*

## RULING ON MOTION TO DISMISS, MOTIONS FOR SUMMARY JUDGMENT, AND REQUEST FOR ORDER REGARDING BIRTH CERTIFICATES (REDACTED VERSION)

On this day, the Motion to Dismiss and Motion for Summary Judgment filed by Defendants, TB and DB (collectively, "Defendants"), comes before the undersigned. In addition, the Counter Motion for Summary Judgment filed by Plaintiffs, PM and CM (collectively, "Plaintiffs"), also comes before the undersigned. The court is also presented with the Plaintiffs' request to enter orders regarding the birth certificate of Baby H. Having considered the arguments of the parties and applicable law, the Court now makes the following findings and enters the following ruling.

*Appendix B*

## PROCEDURAL BACKGROUND AND FACTUAL FINDINGS

Most of the procedural background of this case is set forth in the Order entered by the Honorable Judge Mary Chicchelly on November 23, 2016 and in the Ruling entered by the undersigned on December 7, 2016 regarding the Application for *Pendente Lite* Custody. Though the Court sets forth a detailed procedural background in this Ruling, the Court also incorporates those descriptions of procedural background, which were not based on preliminary findings, into this Ruling by reference.

This case arises from the parties' entry into a Gestational Carrier Agreement ("surrogacy agreement"). Plaintiffs wished to have a child together. CM is not able to have a child at this point in her life. Pursuant to the surrogacy agreement, TB agreed to be the gestational carrier for one or more donor eggs that had been fertilized with PM's sperm. In exchange for acting as the gestational carrier in accordance with the surrogacy agreement and for TB' s performance of said agreement, Plaintiffs agreed to pay TB up to the amount of $13,000 so that she could subsequently have her own in vitro fertilization ("IVF") procedure.

The procedure involved required TB to undergo a regimen of injections and medications so that her ovulation cycle would match that of the egg donor.[1] She

1. The egg donor has not been identified in the record at this point, and she is not a party to this litigation.

was also required to undergo treatment intended to aid in the implanted eggs adhering to the walls of her uterus and becoming viable embryos. The donor eggs were fertilized outside the womb. After a period of what has been represented to be five days, the fertilized eggs were implanted in TB' s womb.

The procedure in question was carried out at a clinic in the Chicago metropolitan area. On the first visit post-implant where an ultrasound was done, all the parties were in attendance. Plaintiffs were in the room for the ultrasound. DB was also in the room and was videotaping the ultrasound. The parties were told that one embryo had adhered to the uterus wall, but that the viability of the second embryo was not yet certain.

By the time of the next visit for an ultrasound, there was apparently some falling out between the parties. Plaintiffs had objected to DB videotaping the ultrasounds, and they had also objected to some degree to information about the babies being posted on social media. DB did not go to the clinic visit for the second ultrasound, and TB refused to let Plaintiffs go into the room for the ultrasound. From this point forward, the only information Plaintiffs received regarding the two babies was from TB. This information either came directly from TB or through attorneys. Although Plaintiffs made requests for medical records, they received no access to them.

During the course of her pregnancy, TB talked to the babies in her womb and otherwise engaged in the same types of bonding activities as many pregnant mothers.

Although there was no genetic connection between TB and the babies, there was a physical or biological connection because as she carried them, they were part of her body. They were nourished by her body and experienced, to the extent they could perceive experiences, everything that TB experienced. TB also arguably formed a psychological bond with the babies not unlike the bond any pregnant mother forms with her natural offspring.[2] After the birth of the babies, TB has further developed her psychological bond with Baby H by interacting with her as if she were her mother. [3]

The Court notes that to some extent in the surrogacy agreement, both parties acknowledged there would be a

2. The Court characterizes the bond in this way because the record at this point does not allow the Court to determine whether the bond would be exactly the same as the one between a mother and a baby born of her own egg or whether the knowledge that this child was the offspring of an egg donor and someone other than her husband, combined with the expectation that she would be giving up the child immediately after birth, might alter the bond to some degree. Nonetheless, in light of the Court's conclusion in this Ruling that summary judgment is appropriate in favor of Plaintiffs, the Court has construed these facts in a light most favorable to Defendants and has recognized that TB may have formed a bond with Baby H similar to the one between a mother and a baby born of her own egg.

3. Such interaction was in direct contravention of the surrogacy agreement. Based on the surrogacy agreement, it was clearly the express intent of the parties at the time they entered into the surrogacy agreement to avoid the furtherance of any parental bond through post-birth contact between TB and any children born pursuant to the agreement.

natural bond between TB and any babies born as a result of the surrogacy agreement. At page 5, the agreement provided for counseling at the expense of PM and CM in accordance with Iowa Code section 600A.4 (2015).[4] The agreement also included a warranty by TB that she had health and medical insurance that would cover the expense of treatment for emotional problems relating to the pregnancy.

Beginning in approximately May 2016, communication between the parties became rather spotty. At points, there were communications between them and/or between counsel for TB and counsel for Plaintiffs. At other points, there was no communication. Over the course of the next few months, there were indications from TB and from her counsel that she wanted out of the surrogacy arrangement. Further, at some point TB indicated she wanted to use a different clinic for her IVF and that it would cost $30,000 versus $13,000 for her procedure. She took the position that Plaintiffs must agree to pay this higher cost if they wanted her to continue to perform her agreed role as gestational carrier.

From Plaintiffs' perspective, one shared at least in part by their counsel at the time, they became very concerned about what TB was going to do with the babies.

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4. The actual applicability of this code section in the present case is not completely clear in that it requires biological parents to be offered counseling. The definition of biological parent is addressed later in this ruling. It would not appear to include TB because she was not a "biological party to the procreation of the child." Iowa Code § 600A.2 (3) (2015).

They apparently imagined that she might abort them, she might try to keep them, and she might even adopt them out. They also appear to have imagined that after the first ultrasound, things had gone south and TB might not even be pregnant. They pressed TB when they had a means of communicating with her to provide them with more information. They also hired a private investigator to try to get more information.

From TB's perspective, Plaintiffs were harassing her by constantly seeking information via calls, texts and/or other means of communication. She also believed that Plaintiffs were following DB at work. On at least one occasion, PM did go to DB's part-time place of employment seeking information. He and CM called this employer on at least one other occasion. Plaintiffs clearly also reached out to at least one of DB's family members, his sister in Arkansas. TB further believed that Plaintiffs were defaming her by sharing their theories as to her alleged intentions and motivations.

TB's response was not to provide all the requested information. Instead, she limited herself to mostly communicating with the attorney for Plaintiffs and to also communicating through her attorney. She refused all requests for access to actual medical records.[5] Eventually, Plaintiffs told TB they did not want her to communicate with them through their attorney. TB apparently took this as some indication she should simply stop all communication.

5. At one point, TB appears to have agreed to provide some medical information through counsel, but she never lived up to this agreement.

Further, PM and/or CM communicated on a few occasions with third parties and shared their concerns that TB might "sell" the babies or kidnap them. These communications, at least in part, made their way back to TB and only created a further wedge between TB and Plaintiffs. Thus, the paranoia and desperation with which Plaintiffs became infected only increased the odds that TB would not abide by the surrogacy agreement.

Ultimately, the relationship between the parties broke down completely. TB stopped using her attorney to communicate. DB's sister received a racially derogatory communication from PM about DB. She then shared that communication with TB. PM asserted at the hearing on the Application for *Pendente Lite* Custody that he sent this communication in the hope it would cause TB to contact him directly. He did not have a phone number for TB because she had changed her number. He wanted to be able to contact her by phone. His gambit worked in that TB did reach out to him, and he was able to get a viable phone number as a result.

However, PM's gambit also backfired because the racially derogatory comment was "the straw that broke the camel's back." This comment, combined with CM calling TB the "N" word during a communication, convinced TB that Plaintiffs were racists. In her mind, she did not need to comply with the surrogacy agreement if Plaintiffs were racists because she could not allow such hateful people to raise the babies. Thus, these two comments stiffened TB's resolve to simply keep the babies and not honor the surrogacy agreement.

Communications between the parties then ceased. TB went into labor a few days after her last contact with Plaintiffs and gave birth by caesarian section to two babies, Baby K and Baby H. TB did not inform PM or CM that the babies had been born. Both babies were very premature. As a result, Plaintiffs did not suspect the babies had been born for some period of time.

Baby K and Baby H were placed in the neonatal intensive care unit ("NICU") at the hospital. Although both babies were initially healthy considering their developmental stage, Baby K became ill. She died several days after being born. TB did nothing to inform Plaintiffs that Baby K was ill or had died. She and/or DB arranged for Baby K's body to be cremated. PM has indicated that he would not have agreed to cremation and would have wanted last rites for Baby K.

On October 24, 2016, Plaintiffs initiated the present case by filing a Petition for Declaratory Judgment and Temporary and Permanent Injunction.[6] They quickly

6. On November 11, 2016, Plaintiffs filed an Amended Petition for Declaratory Judgment, Temporary and Permanent Injunction, and Paternity and Maternity ("Amended Petition"). In Count I of the Amended Petition, Plaintiffs requested, in part, a declaratory judgment ruling that the children born to Defendants in 2016 are the children of PM and that Defendants must turn over custody of the children to Plaintiffs immediately. In Count II of the Amended Petition, Plaintiffs requested temporary and permanent injunctive relief barring Defendants from taking any action contrary to the surrogacy agreement. In Counts III and IV, Plaintiffs requested that the Court disestablish the paternity of DB and the maternity of TB. In Counts V and VI, Plaintiffs requested that the Court establish

obtained an *ex parte* injunction prohibiting Defendants from acting inconsistently with the terms of the surrogacy agreement. That injunction provided:

> IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that a Temporary Injunction which prohibits TB and DB from acting inconsistently with the terms of the Gestational Carrier Agreement between Defendants and Plaintiffs, including, but not limited to the following particulars:
>
> a) The B's may not form a parent-child relationship with the Child and shall not act as parents for the child.
>
> b) DB shall submit to DNA testing upon request of the M's.
>
> c) TB and DB shall "surrender custody of the Child" to PM and CM; shall sign releases which permit any hospital to disclose medical information to the M's regarding the Child, which is a necessary part of the release of custody; and shall no longer make medical decisions on the Child's behalf.
>
> d) The B's shall not prevent the M's from naming the child.

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the paternity of PM and the maternity of CM. The court notes that Plaintiffs have not requested the court order specific performance of the surrogacy agreement.

*Appendix B*

October 31, 2016 Order Granting Motion for Emergency *Ex Parte* Temporary Injunction at 2 (as redacted in the Court's November 18, 2016 Redacted Order). On November 1, 2016, Defendants, *pro se*, filed with the Court a letter indicating that they would be filing an answer to the petition and filing a counterclaim.

On November 2, 2016, the hospital, at which the children were born, filed a Motion for Clarification and/or Amendment of Order Dated October 31, 2016. The hospital requested that the Court clarify and/or amend its October 31, 2016 Order in order to provide a medical decision-maker for Baby H, until such time as the Court makes a final determination regarding custody and control of Baby H. Also, on November 2, 2016, Plaintiffs filed a Joinder to Motion for Clarification and/or Amendment. They asserted that PM should be the medical decisionmaker. The Court set an emergency hearing for November 4, 2016 on the matter. Later that same day, Defendants filed an Opposition to the Motion and a Cross Motion requesting the Court vacate the October 31, 2016 Order. They also requested that the November 4, 2016 hearing be continued to allow time for them to find counsel. On November 3, 2016, the Court entered an Order noting that the November 4, 2016 hearing would continue as scheduled, but it noted that Defendants could raise the issues set forth in their Opposition at that hearing.

After the hearing on November 4, 2016, Judge Chicchelly appointed Attorney Ellen Ramsey-Kacena as a Guardian *Ad Litem* ("GAL") for Baby H and ordered the parties to submit to genetic testing. The Court also

granted Defendants' Motion to Continue regarding whether the temporary injunction should be vacated, and the Court set a hearing on that issue for November 16, 2016. The Court also set forth in its November 4, 2016 Ruling how matters should proceed prior to the November 16, 2016 hearing. Specifically, the Court held that the Court's October 31, 2016 temporary injunction should remain in effect until the November 16, 2016 hearing.

On November 15, 2016, Defendants filed a Verified Answer to the Amended Petition, Additional Defenses, and Counterclaim ("Answer") denying all material allegations adverse to them in the Amended Petition. Furthermore, in Counts I and II of their Counterclaim, Defendants sought a declaration that TB is the biological and legal mother of Baby H and Baby K and that DB is the legal father of Baby H and Baby K. They also sought a declaration that PM has no legal right to a relationship with Baby H. In Counts III, IV, and V, Defendants sought a declaration that the surrogacy agreement is unenforceable under Iowa law and under the United States Constitution. Lastly, in Counts VI and VII, Defendants asserted that the Court should award *pendent lite* custody of Baby H to them.

On November 16, 2016, along with filing dispositive motions (as more fully set forth below), Defendants filed a request to dissolve the temporary injunction and a request for an order awarding *pendente lite* custody and permanent custody of Baby H to Defendants. Plaintiffs resisted these requests.

On November 22, 2016, Plaintiffs filed a Notice Re: Genetic Testing providing the genetic testing results. The

results indicated that there is a 99.99 percent probability that PM is Baby H's biological father, and the results also indicated that DB has been excluded as the biological father and TB as the biological mother. In addition, TB and DB have admitted that they are not genetically related to Baby H. *See also Response of D.B. and T.B. to Plaintiff-Counterclaim Defendants' Statement of Undisputed Facts* at 1 (admitting that TB and DB are not genetically related to Baby H and admitting that the genetic testing makes it most likely that PM is genetically related to Baby H).

On November 23, 2016, after the hearing on November 16, Judge Chicchelly denied the Defendants' motion to vacate the October 31, 2016 injunction. This meant the temporary injunction remained in place and there was to be no contact with Baby H by DB and TB.

On November 30, 2016, Plaintiffs filed a Resistance to the Motion to Dismiss and Motion for Summary Judgment, and they filed a Counter Motion for Summary Judgment. The Court will examine these motions in more detail below.

On December 7, 2016, after a one-day evidentiary hearing on November 28, the undersigned entered a Ruling regarding Defendants' Application for *Pendente Lite* Custody. The Court found that PM has a superior constitutional interest to TB as it regards custody and visitation of Baby H. Consequently, the Court awarded sole legal custody of Baby H to PM pending final resolution of this case. In the alternative, the Court awarded sole

legal custody of Baby H to PM pending final resolution of this case because such an award is in Baby H's best interest.

Subsequently, Defendants filed a Petition for Writ of Certiorari, or, alternatively an Application for Interlocutory Review with the Iowa Supreme Court. On January 11, 2017, the Supreme Court entered an Order Denying the Petition for Writ of Certiorari and Application for Interlocutory Appeal, and on January 28, 2017, the Supreme Court issued Procedendo directing this Court to proceed with diligence and according to the law as if there had been no appeal. Thus, the Court now proceeds with this case and addresses the pending dispositive motions—i.e., the Motion to Dismiss and Motion for Summary Judgment filed by Defendants and the Counter Motion for Summary Judgment filed by Plaintiffs—as if there had been no appeal.

Plaintiffs also filed an Application to Establish Birth Certificates on December 28, 2016. Defendants resisted this application on January 3, 2017. The court delayed ruling on this application because the present dispositive motions were pending and the ruling thereon might impact resolution of any issues relating to the birth certificates.

As set forth above, on November 16, 2016, Defendants filed their pending Motion to Dismiss and Motion for Summary Judgment regarding the claims in the Petition and the claims in Defendants' counterclaim. Defendants contend that TB is the mother of Baby H and the legal mother on her birth certificate. In addition, Defendants

argue that the surrogacy agreement is unenforceable. Defendants assert that enforcement of the surrogacy agreement would violate the constitutional rights of Baby H and TB and would also violate Iowa statutes and public policy pertaining to termination, adoption, and prohibition of purchase of a child, as well as public policy that preserves the sanctity and stability of family. Thus, Defendants argue that Plaintiffs' Petition should be dismissed and that summary judgment should be awarded on Defendants' counterclaim by declaring that TB is the mother of the child and that the contract is unenforceable. Defendants assert that they should be awarded permanent sole physical and legal custody of Baby H.

On November 30, 2016, Plaintiffs filed a Resistance to Motion to Dismiss, Resistance to Motion for Summary Judgment, and a Counter Motion for Summary Judgment. Plaintiffs contend that they are entitled to summary judgment on their claims set forth in the Amended Petition and on all claims made by Defendants. Plaintiffs assert that the surrogacy agreement is enforceable. Moreover, Plaintiffs argue that well-settled Iowa law supports the rights of biological parents over nonparents.

On December 20, 2016, Defendants filed a Resistance to Plaintiffs' Motion for Summary Judgment and a Reply to Plaintiffs' Resistance to Defendants'/Counterclaimants' Motion to Dismiss and Motion for Summary Judgment. Defendants assert that TB is the biological mother of Baby Hand is, therefore, her legal mother. Defendants contend that the only requirement for a woman to meet in order to establish that she is the mother of a particular child is to

prove that she gave birth to the child. Defendants claim that the person who gave birth to the child has legal status as the child's mother and is the child's biological mother.

Plaintiffs filed a Reply to Defendants' Resistance on December 23, 2016. Plaintiffs argue "that P.M. is the only genetic parent the law recognizes." *Plaintiffs' Reply* at 2. Furthermore, Plaintiffs contend that Iowa public policy supports gestational carrier agreements. In addition, Plaintiffs assert that Defendants concealed the birth of the children from them, and Plaintiffs also contend that they had no knowledge of the birth of the children and were, therefore, unable to develop their own parent-child relationship with the children. Plaintiffs argue that Defendants should be estopped, based on the doctrines of equitable estoppel or laches, from asserting a constitutional claim on the basis of an emotional bond that was established during their concealment of the birth of the children. Furthermore, Plaintiffs assert that Defendants' unclean hands should prevent their success on any of their claims.

## MOTION TO DISMISS AND SUMMARY JUDGMENT STANDARDS

Under Iowa Rule of Civil Procedure 1.421(1)(f), a party may file a Motion to Dismiss for "failure to state a claim upon which any relief may be granted." A court may grant a motion to dismiss "only if the petition, on its face, fails to state a cause of action upon which relief could be granted under *any* circumstances." *Raas v. State,* 729 N.W.2d 444, 446 (Iowa 2007) (emphasis added) *(*citing

*Fitzpatrick v. State,* 439 N.W.2d 663, 665 (Iowa 1989)). When considering a motion to dismiss, the Court should construe the petition "in the light most favorable to the [nonmoving party], resolving any doubts in the [nonmoving party's] favor." *Turner v. Iowa State Bank & Trust Co. of Fairfield,* 743 N.W.2d 1, 3 (Iowa 2007). A motion to dismiss admits "well-pleaded facts in the petition and waives any ambiguity or uncertainty." *Tate v. Derifield,* 510 N.W.2d 885, 887 (Iowa 1994). "Where the facts pertinent to the determinative issue in a motion to dismiss are disputed, the case usually cannot be resolved on such a motion." *Pennsylvania Life Ins. Co. v. Simoni,* 641 N.W.2d 807, 810 (Iowa 2002) (citing *Hayden v. Ameristar Casino Council Bluffs, Inc.,* 641 N.W.2d 723, 724 (Iowa 2002)).

"Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Kolarik v. Cory Intern. Corp.,* 721 N.W.2d 159, 162 (Iowa 2006) (citing Iowa R. Civ. P. 1.981(3)). The Court is bound by the following considerations when considering a motion for summary judgment:

> A factual issue is material only if the dispute is over facts that might affect the outcome of the suit. The burden is on the party moving for summary judgment to prove the facts are undisputed. In ruling on a summary judgment motion, the court must look at the facts in a light most favorable to the party resisting the motion. The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record.

*Estate of Harris v. Papa John's Pizza,* 679 N.W.2d 673, 677 (Iowa 2004) (quoting *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 717-18 (Iowa 2001)).

For a motion for summary judgment to be granted, "the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." *McVey v. Nat'l Org. Serv., Inc.,* 719 N.W.2d 801, 802 (Iowa 2006) (citing *Goodwin v. City of Bloomfield,* 203 N.W.2d 582, 588 (Iowa 1973)). "To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings, affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file." *Id.* (citing Iowa R. Civ. P. 1.981(3)) (internal citation omitted).

Generally, "a statement of uncontroverted facts by the moving party made in compliance with [Iowa Rule of Civil Procedure] 1.981(8) does not constitute a part of the record from which the absence of genuine issues of material fact may be determined[,]" unless it carries "with it express stipulations concerning the anticipated summary judgment ruling." *Id.* at 803. Rather, the statement of uncontroverted facts "is intended to be a mere summary of the moving party's factual allegations that must rise or fall on the actual contents of the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits." *Id.* "If those matters do not reveal the absence of genuine factual issues, the motion for summary judgment must be denied." *Id.*

Even if there are no outstanding issues of material fact, the movant must also demonstrate it is entitled to judgment on the merits as a matter of law. *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, L.L.C.,* 784 N.W.2d 753, 756 (Iowa 2010). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986) (emphasis in original).

Therefore, in order to successfully resist a motion for summary judgment, "the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact." *Matter of Estate of Henrich,* 389 N.W.2d 78, 80 (Iowa Ct. App. 1986) (citing *Liska v. First Nat'l Bank,* 310 N.W.2d 531, 534 (Iowa Ct. App. 1981)). "When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party." *Eggiman v. Self-Insured Servs. Co.,* 718 N.W.2d 754, 763 (Iowa 2006) (citing *Daboll v. Hoden,* 222 N.W.2d 727, 733 (Iowa 1974)). "If reasonable minds could draw different inferences and reach different conclusions from the facts, even though undisputed, the issue must be reserved for trial." *Daboll,* 222 N.W.2d at 733; *see also Walderbach v. Archdiocese of Dubuque, Inc.,* 730 N.W.2d 198, 199 (Iowa 2007) (noting that a question of fact arises if reasonable minds could differ on how the issue should be resolved).

*Appendix B*

## FINDINGS AND CONCLUSIONS

As an initial matter, in the Court's December 7, 2016 Ruling Re: Application for *Pendente Lite* Custody, the Court ruled that PM is the legal father of Baby H and that DB is not the legal father of Baby H.[7] The Court also noted that to the extent there is any presumption under Iowa law that DB is the father of Baby H, that presumption had been rebutted.[8] In this regard, the Court also noted in its

7. The Court recognized at the time of its December 7, 2016 Ruling that the parties had not strictly complied with all the requirements under Iowa Code section 600B.41A for disestablishing paternity. However, the Court further noted that at that point there had been substantial compliance with those requirements. Moreover, Plaintiffs have not rebutted the results of the genetic test, and it is undisputed that TB and DB are not the genetic parents of Baby H. *See Callender v. Skiles,* 591 N.W.2d 182, 185-190 (Iowa 1999), *as amended on denial of reh'g* (Apr. 12, 1999) (acknowledging that blood tests can lead to the establishment of paternity through court order and that scientific advancement have "made the identity of a biological parent a virtual certainty."); *see also id.* at 191 (noting that if the "truth about paternity can be discovered, and equity does not demand otherwise, presumption of legitimacy should not be used to perpetuate a falsehood") (quoting *In re Richard W.,* 212 A.D.2d 89, 629 N.Y.S.2d 512, 514 (1995)); *see also Response of D.B. and T.B. to Plaintiff-Counterclaim Defendants' Statement of Undisputed Facts* at 1 (admitting that TB and DB are not genetically related to Baby H and admitting that the genetic testing makes it most likely that PM is genetically related to Baby H). Thus, the Court concludes that PM has been established as Baby H's legal and biological father.

8. Under Iowa Code section 252A.3, for example, DB would be presumed to be the legal father of Baby H. In the present case, however, that presumption makes little sense because all the parties

Ruling that to the extent PM does not have standing to file an action disestablishing paternity under Iowa Code chapter 600B, the statute is unconstitutional to the extent it does not give him standing to do so. *Callender v. Skiles*, 591 N.W.2d 182, 191-192 (Iowa 1999). For the reasons set forth in the Court's December 7, 2016 Ruling, the Court, even in considering the facts in a light most favorable to Defendants, reaches the same conclusion in this Ruling that PM is the legal and biological father of Baby H.

As presented by the parties, the primary issue in this case and the primary issue facing the Court regarding the pending dispositive motions is the validity and enforceability of the surrogacy agreement. If the undisputed material facts establish that the agreement is valid and enforceable, Defendants have no enforceable custody rights to Baby H and are required to surrender all rights they may have and to cooperate in Plaintiffs obtaining custody and parental rights to Baby H. Alternatively, if the agreement is unenforceable or if there are disputed facts in that regard, the Court next considers whether the undisputed facts establish that under Iowa law TB and/or DB would have a right to custody of Baby H that would result in either an award of custody and/or

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have known from the outset that DB was not Baby H's biological or intended father. The eggs that were implanted were not fertilized with DB's sperm. Moreover, Defendants have conceded that they have no genetic connection to Baby H. They also have conceded that they have no basis at this time to challenge the genetic tests performed on Baby H, and the tests, which indicated that PM is the father of Baby H, showed no genetic connection between any other parties and Baby H.

care to them or an award of visitation rights. Though the Court concludes below that the surrogacy agreement is enforceable, the Court addresses both contingencies and reaches the same conclusion whether the agreement is enforceable or not.

## I. The Surrogacy Agreement is Enforceable.

Defendants argue that the surrogacy agreement is unenforceable for a number of reasons.[9] First, Defendants argue that the surrogacy agreement violates Iowa law and is inconsistent with Iowa public policy. Second, Defendants argue that the Court's enforcement of the surrogacy agreement would violate the substantive due process and equal protection rights of Baby H and TB, as guaranteed

9. Outside of the public policy and constitutional arguments, Defendants also contend in more general terms that the surrogacy agreement is not enforceable because of the importance of the mother-child relationship. Even looking at the facts in a light most favorable to Defendants and even accepting that TB made some biological contributions to Baby H by serving as the surrogate and formed a psychological and physiological bond with Baby H, the Court concludes, as set forth in Section II of this Ruling, that TB is not the biological or legal mother of TB under Iowa law. Accordingly, for these reasons and the reasons set forth in the Court's constitutional analysis below, the Court concludes that TB's arguments regarding the importance of a mother-child relationship as they relate to her relationship with TB fail because they are based on the flawed presumption that she is Baby H's mother under Iowa law. *See Callender,* 591 N.W.2d at 190 ("Scientific advancements have opened a host of complex family-related legal issues which have changed the legal definition of a parent. It has also made the identity of a biological parent a virtual certainty.").

under the Fourteenth Amendment of the United States Constitution.

Plaintiffs argue that the surrogacy agreement is not void for violation of public policy or illegality. Moreover, Plaintiffs argue that the surrogacy agreement is not invalid based on Defendants' constitutional claims.

*A. The surrogacy agreement is not illegal under Iowa law or inconsistent with public policy.*

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 77, 102 S. Ct. 851, 856 (1982) (quoted with approval in *Bank of the West v. Kline,* 782 N.W.2d 453, 461 (Iowa 2010)). "[C]ontracts made in contravention of a statute are void, and Iowa courts will not enforce such contracts." *Kline,* 782 N.W.2d at 462.

Similarly, "[c]ontracts that contravene public policy will not be enforced." *Rogers v. Webb,* 558 N.W.2d 155, 156 (Iowa 1997) (citation omitted).

> This "power to invalidate a contract on public policy grounds must be used cautiously and exercised only in cases free from doubt." *De Vetter v. Principal Mut. Life Ins. Co.,* 516 N.W.2d 792, 794 (Iowa 1994). This is because whenever this court considers invalidating a contract on public policy grounds it must "also

> weigh in the balance the parties' freedom to contract." *Walker* [*v. American Family Mut. Ins. Co.],* 340 N.W.2d [599], 601 [(Iowa 1983)].
>
> The term "public policy" is not easily defined but we have said the thrust of the term is quite clear: "a court ought not enforce a contract which tends to be injurious to the public or contrary to the public good." *Id.* (citing *In re Estate of Barnes,* 256 Iowa 1043, 1051-52, 128 N.W.2d 188, 192 (1964)). Thus a contract may be invalidated if it would "violate any established interest of society." *Walker,* 340 N.W.2d at 601. It is "not necessary that the contract actually cause the feared evil in a given case; its tendency to have that result is sufficient." *Wunschel Law Firm,* 291 N.W.2d at 335 (citing *Jones v. American Home Finding Ass'n,* 191 Iowa 211, 213, 182 N.W. 191, 192 (1921)). Thus, before we strike down a contract based upon public policy, we must conclude that "the preservation of the general public welfare imperatively so demands invalidation so as to outweigh the weighty societal interest in the freedom of contract."

*Id.* at 157 (final quoted authority omitted) .

*Appendix B*

**1. The surrogacy agreement does not violate Iowa Code section 710.11.**

Iowa Code section 710.11 provides:

> A person commits a class "C" felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section does not apply to a surrogate mother arrangement. For purposes of this section, a "surrogate mother arrangement" means an arrangement whereby a female agrees to be artificially inseminated with the semen of a donor, to bear a child, and to relinquish all rights regarding that child to the donor or donor couple.

Iowa Code §710.11 (2017).

Defendants argue that because the statute includes only a narrow exception for a "surrogate mother arrangement" and because the definition of that exception would not be broad enough to include the present situation, the agreement now at issue violates the statute and cannot be enforced. Defendants misconstrue the statute.

There are no cases construing this code section. The same law regarding statutory construction that the Court discusses in section II (A) *supra* would apply to construction of this code section. The crime in question is to purchase, sell, or attempt to purchase or sell an individual to another person. In the case of the surrogate

mother arrangement described in the code section, the surrogate mother would be the biological parent of the child. She would have provided the egg that was then fertilized via artificial insemination. Thus, if she is paid money for acting as a surrogate, she is being paid to relinquish the rights to her own genetic offspring, her rights as a biological parent. The code section specifically excepts such an arrangement out of the class C felony described in the statute.

In the present case and in all similar cases involving gestational surrogates, the baby is not the product of artificial insemination of the surrogate mother. It is the product of IVF involving a donor egg. The baby is not the genetic offspring of the surrogate mother. Nor, as the Court concludes below, is the surrogate mother the biological parent of the baby under Iowa law. The surrogate mother is not selling and the biological father is not purchasing an individual or another person. Rather, the surrogate mother is agreeing to gestate a baby produced by the genetic material of others. Thus, the statute does not apply to the present context.[10]

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10. The Court further notes in this regard that the potential criminality of acting as a gestational surrogate is one or more steps removed from that of acting as a surrogate mother who is artificially inseminated. If it is not a criminal act to agree to act as a surrogate when the mother will provide the egg and be artificially inseminated, it is difficult to conceive that the legislature intended to criminalize acting as a surrogate when the mother will provide no genetic material for the child.

This reading of lowa Code section 710.11 is consistent with the provisions of the Iowa Administrative Code.[11] Iowa Administrative Code sections 641-96.8 and 641-99.15 specifically address gestational surrogacy contracts. Section 641-99.15(6) provides in pertinent part:

> Two intended parents—intended father is biological father to the child; his legal spouse is not a biological parent.
>
> a. If the surrogate birth mother is unmarried and the intended father is the sperm donor, the unmarried surrogate birth mother and the intended father may complete a Voluntary Paternity Affidavit form after the child's birth to place the intended father's name and information on the certificate of live birth.
>
> b. If the surrogate birth mother is married and the intended father is the sperm donor, the married surrogate birth mother and the intended father shall by court order disestablish the surrogate birth mother's legal spouse as the legal parent and may complete a Voluntary Paternity Affidavit form pursuant to Iowa Code section 144.13.

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11. The court discussed applicable provisions of the Iowa Administrative Code at greater length in the ruling on Plaintiffs motion for *pendente lite* custody. The court incorporates that discussion herein for the sake of brevity.

Iowa Admin. Code § 641-99.15(6) (2016). This provision is broad enough to encompass the surrogacy involving a gestational carrier as in the present case. If Iowa criminalized gestational surrogacy agreements, the Iowa Department of Human Services would not be likely to have regulations addressing such agreements. Thus, the existing Iowa Administrative Regulations provide some support for the Court's reading of Iowa Code section 710.11. Accordingly, the Court finds that the gestational surrogacy agreement at issue in this case does not violate the Iowa Code.

**2. The surrogacy agreement does not violate Iowa Public Policy.**

Defendants argue that the surrogacy agreement violates Iowa public policy because the agreement exploits TB, does not provide safeguards to ensure that the surrender of TB's rights were informed and voluntary, does not provide that Baby H must be placed upon her best interests, and involves the purchase of a child. Plaintiffs argue that the public does not have an interest in protecting the emotional bond between Baby H and TB, particularly when weighed against the parental bond between Baby H and PM. Furthermore, Plaintiffs contend that Iowa has statutes, administrative code provisions, and cases that indicate Iowa's public policy is in support of surrogacy agreements.

The Court notes that violation of public policy is an affirmative defense. In order to establish that defense, Defendants must first show that Iowa has a public policy

that would run contrary to agreements such as the one at issue in this case. Even in looking at the facts in a light most favorable to Defendants, the Court finds Defendants have failed to show that Iowa has a public policy that would run contrary to the surrogacy agreement at issue in this case.

In support of their public policy argument, Defendants primarily rely on Iowa Administrative Code provisions. Iowa Code section 710.11 and Iowa Administrative Code sections 641-96.8 and 641-99.15 reflect the public policy of Iowa. Contrary to the arguments being asserted by Defendants, it appears to be fairly clear that the State of Iowa favors enforcement of surrogacy agreements. Further, the State of Iowa appears to favor the enforcement of gestational surrogacy agreements such as the one at issue in this case. The Iowa Administrative Regulations provide a mechanism for handling birth certificates in cases involving gestational surrogacy. This would not be the case if the State of Iowa's public policy prohibited such agreements.

The Court also notes that Defendants' characterization of the Administrative Regulations is not entirely accurate. At page 18, Defendants contend "when the husband of the 'intended couple' donated sperm, but the 'intended' wife is not genetically related, it is possible for the 'intended' husband to disestablish the mother's husband as father *only* if the mother agrees and voluntarily completes a parenting affidavit." *Defendants' November 16th Brief* at 18 (emphasis in original). This is a mischaracterization of the regulatory scheme.

The regulation is not voluntary or permissive. It is mandatory. It states: "If the surrogate birth mother is married and the intended father is the sperm donor, the married surrogate birth mother and the intended father shall by court order disestablish the surrogate birth mother's legal spouse as the legal parent[.]" Iowa Admin. Code § 641-99.15(6)(b) (emphasis added). Similarly, although the regulation provides that the intended mother will have her rights established by adoption procedures, the regulation indicates this "shall" be done. Neither provision suggests in any way that Iowa allows the gestational surrogate to renege on any surrogacy contract. Rather, use of the word "shall" suggests Iowa would require the gestational surrogate to comply with the provisions of any such contract by cooperating in procedures to obtain a birth certificate listing the intended parents as the parents of the child(ren) born pursuant to the surrogacy agreement. Thus, the Court concludes that Iowa does not have a public policy against surrogacy agreements and that Iowa law, in fact, favors enforcement of surrogacy agreements.

Furthermore, even if the public would have an interest as to some of the concerns set forth by Defendants, many of Defendants' arguments regarding the alleged public policy violations are premised on false presumptions or are not in accord with Iowa law. The Court addresses in Section I(B) below similar arguments raised by Defendants regarding their constitutional claims, and much of that analysis is also applicable to these public policy claims. The Court, for similar reasons as those set forth below, finds that the surrogacy agreement

does not exploit TB, improperly disregard the interest of Baby H, or involve the purchase of a child. Thus, even accepting as true that society would generally have an established interest in these areas and even considering the facts in a light most favorable to Defendants, the surrogacy agreement at issue in this case would not be violative of these established interests and would not, therefore, contravene public policy concerns in those areas. Moreover, the Court concludes that enforcement of surrogacy agreements would have a different effect than the effect alleged by Defendants. As the Wisconsin Supreme Court persuasively noted, the Court finds that "enforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child's life." *In re F.T.R.*, 2013 WI 66, ¶ 69, 349 Wis. 2d 84, 122, 833 N.W.2d 634, 652.

Accordingly, the Court finds that under the facts of this case the "general public welfare" does not "demand[] invalidation so as to outweigh the weighty societal interest in the freedom of contract." *Rogers,* 558 N.W.2d at 157. For all these reasons, the Court concludes that the surrogacy agreement does not violate public policy.

### B. The surrogacy agreement does not violate the constitutional rights of Baby H or TB.

Defendants argue that this Court's enforcement of the surrogacy agreement would violate Baby H's[12] and TB's substantive due process rights as provided in the Fourteenth Amendment of the United States Constitution. Defendants also argue that enforcing the agreement would violate Baby H's and TB's equal protection rights under the Fourteenth Amendment.

Plaintiffs argue that the surrogacy agreement is not voidable on constitutional grounds. Plaintiffs assert that the surrogacy agreement does not violate the constitutional rights of Defendants or Baby H.

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12. As a preliminary matter, the Court addresses whether Defendants have standing to litigate the constitutional rights of Baby H. In light of the Court's conclusion that Defendants are not Baby H's parents under Iowa law and in light of the Court's appointment of a guardian *ad litem* to represent Baby H's interest, the Court finds it is questionable whether Defendants have standing to bring the claims of Baby H. Nonetheless, the Court addresses Defendants' assertion of Baby H's claims on the merits, because the Court finds that even if Defendants do have standing to litigate Baby H's constitutional claims, Defendants' arguments in this regard fail on the merits.

*Appendix B*

**1. Enforcing the surrogacy agreement does not violate the substantive[13] due process rights of Baby H or TB.**

The Fourteenth Amendment of the United States Constitution "provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.'" *Troxel v. Granville,* 530 U.S. 57, 65, 120 S. Ct. 2054, 2059, 147 L. Ed. 2d 49 (2000) (quoting U.S. Const. amend. XIV) (plurality opinion). Yet, the Fourteenth Amendment "guarantees more than fair process." *Id.* (internal quotation marks and citations omitted). The United States Supreme Court "has interpreted the Due Process Clause to include a 'substantive' component that protects certain liberty interests against state deprivation 'no matter what process is provided.'" *Obergefell v. Hodges,* 135 S. Ct. 2584, 2616, 192 L. Ed. 2d 609 (2015) (quoting *Reno v. Flores,* 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)). "The theory is that some liberties are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' and therefore cannot be deprived without compelling justification." *Id.* (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). "Substantive due process analysis must begin with a careful description of the asserted

13. Defendants have appeared to focus their due process arguments on substantive due process claims. To the extent, if any, Defendants were also raising procedural due process arguments, the Court finds that Defendants were provided the process that was due in that they were provided notice and a meaningful opportunity to be heard. *See Callender,* 591 N.W.2d at 189 (stating that due process generally requires, at a minimum, a meaningful opportunity to be heard).

right, for [t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Reno,* 507 U.S. at 302 (internal quotation marks and citations omitted). If the rights implicated are fundamental rights, the State cannot deprive the rights without compelling justification; however, if the rights implicated are not fundamental, the appropriate level of scrutiny to apply is rational basis. *Obergefell v. Hodges,* 135 S. Ct. 2584, 2616, 192 L. Ed. 2d 609 (2015); *Baker v. City of Iowa City,* 867 N.W.2d 44, 55-56 (Iowa), *reh'g denied* (June 12, 2015), *cert. denied sub nom. Baker v. City of Iowa City, Iowa,* 136 S. Ct. 487, 193 L. Ed. 2d 350 (2015) (citing *Vance v. Bradley,* 440 U.S. 93, 97, 99 S. Ct. 939, 942—43, 59 L. Ed. 2d 171, 176 (1979)); *see also Reno v. Flores,* 507 U.S. 292, 301-02, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1 (1993) (holding that the Fourteenth Amendment guarantee of "due process of law" includes a "substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (emphasis in original).

Defendants first argue that enforcement of the surrogacy agreement would violate the substantive due process rights of both Baby H and TB, because TB and Baby H have a fundamental liberty interest in the parent-child relationship. Second, Defendants contend that Baby H's substantive due process rights would be violated through enforcement of the agreement, because Baby H has a liberty interest to be free from commodification and purchase. Lastly, Defendants argue that TB has a due process right to be free from exploitation.

Accordingly, the Court first addresses whether there is a protected liberty interest regarding the relationship between Baby H and TB. The Supreme Court has recognized that a child has a liberty interest in familial association that is protected by the Due Process Clause. *See F.K. v. Iowa Dist. Court For Polk Cty.,* 630 N.W.2d 801, 808 (Iowa 2001), *as amended on denial of reh'g* (July 27, 2001) (citing *Lehr v. Robertson,* 463 U.S. 248, 256, 103 S. Ct. 2985, 2990-91, 77 L. Ed. 2d 614, 623 (1983) (noting reciprocal nature of interest); *Moore v. City of East Cleveland,* 431 U.S. 494, 503-05, 97 S. Ct. 1932, 1937-39, 52 L. Ed. 2d 531, 539-41 (1977) (noting the private realm of family relationships); and *Wallis v. Spencer,* 202 F. 3d 1126, 1136 (9th Cir. 2000) ("Parents and children have a well-elaborated constitutional right to live together without governmental interference.")). In addition, "[t]he United States Supreme Court has consistently recognized that a parent's 'care, custody, and control' of a child is a fundamental liberty interest given the greatest possible protection." *Id.* (quoting *Troxel,* 530 U.S. at 65-66; *Stanley v. Illinois,* 405 U.S. 645, 651-52, 92 S. Ct. 1208, 1212-13, 31 L. Ed. 2d 551, 558-59 (1972)); see also *Troxel,* 530 U.S. at 65 (holding that "the 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."). Thus, "[a] parent's interest in preserving family relationships is best protected by the Due Process Clause." *Id.* (citing *Alsager v. Iowa Dist. Ct.,* 406 F. Supp. 10, 21-22 (S.D. Iowa 1975), *aff'd in part,* 545 F. 2d 1137 (8th Cir. 1976)).

In the present case, the Court recognizes that there are fundamental liberty interests involved in the parent-child relationship. However, the Court disagrees with Defendants that there is a fundamental liberty interest involved in the relationship between TB and Baby H. The Court concludes that there is not a fundamental liberty interest protecting TB's and Baby H's relationship, because Defendants' argument that there is such an interest is premised on the assumption that TB is Baby H's mother.[14] The Court disagrees with this assumption. TB does not dispute that she has no genetic relationship with Baby H. Moreover, as more fully set forth below in Section II, the Court concludes the undisputed facts establish that TB is not Baby H's legal mother. Accordingly, the Court finds that there is no fundamental liberty interest at stake regarding the relationship with TB and Baby H, because there is not a parent-child relationship between Baby H and TB. *See Johnson v. Calvert*, 5 Cal. 4th 84, 99, 851 P.2d 776, 786 (1993) (noting that any constitutional interests the gestational surrogate possessed were something less than those of a mother).

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14. The Court disagrees with Defendants that TB and Baby H have a *fundamental* right to a relationship with one another, because as set forth in Section II of this Ruling, TB is not Baby H's biological or legal mother. Thus, Defendants' claim is not subject to strict scrutiny. Nonetheless, the Court further concludes that even if TB and Baby H do have a liberty interest in a relationship with one another based on the fact that TB made some biological contributions by gestating the babies, the Court is justified in depriving TB of said right, because PM would have a superior constitutional interest as Baby H's biological parent, and TB has not shown PM is unsuitable or unfit to be Baby H's parent, even if the Court accepts all allegations Defendants have made against PM as true.

Rather, the Court finds that the fundamental liberty interest at stake in this case is the relationship between Baby H and PM, who has been established as the biological father of Baby H. Thus, PM has a fundamental constitutional right to make decisions concerning the care, custody, and control of Baby H. *See Troxel,* 530 U.S. at 72 (establishing that the parent-child relationship is a fundamental right). Defendants are essentially asking the Court to interfere with PM's fundamental rights in this regard. Even in looking at the facts in a light most favorable to Defendants and drawing all reasonable inferences in favor thereof, the Court finds that they have not provided a basis for the Court to interfere with PM's fundamental rights concerning the care, custody, and control of Baby H. As the United States Supreme Court noted in *Troxel,* "so long as a parent adequately cares for his or her children (i.e., is fit)[15], there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." 530 U.S. at 68-69. Here, there is no compelling basis to intervene with PM's fundamental rights regarding his rearing of Baby H.

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15. Even accepting all allegations made against PM by Defendants as true and even in looking at the facts in a light most favorable to Defendants, the Court finds that there is no proof in the record that PM is an unfit parent. The Court cannot presume parental unfitness absent proof of said unfitness. *In re Marriage of Howard,* 661 N.W.2d 183, 192 (Iowa 2003) (citing with favor *Stanley v. Illinois,* 405 U.S. 645, 651-53, 92 S. Ct. 1208, 1212- 13, 31 L. Ed. 2d 551, 558- 59 (1972) (noting that a state may not presume parental unfitness).

In addition, the Court's conclusion that Baby H's and TB's due process rights will not be violated by enforcement of the agreement is supported by the Iowa cases that establish the Court has no authority to grant custody to an unrelated third party[16] when a suitable natural parent seeks custody. *See Petition of Bruce,* 522 N.W.2d 67, 71 (Iowa 1994) (holding that the court has no authority to grant custody to an unrelated third party when a suitable natural parent has or seeks custody). Similar to the Iowa Supreme Court's decision in *Bruce,* the Court finds that Defendants have "not cited any authority which would give an unrelated third party a constitutionally protectable interest in a relationship with a child in derogation of the natural parent's liberty interest[,]" and even if Defendants "could establish a liberty interest in a relationship with [Baby H] based on psychological ties which developed while [TB may have acted as her mother], that interest would not defeat the liberty interest of" PM, Baby H's natural father. *Id.* at 72. Thus, in considering existing Iowa law, the Court concludes that because TB does not have any parental rights to Baby H under Iowa law, there are not "sufficiently strong policy reasons" in existence "to accord her a protected liberty interest in the companionship of the child when such an interest would necessarily detract from or impair the parental bond" enjoyed by PM. *See Calvert,* 5 Cal. 4th at 100.

16. Though the Court recognizes the biological contributions that TB made while pregnant with Baby H, the Court finds that this does not establish TB as Baby H's legal or biological parent. Therefore, even looking at the evidence in the light most favorable to Defendants, the Court finds that TB is not the legal or biological birth mother of Baby H and that her position is largely akin to that of other third-party individuals seeking custody of children of whom they are not the natural parent.

Second, the Court addresses Defendants' contention that Baby H has a protected liberty interest in being free from commodification and the purchase of control and custody over her. The California Supreme Court persuasively addressed this issue by noting:

> We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.

*Calvert,* 5 Cal. 4th at 97. Similarly, in this case, the Court finds that, even in looking at the facts in a light most favorable to Defendants, little evidence is offered to support the argument that surrogacy, in general, fosters the attitude that children are commodities.

Moreover, under the facts of this particular case, the Court disagrees that Baby H was being treated as a commodity in the surrogacy agreement. In Section Four of the surrogacy agreement, it states:

> The consideration of this agreement is compensation for services and expenses as limited by law and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for consent to surrender the child for adoption.

*Petition, Ex. I - Surrogacy Agreement* at 4. Though the surrogacy agreement does include a provision providing that Plaintiffs will pay up to $13,000 for an IVF cycle for the gestational carrier after she has delivered a live child pursuant to the agreement, the Court finds that this is not a payment for the child.[17] Rather, in considering the amount and the language in the contract, the Court construes this to be a payment to compensate TB for her services in gestating the fetus and undergoing labor. *See Calvert,* 5 Cal. 4th at 96 (noting that the payments to the surrogate "were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up "parental" rights to the child"). This conclusion is further supported by the fact that the surrogacy agreement provided some compensation even if the child was miscarried or stillborn. *See Petition, Ex. 1 - Surrogacy Agreement* at 8 (providing that "[i]n the event the child is miscarried or stillborn during the pregnancy, the amount of $2,000 will be paid to the Gestational Carrier."). In addition, the Court notes that Baby H is not the genetic offspring of the surrogate mother, and TB is not the biological parent of the baby under Iowa law. Thus, the surrogate mother is not selling and the biological father is not purchasing an individual or another person. Rather, the surrogate mother is agreeing to gestate a baby produced by the genetic material of others.

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17. The Court notes that its ruling is limited to the surrogacy agreement at issue in this case. The Court does not address whether different surrogacy agreements could ever be construed as commodification of children based on their terms. The Court merely concludes that the surrogacy agreement at issue in this case does not treat the child as a commodity.

Lastly, the Court addresses Defendants' argument that enforcement of the surrogacy agreement would violate TB's due process right to be free from exploitation. Defendants contend that "[s]urrogacy exploits women by treating the mother as if she is not a whole woman." *Defendants' November 16th Brief* at 49.

The Court finds that enforcing the surrogacy agreement does not violate TB's due process rights to be free from exploitation. The surrogacy agreement at issue in this case is not exploitative of TB, because TB voluntarily entered into the agreement at issue after having the right and opportunity to consult with counsel. In fact, the undisputed facts establish that it was TB who reached out to Plaintiffs after seeing their advertisement on Craigslist. Moreover, to the extent TB is arguing that all such surrogacy agreements are exploitative, the Court finds that the California Supreme Court in *Calvert* persuasively addressed this issue by noting as follows:

> The 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. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes.

*Calvert,* 5 Cal. 4th at 97-98. It would be paternalistic of this Court to find all surrogacy agreements unenforceable on the ground that they could be exploitative of women. As in *Calvert,* the Court finds that it is not exploiting women by allowing them the opportunity to agree to gestate and deliver a baby for intended parents, which is precisely what occurred in this case.[18]

### 2. Equal Protection Rights of Baby H and TB

"The Equal Protection Clause of the Fourteenth Amendment provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *LSCP, LLLP v. Kay-Decker,* 861 N.W.2d 846, 856 (Iowa 2015), *reh'g denied* (May 6, 2015)(quoting U.S. Const. amend. XIV, § 1). "The Equal Protection Clause guarantees every person the right to be treated equally by the State[.])" *Fisher v. Univ. of Texas at Austin,* 133 S. Ct. 2411, 2422, 186 L. Ed. 2d 474 (2013). "The constitutional protection of equal protection of the laws means similarly situated persons must receive similar treatment under the law." *Grovijohn v. Virjon, Inc.,* 643 N.W.2d 200, 203-04 (Iowa 2002) (citing *Kuta v. Newberg,* 600 N.W.2d 280, 288

18. Moreover, to the extent, if any, Defendants are arguing that the surrogacy contracts exploit economically disadvantaged women, this Court, similar to the Court in *Calvert,* find that even looking at the facts in the light most favorable to Defendants, Defendants have provided "no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment." 5 Cal. 4th at 97.

(Iowa 1999) (citing *Norland v. Grinnell Mut. Reins. Co.*, 578 N.W.2d 239, 241 (Iowa), *cert. denied,* 525 U.S. 932, 119 S. Ct. 342, 142 L. Ed. 2d 282 (1998))). "Therefore, there is a threshold determination in all equal protection challenges as to whether persons are similarly situated." *NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 45 (Iowa 2012) (discussing federal equal protection principles). "If people are not similarly situated, their dissimilar treatment does not violate equal protection." *Id.* (internal quotation marks and citations omitted).

If people are similarly situated, then the Court determines the level of scrutiny to apply in determining whether there is an equal protection violation. *Id.* The Court applies "strict scrutiny to 'classifications based on race, alienage, or national origin and those affecting fundamental rights.'" *Id.* (internal quotation marks and citations omitted). The Court applies "intermediate scrutiny to classifications based on gender, illegitimacy, or sexual orientation" and applies "a rational basis analysis to all other classifications." *Id.*

Defendants argue that enforcement of the surrogacy agreements would violate TB's equal protection rights. Specifically, Defendants contend that TB would be treated differently than other women who promise, before birth, to surrender their parental rights, because she would not be given the protections afforded to such women if the surrogacy agreement is enforced.

Defendants also argue that Baby H's equal protection rights would be infringed if the Court enforces the

surrogacy agreement. Specifically, Defendants contend that enforcing the contract "would create a class of children who are denied protection of their fundamental liberty interest in their relationship with their mother, denied protection of their interest in not being treated as a commodity, and denied protection of their interest in being placed upon their best interests." *Defendants' November 16th Brief* at 44.

First, the Court addresses whether TB's equal protection rights would be infringed by enforcement of the surrogacy agreement. In this case, the Court finds that TB is not similarly situated to other mothers who promise, before birth, to surrender their parental rights through adoption, because unlike those women who are bearing their genetic offspring, it is undisputed that Baby H is not TB's genetic offspring. *See Calvert,* 5 Cal. 4th at 98 ("This is because a woman who voluntarily agrees to gestate and deliver for a married couple a child who is their genetic offspring is situated differently from the wife who provides the ovum for fertilization, intending to mother the resulting child."). In addition, TB knew from before the time the embryos were implanted in her that the embryos were not her genetic offspring and that the expectation was that she would relinquish the child(ren) upon birth. Thus, TB is not similarly situated to mothers who bear their own genetic offspring. Even if TB is treated differently than other mothers who promise before birth to surrender their parental rights, the dissimilar treatment does not violate the equal protection clause, because she is not similarly situated to other mothers who bear their own genetic offspring.

The Court finds that if TB were to be placed in a class, she would arguably be most similarly situated to other people who may have acted in some capacity as parents but are not the genetic parents of the child. The Court finds that TB has been treated similarly to such people. She is not entitled to custody of a child that is not her genetic offspring when a suitable natural parent has or seeks custody. This is illustrated through the case of *Petition of Bruce.* 522 N.W.2d 67, 68 (Iowa 1994). In *Bruce,* the petitioner had raised the child at issue for several years as if the child was his own, and a father-daughter relationship developed. Yet, the child was not his genetic offspring. Thus, when petitioner moved for custody of the child, the Supreme Court held that it had "no authority to grant custody to an unrelated third party when a suitable natural parent has or seeks custody." *Id.* at 71.

In this case, for purposes of this ruling, the Court recognizes that, taking the evidence in the light most favorable to TB, she has a physical or biological connection with Baby H. While acting as a surrogate, she carried Baby H as part of her body, and Baby H was nourished by her body. Moreover, Defendants have also alleged that they formed a relationship with Baby H while caring for her after she was born. Although the Court has previously noted that caring for Baby H after her birth was in contravention of the surrogacy agreement and that Defendants did not inform Plaintiffs of Baby H's birth so that they could form a similar relationship, the Court has nonetheless looked at these facts in the light most favorable to Defendants for the purpose of this Ruling. Thus, the Court finds, for the purpose of this ruling, that in

these ways TB may have acted as a parent of Baby H and formed a relationship with her. Even in looking at the facts in a light most favorable to Defendants and in drawing all reasonable inferences in favor thereof, the Court concludes that TB is similarly situated to the petitioner in *Bruce,* where he raised the child as his own for several years but was not the genetic parent. The Supreme Court concluded that the petitioner in *Bruce* did not have right to custody of the child. Accordingly, the Court in this case finds that enforcing the surrogacy agreement would not violate TB's equal protection rights, because she is not being treated any differently than the class of people to whom she is most similarly situated.[19]

Second, the Court addresses whether Baby H's equal protection rights would be infringed by enforcement of the surrogacy agreement. For some of the same reasons that enforcing the surrogacy agreement does not infringe TB's

19. To the extent TB is arguing that it is an equal protection violation to treat this class of individuals differently than other "biological parents," the Court disagrees for the same reasons it concluded it is not an equal protection violation to treat TB differently than other birth mothers. TB is not similarly situated to birth mothers who are the genetic parents of the children. Similarly, the Court finds that treating the class of individuals, such as the petitioner in *Bruce* and TB in this case, different than other parents is not an equal protection violation, because they are not similarly situated. Furthermore, even if nongenetic "parents" are being treated differently than "genetic" parents, the Court finds, for many of the same reasons set forth in the Court's due process analysis, that there is not a fundamental right at issue and that, for many of the reasons set forth in *Petition of Bruce,* there is a rational basis for the state treating this class of individuals differently.

equal protection rights and for some of the same reasons that enforcing the surrogacy agreement does not infringe Baby H's substantive due process rights, the Court finds that enforcing the agreement would not infringe Baby H's equal protection rights. The Court concludes that Baby H is not similarly situated to babies born to their genetic mothers or to babies born and given up for adoption. In this case, it is undisputed that Baby H is not the genetic offspring of TB, and Baby H is the genetic offspring of PM, who desires to raise her. *See Response of DB and TB to Plaintiff-Counterclaim Defendants' Statement of Undisputed Facts* at 1 (admitting that Baby H is not genetically related to TB). Thus, Baby H is not similarly situated to other babies who are the genetic offspring of the mother who has birthed them. In addition, the Court finds that Baby H is not similarly situated to children given up for adoption or children placed through family courts, because Baby H has a natural, biological parent who has from inception desired to raise the child and who has not been deemed unfit. The Court concludes that Baby H's due process rights would not be violated by enforcement of the surrogacy agreement, because Baby H is not similarly situated as other children.

Furthermore, even if Baby H was similarly situated to other children, the Court concludes that Baby H is not being treated differently than other children. TB argues she is Baby H's mother and that the Court would be creating a class of children who are denied protection of a fundamental liberty interest in a relationship with their mother. However, under Iowa law, TB is not Baby H's biological or legal mother. *See* discussion *infra* Section II.

Thus, Baby H is not being treated differently than other children in this regard. Furthermore, Baby H is not being treated differently than other children by not being placed according to her best interest. As noted above, Baby H has a natural, biological parent who desires to raise her. Our courts do not regulate who can or should have a child. Our courts do not "grant custody to an unrelated third party when a suitable natural parent has or seeks custody" and thus do not apply a best interest analysis in this regard. *Bruce,* 522 N.W.2d at 71; *see also Troxel,* 530 U.S. at 68-69 (noting that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."). Thus, Baby His not being treated any differently from other children born and placed with their known biological parents.

Lastly, Defendants argue that enforcing the surrogacy agreement would create a class of children who are denied protection of their interest in not being treated as a commodity. The Court concludes that Baby H is not treated as a commodity under the surrogacy agreement because under the surrogacy agreement, the surrogate mother is not selling and the biological father is not purchasing an individual or another person. *See* discussion *supra* Section I(B)(l). Rather, the surrogate mother is agreeing to gestate a baby produced by the genetic material of others. Thus, the Court concludes that Baby H's equal protection rights are also not violated in this regard if the agreement is enforced.

### C. The gestational surrogacy agreement is an enforceable contract.

Having found that the gestational[20] surrogacy agreement is not illegal under Iowa law, void due to public policy considerations, or unconstitutional if enforced, the Court utilizes a contractual analysis in determining whether the surrogacy agreement should be enforced. The surrogacy agreement at issue in this case contains all the necessary elements of a valid, binding contract: capacity to contract, offer, acceptance, mutual assent, and consideration.[21] *Magnusson Agency v. Pub. Entity Nat. Co.-Midwest,* 560 N.W.2d 20, 25-27 (Iowa 1997). Furthermore, the defenses raised by Defendants regarding the enforcement of the contract fail for the reasons previously set forth. The Court finds that the surrogacy agreement is an enforceable contract.[22]

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20. The Court notes that the type of surrogacy agreement at issue in this case is a gestational surrogacy agreement in that the egg at issue in this case was not TB's egg. Different issues may be at play in cases involving traditional surrogacy agreements (where the person gestating the child also contributes the egg used to beget the child), as compared to the gestational surrogacy agreement at issue in this case. The Court recognizes that at least some of the analysis in this decision would be different if TB's egg had been used and she was the biological mother of the child under Iowa law.

21. Based on the record before the Court, the parties do not dispute that the surrogacy agreement contained the ordinary elements of a contract. Moreover, the record supports that such elements were present in the surrogacy agreement.

22. Having concluded that there are no genuine issues of fact in dispute as to whether this contract contains the material elements of a contract and is subject to defenses, the Court finds that the

surrogacy agreement should be enforced. However, in reviewing approaches taken by other jurisdictions and in recognizing that Defendants appear to argue that the child's best interest should be considered, the Court notes that the Wisconsin Supreme Court has considered the best interest of the child in determining whether the agreement should be enforced. *See In re F.T.R.,* 2013 WI 66, ¶ 69, 349 Wis. 2d 84, 122, 833 N.W.2d 634, 652 (finding that the traditional surrogacy agreement, aside from the provisions terminating the parental rights (the surrogate was also the genetic mother), was a valid, enforceable contract unless enforcement would be contrary to the best interests of the child). However, the Wisconsin case is distinguishable in that it involved a traditional surrogacy agreement. Moreover, the Court notes that at least some other state courts, who have found that the agreement does not violate public policy, have not appeared to utilize a best interest analysis in considering the enforceability of the surrogacy agreements. *See JF. v. D.B.,* 2007-Ohio-6750, ¶ 6, 116 Ohio St. 3d 363, 364, 879 N.E.2d 740, 741-42 ("A written contract defining the rights and obligations of the parties seems an appropriate way to enter into a surrogacy agreement. If the parties understand their contract rights, requiring them to honor the contract they entered into is manifestly right and just. . . . We conclude, therefore, that Ohio does not have an articulated public policy against gestational-surrogacy contracts. Consequently, no public policy is violated when a gestational-surrogacy contract is entered into, even when one of the provisions requires the gestational surrogate not to assert parental rights regarding children she bears that are of another woman's artificially inseminated egg."); *see also Johnson v. Calvert,* 5 Cal. 4th 84, 95, 851 P.2d 776, 783 (1993) ("In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.").

In this case, the Court has adopted an approach similar to courts in Ohio and California in finding that a written contract is

*See Norwest Bank Des Moines, Nat. Ass'n v. Bruett*, 432 N.W.2d 711, 712 (Iowa Ct. App. 1988) ("There is a presumption that any contractual agreement is binding upon the parties."). Accordingly, Plaintiffs' Motion for Summary Judgment is granted, and Defendants' Motion to Dismiss and Motion for Summary Judgment are denied.[23]

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an appropriate way to enter into a surrogacy agreement and that Iowa does not have a public policy against the gestational surrogacy agreement. Thus, the Court has utilized a contractual analysis, and the Court finds that a best interest analysis is not necessary in determining whether to enforce the surrogacy agreement. *See In re Marriage of Howard*, 661 N.W.2d 183, 192 (Iowa 2003) (recognizing that courts must presume parents are fit and that "the judge must presume a fit parent acts in the best interests of their children"). As noted above, Baby H has a natural, biological parent who desires to raise her, and TB, unlike the mother in the Wisconsin case of *In re F.T.R.*, is not biologically related to the child. If, however, Iowa determines that the child's best interest should be considered in determining the enforceability of gestational surrogacy agreements, a trial would arguably be necessary on this issue because there are disputed issues of fact.

23. Defendants have set forth their due process and equal protection arguments under the U.S. Constitution. To the extent Defendants are also asserting that the claims violate the equal protection and due process provisions of the Iowa Constitution, the Court (even in recognizing that our courts have the right to develop an independent framework under the Iowa Constitution) finds that these arguments fail for similar reasons that the federal constitutional claims fail. *See NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 45 (Iowa 2012) ("[W]e jealously reserve the right to develop an independent framework under the Iowa Constitution.").

## II. Even if the Surrogacy Agreement is Unenforceable, Defendants Do Not Have Enforceable Custody or Visitation Rights

### A. TB is not the legal mother of Baby H for purposes of a custody and visitation determination.

Defendants have presumed that TB is Baby H's legal mother under Iowa law for purposes of this custody determination because she gave birth to Baby H. Defendants have also presumed that because she gave birth to Baby H, TB has the same custody and visitation rights as any other birth mother. The Court finds these assumptions to be false.

The Court's resolution of this first issue begins with an examination of Iowa law regarding termination of parental rights. Thus, the Court considers Iowa Code chapter 600A. Iowa Code section 600A.2 defines "biological parent" as "a parent who has been a biological party to the procreation of the child." Iowa Code § 600A.2(3) (2015). The statute does not define "biological party", and it does not define "procreation." Because these terms are not defined, the Court must resort to statutory construction to determine the Legislature's intent.

> The rules of statutory/regulatory construction in Iowa are well settled.
>
> When a statute is plain and its meaning is clear, [the courts] need not search for its meaning beyond its expressed language. *American Asbestos Training Ctr., Ltd. v. Eastern Iowa*

> *Community College,* 463 N.W.2d 56, 58 (Iowa 1990) (citation omitted). [The courts] resort to rules of statutory construction only when the terms of the statute are ambiguous. *Le Mars Mut. Ins. Co. of Iowa v. Bonnecroy,* 304 N.W.2d 422, 424 (Iowa 1981) (citation omitted), superseded by statute on other grounds, *Steinkuehler* v. *Brotherson,* 443 N.W.2d 698 (Iowa 1989); Iowa Code § 4.6.
>
> [Iowa Courts] give precise and unambiguous language its plain and rational meaning as used in conjunction with the subject considered, absent legislative definition or particular and appropriate meaning in law. *American Asbestos,* 463 N.W.2d at 58 (citation omitted); Iowa Code § 4.1(38). Thus, it is not for [the courts] to speculate as to the probable legislative intent apart from the wording used in the statute or to use legislative history to defeat the plain words of the statute. *Le Mars,* 304 N.W.2d at 424 (citation omitted). [The courts] must look to what the legislature said rather than what it should or might have said. Iowa R. App. P. 14(f)(13).

*Stroup v. Reno,* 530 N.W.2d 441, 443-444 (Iowa 1995).

When a court does have need to construe the language in a statute or regulation, the court will not construe the language of a statute in a manner that will produce an absurd or impractical result. *State v. Carpenter,* 616 N.W.2d 540, 541 (Iowa 2000) (citation omitted).

> [S]tatute[s] should be construed as to give meaning to all of them, if this can be done, and each statute should be afforded a field of operation. So, where the enactment of a series of statutes results in confusion and consequences which the legislature may not have contemplated, the courts must construe the statutes to reflect the obvious intent of the legislature and permit the practical application of the statutes.

*Judicial Branch v. Iowa Dist. Ct.,* 800 N.W.2d 569, 576-577 (Iowa 2011).

Biological is commonly defined as "of or relating to biology or to life and living processes . . . . connected by direct genetic relationship rather than by adoption or marriage." Merriam Webster Dictionary. Procreation is defined as "the act of begetting or generating . . . . [t]he entire reproductive process of producing offspring." The Free Dictionary by Farlex (citing Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health, Seventh Ed. 2003; Dorland's Medical Dictionary for Health Consumers 2007). It is also defined as "to beget or bring forth offspring." Merriam-Webster Dictionary.

The Court concludes that in using the term biological party, the Iowa Legislature was referencing a party connected by direct genetic relationship. In using the term procreate, the legislature was referencing the act of begetting a child. Thus, a biological parent is a parent

whose egg or whose sperm was used to beget a child. Only such a person would have a direct genetic relationship to procreation of the child. Thus, although TB had a form of biological connection to Baby H by virtue of being the gestational carrier for Baby H, she is not the biological parent of Baby H as that term is defined in Iowa Code section 600A.2.

In reaching this conclusion, the Court has also considered the import of a different construction. If the phrase "a parent who has been a biological party to the procreation of the child" included any part of the entire reproductive process relating to biology, the Court's construction would result in an absurd or impractical result. Yes, this interpretation would include TB and any other gestational carrier within the definition of biological parent. It would also include the individuals who fertilized the donor egg with PM's sperm because that was a biological part of the reproductive process. It would include any individuals who cared for the fertilized eggs over the five days between the point when they were fertilized and when they were implanted in TB's uterus. It would also include the individual(s) who implanted the eggs in TB's uterus. TB would clearly have a far greater biological connection to the entire reproductive process than these other individuals, but reading the statutory definition broadly enough to include her as a biological parent would also mean all these other persons fell within the statutory definition.

Additionally, if the Court settled on a construction of section 600A.2 that included TB as a parent and

excluded all others who were part of carrying out the IVF process, the construction would still result in an absurd or impractical result. This construction of the statute would mean any baby born by use of a donor egg in IVF has two biological mothers, the egg donor and the gestational carrier. The Court has no basis to believe the Iowa Legislature intended for such children to have two biological mothers.

The Court's conclusion in this regard is bolstered by a review of the Iowa Supreme Court's decision in *In re Marriage of Bethards,* 526 N.W.2d 871 (Iowa Ct. App. 1994). In that case, Dennis Bethards had been ordered to pay child support for a child born during his marriage to Connie Bethards. At the time of the divorce between Connie and Dennis Bethards, Dennis had believed the child was his. Subsequent to the divorce, Dennis Bethards learned the child was likely not his. Genetic testing established Dennis Bethards was not the child's biological father. The court's decision in *Bethards* made it clear that the Iowa courts define a biological parent as one who is related to the child by genetics. *Id.* at 874-75.

DB has no biological connection to Baby H of any kind. Although TB has a sort of biological connection because she acted as the gestational carrier, she has no genetic connection to Baby H. Baby H's genetic parents are the egg donor, who is not a party to this case, and PM.

Defendants argue that under Iowa law, a genetic connection is not necessary because TB is the legal mother of Baby H because she gave birth to Baby H. This argument is both a factual and legal argument. From the factual perspective, she emphasizes the strong biological

connection between her body and the fetus that existed because she carried the embryo and nurtured it from the time it was approximately five days old until birth. Even accepting Defendants' assertions as true regarding TB's biological connection with Baby H, the Court does not construe the Iowa definition of biological parent as broad enough to make TB a biological party to the procreation of Baby H by virtue of this connection.

From a legal standpoint, Defendants argue that under Iowa law a genetic father does not necessarily have a right to a relationship with a child. In support of that argument, they cite *Callender v. Skiles,* 591 N.W.2d 182 (Iowa 1999). That case does not really support Defendants' position. Rather, in *Callender,* the Iowa Supreme Court held that a putative father must be allowed to file and pursue an action disestablishing paternity because he has a protected liberty interest under the Iowa Constitution in the relationship with his genetic offspring. The court left open the possibility that a putative father could waive or otherwise lose the right to maintain the relationship with his genetic offspring. In the present case, PM has clearly not acted in a manner intended to waive his rights. Rather, he was prevented from establishing a relationship with Baby H by the conduct of TB and DB. Further, PM is not on the same footing as a typical putative father. All involved have known that PM is the father of Baby H from the date Baby H was conceived. As a result, the multiple policy reasons favoring enforcement of Iowa Code section 600B.41A in *Callendar* largely do not exist in the present context.

Defendants also contend that United States Supreme Court precedent and Iowa Code section 144.1(11) support their argument. In *Lehr v. Robertson,* 463 U.S. 248 (1983), the Supreme Court noted the parental relationship between a birth mother and the children to whom she has given birth is clear. *Id.* at 260 n. 16. However, *Lehr* was decided in 1983. At that point in time, IVF involving implantation of a donor egg in the uterus of a gestational carrier was a dream of the medical/scientific community that had not yet been realized. Science has now moved far beyond 1983. Now such procedures are not only possible, but they are successfully carried out on a relatively regular basis. Thus, the previously accepted legal doctrine recognized in *Lehr* is no longer viable because birth does not necessarily equate to a genetic relationship. *See Johnson v. Calvert,* 851 P.2d 776, 782, 19 Cal. Rep. 494, 499-500 (Cal. 1993) (explaining the long held common law doctrine of *mater est quam [gestation] demonstrat* (by gestation the mother is demonstrated) may simply be viewed as reflecting what was previously a certainty).

Iowa Code section 144 .1 (11) is a different matter. That code section is part of the Iowa statute on vital records.

> Vital statistics are the "records of births, deaths, fetal deaths, adoptions, marriages, dissolutions, annulments, and data related thereto." . . . . The state uses birth certificates to establish the fact a birth occurred, as well as to identify a child for immunization purposes . . . . The state also uses a birth certificate to verify a person's identity and date of birth

> . . . . The federal government recognizes the following purposes for birth certificates: (1) to maintain population statistics, (2) to confirm a child's identity, and (3) to ensure access to federal benefits and programs.

*Gartner v. Iowa Dept. of Human Servs.,* 830 N.W.2d 335, 351 (Iowa 2013) (citations omitted).

> Section 144.1(11) defines a "live birth" as:
>
> > the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached. In determining a live birth, heartbeats shall be distinguished from transient cardiac contractions, and respirations shall be distinguished from fleeting respiratory efforts or gasps.

Iowa Code § 144.1(11) (2015). Iowa Administrative Code section 641-99.15(1) provides that "[a]ll live births shall be considered to be the product of the woman who delivered the live infant and shall be filed in the standard manner, with that woman named as the birth mother on the original record submitted for registration." Iowa Admin. Code § 641-99.15(1) (2016). Defendants argue that the

code section, read in combination with the administrative code definition, show that in the present context TB is the presumptive mother of Baby H.

A careful reading of the administrative code provision shows the Iowa Department of Human Services does not equate a "presumptive mother" with a "biological parent." Subsections 4 through 10 address the multiple contingencies that may arise if a child is born to a surrogate mother. In subsection 4, the regulation addresses the scenario where the intended mother has provided the egg and the intended father has provided the sperm, but a gestational surrogate has carried the child and given "live birth." In that subsection and throughout subsections 4 through 10, the term "biological parent" is never used to describe a gestational surrogate. Rather, the term is used in subsections 4 and 8 to describe an intended mother who provided the egg. In subsection 6, the gestational carrier is described as the "surrogate birth mother," not as the "biological mother" or "biological parent."

As a provision governing the keeping of vital statistics, Iowa Code chapter 144 utilizes certain presumptions of parentage because of the governmental interests involved in keeping those statistics. *See Gartner,* 830 N.W.2d at 344-345. At least in the case of a father, this presumption is rebuttable. *Id.* The presumption is not always consistent with Iowa's definition of a "biological parent." This is why the presumption has previously been found to be rebuttable for fathers and why the Iowa Department of Human Services has been careful to not equate a gestational surrogate with a "biological parent" in the

Iowa Administrative Code. Although in most cases the biological mother is also the presumptive mother, that is clearly not the case in surrogacy cases such as the present one where the presumptive mother did not provide the egg from which the child was conceived.

If the Court reads Iowa Code chapter 144 and the relevant regulations in this manner, they do not conflict with Iowa Code section 600A.2. Defendants equate presumptive mother with biological mother. If the Court reads chapter 144 and the relevant regulations in the manner proposed by Defendants, Iowa has conflicting statutes and any baby conceived in the manner of Baby H has two biological mothers, the gestational carrier and the egg donor. Further, if the Court construes Chapter 144 and the regulations as proposed by Defendants, chapter 144 conflicts with Iowa Code section 600A.2. The Court should, if reasonably possible, construe the statutory provisions so that they are consistent, not in conflict. Thus, the principles of statutory construction support the court's reading of the statutes.

In short, although chapter 144 recognizes TB as the presumptive mother of Baby H for purposes of vital records, TB is not the biological parent of Baby H. Parental rights in Iowa flow from whether the person in question is the biological parent of a child. Because TB is not the biological parent of Baby H, the court must decide whether she can obtain an order from the court for custody and/or visitation over the objections of PM, who is undisputedly the biological parent of Baby H.

**B. TB and/or DB do not have enforceable custody/visitation rights relative to PM.**

Even if a person who is not the genetic parent of a child has a constitutional interest in a relationship with the child based on psychological ties, that interest cannot defeat the constitutional interest of the child's biological parent. *Bethards,* 526 N.W.2d at 875.

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right. . .

*Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 846, 97 S. Ct. 2094, 2110-2011 (1977) (quoted with approval in *Bethards,* 526 N.W.2d at 875). Although TB has asserted an interest greater than one based solely on psychological ties, she is not Baby H's biological parent. Neither TB nor DB has a genetic connection to Baby H.

So although TB raises a number of constitutional claims in her submissions to the Court, as set forth in Section I above, she has no constitutional right that could

defeat PM's constitutional interest as Baby H's biological parent. As a result, PM has a superior constitutional interest as Baby H's biological parent. Even looking at the record in a light most favorable to Defendants, no reasonable fact finder could conclude that PM is unsuitable or unfit to be Baby H's parent. Thus, he is the only party in this action legally entitled to custody of Baby H.

As it regards custody of Baby H, "custodial parents have a common law veto power over visitation between the child and all other third parties, except the noncustodial parent." *In re Petition of Bruce,* 522 N.W.2d 67, 71 (Iowa 1994) (cited authorities omitted). Because the Iowa courts lack "any statutory or common law authority to authorize relationships with a third party for the purpose of ordering visitation over the natural parent's objection, we clearly have no authority to grant custody to an unrelated third party when a suitable natural parent has or seeks custody." *Id.* In Iowa the court may only grant custody to a nonparent over a parent when the parent with custody is unfit or unsuitable.[24] *In re Marriage of Reschly,* 334 N.W.2d 720, 721 (Iowa 1983).

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24. The Iowa Legislature attempted to craft a narrow statutory exception to this rule in Iowa Code section 598.35 which allowed for grandparent visitation under certain circumstances. The Iowa Supreme Court then held the code section unconstitutional in three separate cases. These holdings largely turned on the fact that the legislature had allowed for grandparents to override the constitutional rights of biological/genetic parents to control visitation with their children without a finding that the biological/genetic parents were unfit or unsuitable. *Santi v. Santi,* 633 N.W.2d 312 (Iowa 2001) (unconstitutional as applied to overrule the decisions

Because, based on the factual record before the court, no reasonable fact finder could conclude PM is unfit and because he is the only party in the case who is a genetic or biological parent of Baby H, the Court grants sole legal custody of Baby H to PM. The Court grants no visitation rights to TB because it has no authority to do so in the face of PM's rights as custodial parent of Baby H. TB and DB do not have the same standing to seek visitation as the genetic or biological mother of Baby H. TB and DB are postured similar to an aunt, uncle, godparent, or close family friend. Their right to visitation with Baby H is at the sole discretion of PM.

## CONCLUSION AND RULING

The Court finds that there are no genuine issues of material facts in dispute in this case. Although the parties have disputed the enforceability of the surrogacy agreement and the determination of biological parents, the Court finds that these matters involve legal issues that are appropriately considered by the Court at the summary

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of married, fit parents); *In re Marriage of Howard,* 661 N.W.2d 183 (Iowa 2003) (unconstitutional as applied where the grandparents had a strong psychological bond with the children and the parents were divorced because it did not require a finding that the parent(s) were unfit); *Lamberts v. Lillig,* 670 N.W.2d 129 (Iowa 2003) (unconstitutional as applied where the grandparents were parents of a parent who had died). The Court notes that grandparents generally have a close biological/genetic connection to their grandchildren and in many cases would have a strong psychological bond. Neither TB, nor DB, are situated substantially better than a child's grandparents who have a strong psychological bond with the child when it comes to custody and visitation.

judgment stage. *Wilson v. Farm Bureau Mut. Ins. Co.*, 714 N.W.2d 250, 255 (Iowa 2006) ("'Summary judgment is appropriate if the only conflict concerns the legal consequences of undisputed facts.'") (quoting *Farmers Nat'l Bank of Winfield v. Winfield Implement Co.*, 702 N.W.2d 465, 466 (Iowa 2005)). Even in looking at the facts in a light most favorable to Defendants and drawing all reasonable inferences in favor thereof, the Court finds that TB is not the biological and legal mother of Baby H and Baby K and that DB is not the legal father of Baby H and Baby K. The Court further finds that PM has a legal right to a relationship with Baby H, and he is entitled to permanent custody of Baby H. Moreover, having carefully reviewed Iowa law, all the arguments of the parties, and the surrogacy agreement at issue, the Court concludes that the agreement at issue in this case is enforceable as a matter of law.

**IT IS THEREFORE ORDERED THAT** Defendants' Motion to Dismiss and Motion for Summary Judgment are **DENIED.**

**IT IS FURTHER ORDERED THAT** Plaintiffs' Counter Motion for Summary Judgment is **GRANTED.** Plaintiffs are entitled to summary judgment on their claims and on the claims raised against them in Defendants' counterclaims. The Court finds that the parties have entered a binding and enforceable surrogacy agreement.

**IT IS ORDERED, ADJUDGED AND DECREED that:**

*Appendix B*

IT IS ORDERED, ADJUDGED AND DECREED that

1. PM is the biological father of Baby H and Baby K for all legal purposes, including, but not limited to, Iowa Code Chapter 144 and Iowa Administrative Code 641-99.15.

2. The Defendants are ordered to provide the missing information (as indicated by underlines) in paragraphs 3 and 4 below within 2 business days of this order.

3. The Iowa Department of Public Health is directed to remove DB as the father of Baby H and Baby K and enter PM as the father of Baby H and Baby K.

4. The Iowa Department of Public Health is directed to establish the initial birth certificate for Baby H as follows:

**ALL DETAILS IN THIS PARAGRAPH HAVE BEEN REDACTED**

5. The Iowa Department of Public Health is directed to establish the initial birth certificate for Baby K as follows:

**ALL DETAILS IN THIS PARAGRAPH HAVE BEEN REDACTED**

6. The parties shall provide a certified copy of this order to the Iowa Department of Public Health.

7. The Iowa Department of Public Health shall seal the original birth record and all accompanying documents.

This unredacted ruling shall be sealed in its entirety with a security level of 2. The court has filed a redacted version of this ruling which shall be available to the public with a security level of 0.

Clerk to notify.

So Ordered

/s/
Christopher L. Burns,
District Court Judge
Sixth Judicial District of Iowa

## APPENDIX C — ORDER OF THE IOWA DISTRICT COURT FOR LINN COUNTY, FILED NOVEMBER 18, 2016

IN THE IOWA DISTRICT COURT FOR LINN COUNTY

EQUITY NO. EQCV086415

P. M. AND C. M., HUSBAND AND WIFE,

*Plaintiffs,*

v.

D. B. AND T. B., HUSBAND AND WIFE,

*Defendants.*

### *REDACTED/REFILED 10-31-16* ORDER GRANTING MOTION FOR EMERGENCY EX PARTE TEMPORARY INJUNCTION AND ORDER REGARDING CHILD BORN PURSUANT TO GESTATIONAL SURROGACY AGREEMENT

NOW, on the date set forth below, the Court has before it the Motion for Emergency Ex Parte Temporary Injunction and Order Regarding Child Born Pursuant to Gestational Surrogacy Agreement, and after reviewing the Application and the Petition filed in this matter, makes the following findings:

1. A temporary injunction is necessary in this matter to prevent irreparable injury to the M.'s.

2. A temporary injunction is necessary in this matter will prevent actions which may make a final judgment ineffectual.

3. No notice is required in this matter as time is of the absolute essence, and notice may result in further injury either by a delay of time or by causing the B.'s to take a harmful action toward the M.'s or the Child.

4. There is reason to believe P. M. has a genetic connection to the Child and that neither T. B. nor D. B. have a genetic connection to the Child

5. This order is in the Child's best interest.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that a Temporary Injunction which prohibits T. B. and D. B. from acting inconsistently with the terms of the Gestational Carrier Agreement between the B.'s and the M.'s, including, but not limited to the following particulars:

a) The B.'s may not form a parent-child relationship with the Child and shall not act as parents for the child.

b) D. B. shall submit to DNA testing upon request of the M.'s.

c) T. B. and D. B. shall "surrender custody of the Child" to P.M. and C.M.; shall sign releases

which permit any hospital to disclose medical information to the M.'s regarding the Child, which is a necessary part of the release of custody; and shall no longer make medical decisions on the Child's behalf.

d) The B.'s shall not prevent the M's from naming the child

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that a hearing shall be set on a permanent injunction in this matter as soon as reasonably possible. The hearing shall be scheduled such that at least two hours are available for this matter to be fully heard.

## APPENDIX D — THE CONSTITUTION OF THE UNITED STATES OF AMERICA AMENDMENT XIV, SECTION 1

THE CONSTITUTION OF THE
UNITED STATES OF AMERICA
AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.