No. 17-1631

In The
Supreme Court of the United States

D.B. and T.B.,

Petitioners,

v.

P.M. and C.M.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This action relates to Iowa courts' enforcement of a gestational surrogacy contract as a matter of Iowa law. The parties executed the contract prior to implantation of embryos into a surrogate. P.M. is the genetic father of the embryos and Petitioners have no genetic connection. The lower courts found Petitioners failed to meet their burden to prove the contract unenforceable for any reason, including constitutional, found the surrogate is not the legal mother of the birthed child under Iowa law, and found Petitioners contractually waived the right to assert any constitutional claim to invalidate the contract. The petition raises the following questions:

1. Should the Court grant certiorari to consider whether it should expand substantive due process rights to afford protection to the relationship between a gestational surrogate and the genetic stranger she births, over the objection of that child's genetic father and despite a contract, executed preimplantation, which waives the assertion of any such constitutional protection?

2. Should the Court grant certiorari to consider the decisions of Iowa courts interpreting questions of Iowa law?

3. Did Petitioners preserve error on their contention that the constitutional rights asserted are "unwaivable?"

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INTRODUCTION

Petitioners, T.B. and D.B., ask this Court to grant certiorari to expand dramatically substantive due process rights under the Fourteenth Amendment to the United States Constitution. They then seek to use these two new rights, with equal protection rights as a contingency, to invalidate a contract and invalidate several Iowa laws. Petitioners attempt this despite contractual provisions waiving the right to assert such constitutional challenges by claiming there was no waiver of the rights and, even if there were, these new rights are "unwaivable." (Pet. i.)

Assuming all these questions are properly before this Court, neither ruling of the Iowa courts, nor any Iowa law, conflict with decisions of any United States court on questions of federal law. Instead, Petitioners define new constitutional rights and reimagine the record, using both to create the illusion of conflict. Because these rights do not exist, and Petitioners waived the right to assert them if they did, certiorari should be denied.

STATEMENT OF THE CASE

The Iowa District Court for Linn County held, as a matter of law, that the genetic father of two children, P.M., is the biological and legal parent of those children. (Pet. App. 112a.) In the same ruling on summary judgment, the district court found two genetic strangers to those children—the gestational surrogate,

T.B., and her husband, D.B.—are neither legal, nor biological, parents of the children. (Pet. App. 112a.) As part of these holdings, the district court found the gestational surrogacy agreement, entered into prior to conception, enforceable as a matter of law. (Pet. App. 112a.) The Supreme Court of Iowa unanimously affirmed the decision of the district court. (Pet. App. 48a.)

1. The Ms and Bs met when T.B. responded to an advertisement posted by the Ms in their search for a gestational carrier. (Pet. App. 3a–4a.) A while after meeting, the Ms and the Bs executed a gestational carrier agreement (the "Agreement") with the "stated purpose '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.' " (Pet. App. 4a.) The Agreement provides that T.B. will gestate embryos created with P.M.'s sperm and the egg of an anonymous donor. (Pet. App. 50a.) Further, the Agreement provides, upon the birth of a child, the Bs will surrender custody to the Ms. (Pet. App. 4a.) The Agreement recited the parties' understanding and agreement that the best interests of the contemplated child required the Bs not form a parent-child relationship with that child. (Pet. App. 5a.) Accordingly, the Bs agreed to surrender custody of a child to the Ms "immediately upon birth." (Pet. App. 5a.) In exchange for gestation, the Ms agreed to pay for an in vitro fertilization procedure for T.B., up to a cost of $13,000, to allow the Bs to have a child of their own. (Pet. App. 4a.)

On March 27, 2016, pursuant to the Agreement, a fertility clinic implanted two of the Ms' embryos—created from the genetic material of P.M. and an anonymous egg donor—into T.B.'s uterus. (Pet. App. 6a.) On April 4, 2016, blood testing confirmed T.B.'s pregnancy. (Pet. App. 6a.)

After implantation, "the relationship soon began to break down" and communication between the parties ceased. (Pet. App. 6a–8a.) During this time, T.B. demanded the Ms pay additional funds so she could use a different IVF clinic. (Pet. App. 8a.) Eventually, T.B. decided to keep the children based on her opinion that the Ms were racist. (Pet. App. 9a.) Soon thereafter, T.B. gave birth to twins without notifying the Ms of the very premature birth. (Pet. App. 9a.) One child passed away eight days after birth and was cremated. (Pet. App. 9a.)

2. Not knowing of this birth, death, or cremation, the Ms filed a petition for declaratory judgment and injunction on October 24, 2016. (Pet. App. 9a.) On October 31, 2016, believing the birth occurred, the Ms filed a motion for an emergency ex parte injunction. (Pet. App. 9a.) That same day, the district court entered an order granting a temporary injunction, ordering, *inter alia*, T.B. and D.B. to "surrender custody of 'Baby H' to the Ms." (Pet. App. 9a–10a.) On November 11, 2016, the Ms filed an Amended Petition requesting the district court enforce the agreement, disestablish maternity of T.B. and paternity of D.B., and establish P.M. as Baby H's father and C.M. as Baby H's mother. (Pet. App. 10a.)

On November 22, 2016, the Ms filed a Notice regarding the genetic test results, conclusively showing that P.M. was the genetic father of Baby H, and excluding D.B. and T.B. as the genetic parents. (Pet. App. 11a.) On November 23, 2016, the Court issued an order upholding the injunction issued on October 31 and indicating the Ms were likely to succeed on the merits. Iowa R. Civ. P. 1.1502(1); (App. 432.)

Five days later, the district court held an evidentiary hearing regarding both parties' application for temporary custody and, in its order, found P.M. entitled to sole custody by virtue of P.M.'s superior constitutional right to raise the child and a "best interests" analysis. (Pet. App. 12a.) Following cross-motions for summary judgment, the district court ruled T.B. is not the biological or legal mother, D.B. is not the legal father, P.M. is the biological and legal father, and the Agreement is enforceable. (Pet. App. 13a.)

T.B. and D.B. appealed to the Iowa Supreme Court, which retained jurisdiction and affirmed the ruling of the district court in its entirety. (Pet. App. 13a.)

REASONS FOR DENYING THE WRIT

Not only are there many inaccuracies in the Petition, the asserted liberty interests do not exist—this Court has never protected the alleged relationship between gestational carrier and the child she delivers. Accordingly, the Petition should be denied. Additionally, the Iowa Court's decision relied on Iowa contract

law, rather than any federal law issue. Petitioners also make various false statements of fact regarding the underlying proceedings. This Court rarely grants certiorari where "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioners misstate the record and misapply nearly every case they cite. Forming separate bases for denial, this Court should deny certiorari because Petitioners fail to provide the "compelling reasons" necessary for granting the writ. Specifically, the Iowa Supreme Court did not decide any question of federal law, its decision does not conflict with other states or United States courts of appeals on federal issues, and its decision does not conflict with relevant decisions of this Court.

I. Incorrect Statements of Facts and Law (Rule 15.2)

Throughout the Bs' Petition, they claim the lower courts ignored their various constitutional arguments. (Pet. 2, 4, 16, 17, 19, 20.) These assertions contend, because these courts "ignored the constitutional issues," the Bs did not receive "their day in court." (Pet. 2, 16). A review of the Iowa courts' rulings, found in the Petition's appendices, prove the opposite.

In the Iowa Supreme Court opinion, beginning on page 43a of the Appendix, is a four-page section entitled "Whether Enforcement of the Surrogacy Agreement Violates T.B.'s Substantive Due Process and Equal Protection Rights." In this section, the Iowa

Court discusses the various cases cited by Petitioners and distinguishes them, noting they "dealt not with a surrogate mother but, rather, with a traditional mother—the child's genetic parent." (Pet. App. 44a.) Following this section is over a page of discussion, entitled "Whether Enforcement of the Surrogacy Agreement Violates Baby H's Substantive Due Process and Equal Protection Rights," which rejects T.B.'s ability to assert rights on behalf of Baby H. (Pet. App. 47a.) Seventeen pages of the district court's ruling are devoted to the question of T.B.'s asserted constitutional entitlements. (Pet. App. 79a–95a.) In this lengthy section, the district court takes great care to address each constitutional grievance alleged by the Bs. Far from refusing to consider the arguments, the Courts simply disagreed with the Bs' contention these constitutional claims were meritorious.

In short, the Bs make the same baseless claims as those asserted in *Cook v. Harding*, No. 16-55968 (9th Cir. Jan. 12, 2018). There, Melissa Cook argued her "constitutional claims 'have never been directly addressed and decided' " by either the California Court of Appeal or the United States District Court. *Id.* at *14. The Ninth Circuit Court of Appeals found "[t]his is baseless in light of the Court of Appeal's thorough and well-reasoned opinion, which devotes over eight pages to addressing each of her constitutional challenges in turn." *Id.* Here, as in *Cook*, the courts considered the Bs' claim but found those claims unpersuasive.

The Bs state "[t]he [Iowa Supreme C]ourt ruled that Baby H had no legal mother under Iowa law." This is false. Instead, the Iowa Supreme Court held T.B. is

not the legal mother of Baby H because "the statutory definition of 'biological parent' of Baby H does not include a surrogate birth mother who is not the genetic parent." (Pet. App. 41a.)

Petitioners also contend the Iowa Supreme Court held, by signing the Agreement, "T.B. waived the rights of the child." (Pet. 18). This is incorrect. The Court held "T.B. waived her rights to *assert claims on behalf of* Baby H in the Surrogacy Agreement."[1] (Pet. App. 48a [emphasis added].)

It is true Iowa does not have a specific statute or case that "enables" surrogacy. (Pet. 3.) Yet, it is disingenuous to omit the presence of administrative regulations that "specifically contemplate" recordkeeping procedures for children born from gestational carrier agreements. (Pet. App. 27a.) It is also disingenuous to omit a reference to Iowa Code section 710.11, passed immediately following the *Baby M* case, which the Iowa Court found instructive on these agreements in that it removes criminality from those who engage in "traditional surrogacy." (Pet. App. 25a–26a.)

In the Bs' Petition, they suggest that all involved—the Ms, Bs, and the attorney who drafted the Agreement for the Ms—believed, upon birth, T.B. had

[1] In their Petition, the Bs argue for the first time in this action, that these constitutional claims are "unwaivable." (Pet. 21.) The Bs should be precluded from asserting this argument for the first time on appeal. Additionally, neither federal statute, nor ruling of this Court, categorize as "unwaivable" the right of a gestational carrier to assert a liberty interest over the relationship, if any, between her and the child she carries.

the choice whether or not to terminate her parental rights relating to the child. (Pet. 3, 8.) The Bs emphasize that any post-birth surrender of rights must be voluntary. (Pet. 3, 8.) This is contrary to Iowa law and fails to recognize the Iowa Supreme Court rejected this suggestion, when it wrote "T.B. also mischaracterizes these regulations by stating . . . 'it is possible for the "intended" [parent] 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." (Pet. App. 42a;) *accord* Iowa Admin. Code r. 641—99.15(6)(d) (stating "adoption laws *shall* be followed to reestablish the certificate of live birth showing the nonbiological parent on the certificate of live birth pursuant to Iowa Code chapter 600").

At page twenty-five of their Petition, the Bs misquote the Iowa Supreme Court, stating " '[t]hat (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.' App., *infra*, 42a." (Pet. 25.) The misstated and omitted portion of that quote reads, "[t]hat [14th Amendment] 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. . . ." (Pet. App. 43a.) By adding an ellipsis and changing the word contrast to contract, the Bs change the character of the cited section. With this modification, the Bs suggest P.M. obtained a parent-child liberty interest by contract rather than by genetic

relation to the child. The purpose of the quote, though, was to emphasize that any prospective liberty interest asserted by T.B. pales when compared to the liberty interest held by P.M., by virtue of his genetic connection.

On that same topic, the Bs suggest "[i]t was always the actual relationship between a parent and child which was protected as a liberty, not genetics alone." (Pet. 26.) This ignores the reality that genetics is a prerequisite in such legal determinations on competing constitutional interests. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (stating "the actions of judges neither create nor sever genetic bonds"); *Smith v. Org. Foster Families for Eq. & Reform*, 431 U.S. 816, 846 (1977) (holding "it is quite another to say that one may acquire [a parent-child liberty interest] in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right an interest the [claimant] has recognized by contract from the outset").

Petitioners attempt to define T.B. as the biological mother "as a matter of scientific and medical fact." (Pet. 12.) The Iowa Supreme Court, however, held this question was one of "statutory interpretation" regarding Iowa laws, not fact. (Pet. App. 38a.) Indeed, if this were a question of fact, as Petitioners contend, this Court should deny certiorari. *See* Sup. Ct. R. 10 (stating this Court typically limits certiorari to questions of federal law, not questions of fact).

Factual inaccuracies and legal misstatements make review less likely. Given the considerable discrepancies

between the record and the Petition, this Court should reject the Petition and deny the writ.

II. The Iowa Supreme Court Did Not Decide Any Question of Federal Law and Its Decision Does Not Conflict with This Court, or Any Other Court of Last Resort or United States Court of Appeal, on a Federal Issue.

Certiorari should be denied because Petitioners fail to provide the "compelling reasons" necessary for retention. Petitioners cannot provide these compelling reasons because two aspects of the Iowa Supreme Court ruling preclude it. First, the liberty interests asserted by Petitioners do not exist. Second, the Iowa decision rests on Iowa, rather than federal, law.

A. There is no liberty interest between a gestational carrier and the child she carries.

This Court has never found that a liberty interest exists in the relationship between a gestational carrier and the child she carries. Petitioners assert, because T.B. gave birth to Baby H, she obtained a liberty interest to "companionship" with Baby H. (Pet. 26.) For a liberty interest to exist, it must be "fundamental" and "traditionally protected by our society." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (Scalia, J., plurality opinion); *see also Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (Powell, J., plurality opinion) (citations omitted) (finding, through the history of substantive

due process rights, that these liberty interests gain their "sanctity . . . precisely because the institution [it protects] is deeply rooted in this Nation's history and tradition"); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937) (validating the enforcement of particular amendments against the states where the protection is "implicit in the concept of ordered liberty"); *accord Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986) (White, J., majority opinion) (embracing both *Moore* and *Palko*, for the test to establish a fundamental right, that right must be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty"); *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) (majority opinion) (holding that rights arise from "history and tradition" but adapt so as not to exclude new groups from the right[2]."). For that reason, it is insufficient to assume the existence of a liberty interest based on "isolated factors" (such as a genetic link and an established parental relationship) utilized in prior decisions. *Michael H.*, 491 U.S. at 123. Instead, the interests become constitutionally protected only where their protection would align with "the historic respect . . . traditionally accorded to" that interest. *Id.* In matters of parent-child relationships, the keystone is whether the particular parent-child relationship "has been treated as a protected family unit under the historic

[2] Any argument that "Gestational carriers" should be a new group to be included must fail. T.B. never would have received the Ms' genetic material without signing the contract with the promises it contained. To allow her to become a parent through these means would either deprive the Ms of the same right, force P.M. to be a father against his will (i.e., with T.B.), or both.

practices of our society, or whether, on any other basis, it has been accorded special protection." *Id.* at 124. Because the relationship between a gestational carrier and the carried child has not been so protected, a liberty interest does not exist between Baby H and T.B.

Similar to Michael in *Michael H. v. Gerald D.*, the Bs' entire argument rests upon the faulty assumption that merely establishing a biological and emotional relationship—albeit fraudulently obtained—gives rise to a protected liberty interest. *Compare* (Pet. 12 (stating the surrogate is the mother "as a matter of biological and scientific fact")), *with* 491 U.S. at 123 (holding the existence of a biological link and an emotional relationship is insufficient, on its own, to trigger liberty interest protection). No prior decision by this Court affords constitutional protection of T.B.'s claimed rights. Neither has this Court suggested the protection of gestational carrier's relationship with a carried child "has been treated as a protected family unit under the historic practices of our society" or for any other reason. *Michael H.*, 491 U.S. at 124. Indeed, Petitioners cite no federal law or precedent that even suggests "traditional protection" of this sort of relationship. The Iowa court addresses this matter when it cites laws in Iowa, California, New Hampshire, Virginia, and Washington, all of which prevent gestational surrogates from asserting these protected interests. (Pet. App. 19a, 27a–28a, 31a n. 4 (citing Iowa Admin Code r. 641—99.15; Cal. Fam. Code § 7962(f)(2); N.H. Rev. Stat. Ann. §§ 168-B:1 to B:32; Va. Code Ann. §§ 20-156 to 20-165; Wash Rev. Code Ann. 26.26.210-.260)); *accord Michael*

H., 491 U.S. at 143 n. 2 (stating traditional protection "must at least exclude . . . a societal tradition of enacting laws denying the [asserted] interest).

Traditional protection of these types of relationships cannot exist because in vitro fertilization (IVF), "egg donation, and gestational surrogacy are decidedly modern phenomena." (Pet. App. 16a.) (quoting *Morrissey v. United States*, 871 F.3d 1260, 1269 (11th Cir. 2017) (further citations omitted)). In fact, "[t]he 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 conjunctions with IVF procedures." *Morrissey*, 871 F.3d 1260, 1269 (11th Cir. 2017). With this background, the Iowa courts correctly refused to create a liberty interest between gestational carrier and child. Creating such an interest would remove the issue of gestational surrogacy from "the arena of public debate and legislative action." *See id.* at 1270 (quoting *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))). On a more basic level, even this "Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State. . . ." *Michael H.*, 491 U.S. at 122 (quoting *Moore v. East Cleveland*, 431 U.S. at 544 (White, J., dissenting)). Iowa has both legislation and administrative regulations in this area, indicating its assent to both traditional and gestational surrogacy. Iowa Code § 710.11 (2018); Iowa Admin. Code 641—99.15(6)(d).

Again, Petitioners cite no law to support their contention that a United States court has embraced the right to be "free from state enforced exploitation" as a liberty interest. (Pet. 22, 31.) Instead of arguing theories of economic duress or unconscionability, Petitioners claim women are categorically unable to knowingly enter these agreements because they conclude any agreement concerning reproduction is inherently exploitative such that it violates their newly asserted liberty interest. (Pet. 32; Pet. App. 35a.) Despite ambiguity in the purported right's terms, both lower courts considered the asserted right and determined the contract is not inherently exploitative as a matter of law. (Pet. App. 35a; 88a–89a.) Moreover, both courts found Petitioners' contention, that women are unable to freely and knowingly enter contracts of this nature, "carries overtones of the reasoning that for centuries prevented women from attaining equal rights and profession status under the law." (Pet. App. 36a.) (citing *Johnson v. Calvert*, 851 P.2d 776, 785 (1993)). The Iowa courts acknowledge the public policy of the state of Iowa and a woman's interest to being treated equally under the law prevails against the specious right asserted by Petitioners.

Then, for a third time, Petitioners seek to create constitutional protection that does not exist—this time under the Equal Protection Clause of the Fourteenth Amendment. The thrust of their argument is that T.B.'s right to Equal Protection entitles her to be identified as the biological mother, regardless of Iowa law that excludes a gestational carrier from this definition.

(Pet. 29.) Not only does this claim disregard the terms of the Agreement, but it fails to acknowledge that the intricacies of intra-family relationships—especially where asserted protected relationships might conflict with each other—are questions of legislative policy rather than constitutional law. *Compare Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968) (holding that Louisiana statute precluding recovery in a wrongful death action by decedent's illegitimate, biological mother was impermissible because the Court saw no rational basis in precluding recovery merely because the child was born out of wedlock) *with Michael H.*, 491 U.S. at 124 (upholding a presumption of paternity statute, which precluded a genetic father from rebutting that presumption, as a policy decision properly left to state legislatures, in light of competing constitutional interests); *see* discussion infra, p. 13–15. Assuming, *arguendo*, Petitioners succeed in their argument equal protection rights apply, they identify no classification created by the statute or contract. It is only after identifying a classification that a court can apply scrutiny to that classification, under the Equal Protection Clause of the Fourteenth Amendment. *Clark v. Jeter*, 486 U.S. 456, 461 (1998). Petitioners also fail to suggest any level of scrutiny and fail to contemplate that States have rational—or even compelling interests—in balancing competing legal relationships that arise from biological connections. *Michael H.*, 491 U.S. at 124. Moreover, Petitioners cite no law or case that suggests the Due Process Clause can invalidate a freely entered contract.

This Court should reject certiorari because Petitioners waive the "rights" they assert, because the waiver was of a known right, was voluntary, and was fully informed. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *accord* (Pet. App. 35a (finding "T.B. entered into the Surrogacy Agreement voluntarily. She had given birth to four children of her own before signing the surrogacy Agreement, was no stranger to the effects of pregnancy, [and] does not allege she signed the surrogacy Agreement under economic duress or that its terms are unconscionable.")) Regardless of this waiver, Petitioners' application should be denied because the underlying rights asserted by Petitioners are not protected by the laws of the United States. Supposing protection does extend to these "rights," the lower court decisions did not violate those rights because that question is one of State law.

B. The Iowa courts' decisions rest on state, not federal, law.

The decision of the Iowa Supreme Court rests on Iowa law, further warranting denial of the Petition. The Iowa Supreme Court correctly followed this Court's jurisprudence in balancing and deciding who held the parent-child relationship in this case. As this Court has recognized, "[i]n the vast majority of cases, state law determines the final outcome" of "legal problems arising from the parent-child relationship." *Lehr*, 463 U.S. at 256. Particularly where a "claimed interest derives from a knowingly assumed contractual relation[ship], it is appropriate to ascertain from state law

the expectations and entitlements of the parties." *Smith*, 431 U.S. at 845–46. Though the Iowa Constitution contains similar language to that of the United States Constitution, "it is the exclusive prerogative of [the Iowa Supreme Court] to determine the constitutionality of Iowa statutes challenged under [the Iowa] Constitution." *Callender v. Skiles*, 591 N.W.2d 182, 187 (1999) (citations omitted); *accord Racing Ass'n Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 5 (Iowa 2004) (choosing not to follow this Court's interpretation of the United States Constitution when analyzing similar language contained in the Iowa Constitution).

Here, the Iowa courts found, as a matter of Iowa law, Petitioner failed to meet her burden to invalidate a contract on public policy considerations. (Pet. App. 23a.) Then, on "a question of [Iowa] statutory interpretation," they found T.B. is not a "parent according to applicable [Iowa] statutes and regulations." (Pet. App. 38a, 41a.) Finally, returning to Iowa contract law, they found T.B. waived her right to assert any constitutional claim that could invalidate the contract. (Pet. App. 47a–48a.)

Regarding the contractual claims, the Iowa courts found, but for the Agreement, the "Ms would not have entrusted their embryos to T.B." (Pet. App. 31a.) Indeed, but for this Agreement, "Baby H would not exist." (Pet. App. 31a.) For this reason, it is clear because the only possible interest between T.B. and Baby H

arises from T.B.'s "knowingly[3] assumed contractual relationship" with the Ms.[4] *Smith*, 431 U.S. at 845. As a result, state law necessarily governs "the expectations and entitlements of the parties" regarding that interest. *Id.* at 845–46. Petitioners cite no federal rule to require a different holding.

For the same reasons, Iowa's interpretation of the applicable Iowa statutes must govern. Again, the statutes and regulations contemplated here define and manage the legal problems arising from complex biology-related relationships. *Lehr*, 463 U.S. at 256. A primary reason these complex questions are left to the states is that they contemplate opposing interests. When a claimed parent-child liberty interest opposes that of another person, the resolution of these conflicting interests becomes a question "of legislative policy and not constitutional law." *Michael H.*, 491 U.S. at 124. Thus, it is entirely the province of the Iowa court to embrace legislative action, which favors the relationship between Baby H and P.M., and disfavors that with T.B. *See Smith*, 431 U.S. at 846 (holding "it is one

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[3] The Iowa court specifically found T.B. knowingly assumed this contractual relationship because "[s]he had given birth to four children of her own before signing the Surrogacy Agreement and was no stranger to the effects of pregnancy." (Pet. App. 35a.)

[4] Of note, the fact T.B.'s claimed interests derive from contract rather than tradition or history, indicates that the relationship between a gestational carrier and the child she carries is not protected under the Due Process Clause. *See Smith*, 431 U.S. at 845 (finding protected rights have "origins entirely apart from the power of the State," while an unprotected right finds "its source in . . . contractual arrangements. . . ." *Smith*, 431 U.S. at 845).

thing to say that individuals may acquire a liberty interest against arbitrary interference in the family-like associations into which they have freely entered. . . . 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—an interest the [surrogate carrier] has recognized by contract from the outset.") At best, the relationship interests asserted by T.B. and P.M. are in conflict. According to the holdings of both *Michael H.* and *Smith*, where conflicting interests exist, states have a choice, as a matter of public policy, to protect one interest over another. 491 U.S. at 124; 431 U.S. at 846. This policy choice is exactly what occurred in the State of Iowa. Thus, this matter rests on state law, not federal, and certiorari must be denied.

CONCLUSION

The writ should be denied because the Iowa Supreme Court's decision rested squarely on Iowa law

and the relationship, if any, between gestational carrier and the child she birthed lacks a protectable liberty interest.

Respectfully submitted,

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