No. 17-

IN THE

Supreme Court of the United States

MELISSA KAY COOK, INDIVIDUALLY AND MELISSA KAY COOK, AS GUARDIAN *AD LITEM* OF BABY A, BABY B AND BABY C,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Melissa Cook simultaneously filed a counterclaim in the California family court and a complaint in the federal district court pursuant to 42 U.S.C. §1983, both challenging the constitutionality of California's surrogacy statute as violative of the Due Process and Equal Protection rights of herself and the three children she carried. The family court held that it lacked jurisdiction to entertain the constitutional claims because the state statute under review forbids its constitutional scrutiny. For that reason, the family court refused to consider the constitutional issues at all, permit Cook to present evidence, or make findings of fact. The federal district court erroneously dismissed Petitioners' complaint based upon the *Younger* Abstention Doctrine. The California appellate court subsequently affirmed the family court holding that it lacked authority to entertain the constitutional claims or hold a hearing. The California appellate court held that the statute was consistent with the state's public policy and, exclusively for that reason, assumed it to be constitutional without directly deciding the federal issues. The Ninth Circuit held that the district court erred by abstaining, but refused to decide the federal questions or remand them, based upon "issue preclusion," thereby denying Petitioners any hearing on their constitutional claims by any state or federal court. The question presented is:

Where a state trial court held that it lacked the jurisdiction to decide federal constitutional issues and refused to consider them, can the federal courts avoid deciding those federal constitutional issues by invoking the doctrine of "issue preclusion" based upon the state appellate court's illusory consideration of those issues?

PARTIES TO THE PROCEEDINGS

Petitioner, Melissa Kay Cook, is the mother who gave birth, at age 47, to three babies born ten weeks prematurely. The children were conceived pursuant to a gestational surrogacy arrangement with ova from an anonymous donor. Ms. Cook was the first party to file an action in this matter, which asserted the violation of the 14th Amendment Due Process and Equal Protection rights of the three children and herself. That Superior Court Complaint was dismissed because the so-called intended father subsequently filed an "uncontested" petition in family court to enforce the contract and terminate Ms. Cook's parental rights. Ms. Cook filed an answer and counterclaim which reasserted those constitutional claims. The very next day, she filed in federal district court a complaint pursuant to 42 U.S.C. §1983 asserting as-applied and facial challenges to enforcement of the California statute as violative of the Equal Protection and Due Process rights of both mother and children. The district court determined that Ms. Cook could litigate the rights of the children as guardian ad litem.

Baby A, Baby B, and Baby C, are the designations for the male triplets born to Ms. Cook in Los Angeles County, California, on February 22, 2016.

Respondent Cynthia Ann Harding, M.P.H. is sued in her official capacity as the Director of the Los Angeles County Department of Public Health which issues birth certificates for children born in Los Angeles County.

Respondent Jeffrey D. Gunzenhauser, M.D., M.P.H. is sued in his official capacity as the Health Officer and

Medical Director for the Los Angeles County Department of Public Health. He works under the supervision of Director Harding, and is the state employee personally responsible for issuing birth certificates in Los Angeles County.

Respondent Dean C. Logan is sued in his official capacity as the Registrar-Recorder/County Clerk of Los Angeles County who is responsible for issuing and changing birth certificates after children become one-year old following birth.

Respondent Edmund G. Brown, Jr. is sued in his official capacity as the Governor of the State of California. Governor Brown is responsible for the Executive Branch of the State of California, which includes the issuance of birth certificates administered through the California Department of Public Health.

Respondent Karen Smith, M.D., M.P.H. is sued in her official capacity as the Director and State Public Health Officer for the California Department of Public Health which is responsible for the issuance and maintenance of birth certificates of children born in the State of California.

Respondent C.M., here designated by his initials, is a single man who contracted as an "intended father" of Baby A, Baby B and Baby C. C.M., who was 50 years old, lives in the basement of his elderly and disabled parents' home in Georgia. C.M. is deaf and does not speak. Following the triple embryo transfer performed in California, C.M. stated that he could not raise the children, first asked to have all three children aborted, and then made

repeated demands that Ms. Cook abort one of the children. After Ms. Cook refused to abort any of the children, he announced that he would surrender one of the children for adoption.

Kaiser Foundation Hospital, Panorama City Medical Center is the hospital at which Ms. Cook gave birth to the three children. Its agents and employees acted to enforce the family court's judgment.

Payman Roshan is the Senior Vice President of Panorama City Medical Center responsible for patient care. He supervised the administration of the enforcement of the family court judgment.

TABLE OF CONTENTS

Table of Contents

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

STATUTES AND OTHER AUTHORITIES

Page

PETITION FOR A WRIT OF CERTIORARI

Melissa Kay Cook, individually, and Melissa Kay Cook in her capacity as Guardian *ad Litem* of Baby A, Baby B, and Baby C respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 879 F.3d 1035 (2018). *See*, Pet. App. A. The opinion of the United States District Court (C.D. California) is reported at 190 F. Supp. 3d 921 (2016). *See*, Pet. App. B.

A related opinion of the California State Court of Appeal, which is relevant to this petition, is reported at (2017) 7 Cal. App. 5th 1188 (Ct.App. 2d Div.1). *See*, Pet. App.C.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 12, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourteenth Amendment of the United States Constitution and California's "gestational surrogacy" statute, Cal. Fam. Code §7962, are set forth at Appendix E and F to this petition respectively.

STATEMENT OF THE CASE

A. Nature of the Action

The complaint in this case was filed by petitioner in the United States District Court, Central District for California, on February 2, 2016. The complaint was filed pursuant to 42 U.S.C. §1983 asserting claims challenging the constitutionality of California's "Gestational Carrier" Statute, Cal. Fam. Code §7962 as violative of Petitioners' Due Process and Equal Protection Rights guaranteed under the Fourteenth Amendment, on its face and as applied to Melissa Cook and Babies A, B and C. 3ER 297-298, 367-376,[Second Amended Complaint (SAC), ¶¶ 1; 195-222].

The case arises out of a "gestational surrogacy" contract dated June 3, 2015 entered into between Petitioner Melissa Cook, a 47 year old California woman and C.M., a single, 50 year old man living in Georgia who is deaf and does not speak. 3ER 305,315 [SAC ¶¶19,47].

After a triple embryo transfer resulted in Petitioner Cook becoming pregnant with triplets, C.M. repeatedly demanded that Ms. Cook abort one or more of the unborn children because he could not raise them. 3ER 320-327 [SAC ¶¶67-90].

Following a long dispute, Cook determined that it was not in the children's best interest, and contrary to her moral obligations to the babies, for her to surrender the three children to a man who clearly could not care for them. 3ER 327 [SAC ¶90]. She had offered to raise one or more of the children in light of his inability to raise

them all, but C.M. refused, and because Melissa refused to abort any of them, he announced his intention to give up at least one of them to a stranger in an adoption. 3ER 327 [SAC ¶91].

The complaint in this case was filed on behalf of Melissa Cook and all three of the babies, Baby A, Baby B and Baby C. By order dated February 12, 2016, the district court granted Cook's motion to act as the children's guardian *ad litem* to litigate the children's constitutional rights. The complaint sets forth ten claims for relief including claims alleging the violation of the children's substantive Due Process rights not to be sold or treated as a commodity, which sale is promoted and enforced by the state; for the violation of the children's right to maintain their relationship with their birth mother with whom they bonded; the violation of the children's Equal Protection rights to be placed based upon their best interests and to maintain their relationship with their birth mother; Melissa Cook's substantive Due Process right to maintain her relationship with her children, and to be free from state promoted and state enforced exploitation of her; and Melissa Cook's Equal Protection rights to receive the same legal protections as those provided to all other birth mothers. In addition, the complaint set forth a claim for violating the procedural Due Process rights of Cook and the children since the state court refused to consider their constitutional claims, denied them a fact finding hearing, and completely denied them any opportunity for a full and fair hearing on their claims.

B. Statement of Facts

1. Facts Relating to the Underlying Dispute

Petitioner Cook is now 49 years old. 2ER 223[Declaration of Melissa Cook (hereafter "Cook"), ¶1]. Surrogacy International ("S.I.") is a California surrogacy broker which solicited Cook to act as a surrogate for C.M., a single fifty year old man. Petitioner has never met C.M. or spoken with him. 2ER 224-225[Cook, ¶¶9-11]; 3ER 314-315 [SAC ¶¶44-45]. C.M. is deaf, has never been married, and lives in Georgia with two elderly disabled parents. His mother is confined to bed. 3ER 305, 314-315 [SAC ¶19; ¶¶44-47]. C.M. does not speak. 2ER 287[Affidavit of Eduardo Alford ¶7]. C.M. has stated that he is not capable of raising three children. S.I. did not arrange for a home study to determine whether C.M. was capable of raising any children, let alone triplets. 3ER 315-316[SAC ¶¶46-49].

S.I.'s owner, Robert Walmsley, drafted the contract signed by Cook and C.M. By its terms, ova donated by an anonymous woman was to be fertilized with sperm donated by C.M., and Cook was to submit to a long series of hormone injections, and an "embryo transfer," was to carry the children to term, give birth and surrender the children to C.M. Melissa Cook's parental rights, and the rights of the children, were to be terminated pursuant to Family Code §7962, and C.M. was to be declared the only legal parent of the children. 3ER 316[SAC ¶50].

Before the surrogacy contract was signed, C.M. sent Petitioner an email stating that he was committed to accepting responsibility to raise three children. 2ER 225[Dec. Cook, ¶¶12-13]. 3ER 316-317[SAC ¶51].

On June 13, Melissa Cook started a drug regimen required by the surrogacy contract to prepare her body to accept the embryo transfers. 2ER 225-226[Cook, ¶¶15-19]. That drug regimen and the fertility techniques used in surrogacy arrangements, posed significant risks to Cook and the children. 3ER 317-319[SAC,¶¶54-62]; 2ER 198-204[Declaration of Anthony Caruso, MD., ("Caruso"), ¶¶7-27]. At the request of C.M., three male embryos were transferred on August 17, 2015. 2ER 226[Cook, ¶20]; 3ER 320[SAC, ¶¶64-66].

On September 16, 2015, C.M. first mentioned an abortion. On September 17, C.M. sent an email to Fertility Institute, which monitored Cook's pregnancy:

> "Please try to make her (Melissa's) visits less often, because I get a bill that costs me a lot of money. ... It causes me financial problems not to be able afford triplets (sic) maybe even twins that worries me so bad for real." 2ER 226[Cook, ¶23]; 3ER 320-321[SAC, ¶68].

On September 18, the infertility clinic wrote to C.M. that because the pregnancy was such a high risk, Melissa had to be seen each week, noting that the risk came with C.M.'s request that three embryos be transferred. 2ER 226-227[Cook, ¶24]; 3ER 321[SAC, ¶69]. That day C.M. wrote to Walmsley, with a copy to Cook, stating:

> "I *cannot afford to continue M.'s to visit weekly* (sic) in the fertility institute because of our contract that *I never anticipated something such worse (sic) like draining my finances so fast. ... I do not want to abort twin babies, but*

> *I felt that is such possible (sic) to seek aborting all three babies*. I do not want to affect Melissa's health. *I do not have any more money in the bank, and my job does not pay great biweekly.*" (Emphasis added). 2ER 227[Cook, ¶25]; 3ER 321-322[SAC, ¶70; ¶72].

Petitioner became anxious as she began to realize that C.M. was not capable of properly caring for the children. 2ER 227-228[Cook, ¶¶26-29]; 3ER 321-322[SAC, ¶72].

Petitioner wrote to C.M.:

> "You need to make a decision if you want any of these babies so that I know what to expect. I have been really upset and nervous and anxiety ridden." 2ER 228[Cook, ¶30]; 3ER 322[SAC, ¶73].

Petitioner wrote to C.M. stating that they had to make a plan for the third baby and that she would, in order to assist him, raise all the children herself for a few months. In September Melissa first realized that he may not be able to care for them at all. 2ER 228[Cook, ¶31]; 3ER 322[SAC, ¶¶74-75].

On September 22, 2015, Petitioner wrote:

> "Do you even know what you want/can do? Are you able to afford and love and have the support to care for all three babies? You need to realistically look at the situation in hand. They will most likely come early and I will try my best to go as long as possible. ...We have to

> do what's best for these babies." 2ER 228[Cook, ¶32]; 3ER 322[SAC, ¶76].

C.M. wrote to Cook that day that he wanted an abortion and was exercising a term under the contract for a "Selective Reduction,":

> "*I would decide to select - reduct (sic) one of three babies*, ... I will tell them 3 weeks ahead before November 9 that *I would look for twin babies*." (Emphasis added). 2ER 228-229[Cook, ¶33]; 3ER 322-323[SAC, ¶77].

On September 23, Cook advised C.M. that she would not "abort any of them...I am not having an abortion. They are all doing just fine." 2ER 229[Cook, ¶34]; 3ER 323[SAC, ¶78].

Both C.M. and Walmsley made it clear that the reason that C.M. wanted the abortion was because he was not capable of raising three children. On October 28, C.M. mentions, in an email, that he may "start looking agencies for adoptive parents (sic)." On November 12, Petitioner reported to C.M. that Baby B was kicking and that she heard the babies' heart beats. She wrote that if he wanted to raise only two of the children that she "would love to raise and love" the third child. In response C.M. wrote that he "would encourage" her to "consider selection reduction (sic)." 2ER 229-230[Cook, ¶¶35-38]; 3ER 323-324[SAC, ¶¶79-82].

On November 16, 2015, C.M. wrote to Cook and advised her that "... *I had decided ... to pursue reduction*." On November 24, C.M. wrote: "*My decision made is,*

requires a selection reduction (sic)." On November 27, C.M. wrote again stating "*I made my decision which is best*. ..." (All Emphasis added). 3ER 324-325[SAC, ¶¶83-84]; 2ER 230-231[Cook, ¶¶39-41].

On September 24, Walmsley wrote to Melissa's attorney: "Triplets for a married couple is hard enough. Triplets for a single parent would be excruciating; triplets for a single parent who is deaf is - well beyond contemplation." 3ER 325[SAC, ¶¶85-86]; 2ER 231[Cook, ¶¶42-43, (Cook Exhibit 19)].

On November 20, C.M.'s attorney wrote to Petitioner threatening to sue her for large money damages if she continued to refuse to have an abortion. He cited as a reason an abortion was necessary was that "C.M. is a single male and is deaf." 3ER 326[SAC ¶88]; 2ER231-232[Cook, ¶45, (Cook Exhibit 21)].

Late November, 2015, Cook learned for the first time that S.I., and Walmsley admitted that they never did a home study of C.M.'s living arrangement. 2ER 232-233[Cook, ¶49]. Cook advised C.M. that she would not abort a child and that she would raise the child herself. C.M.'s response was that he intended to surrender the child to a stranger. 3ER 327[SAC ¶91]; 2ER 232-233[Cook, ¶49]; 2ER 215-217[Declaration of Harold Cassidy ¶¶7-14].

2. The Mother-Child Relationship

Throughout the pregnancy, Melissa Cook bonded with the children and the children bonded with her. 3ER 332-337[SAC, ¶¶106-116]. Cook is the mother of Babies A, B and C, as a matter of biological fact, and she and

the children had an existing relationship during the pregnancy. That relationship was greatly beneficial to the children, and destruction of the bond and relationship between them is harmful to the children. 3ER 332-340[SAC ¶¶106-121]; 2ER106-124[Declaration of Alma Golden, M.D. ("Golden") ¶¶11-51.]. A mother provides an essential benefit throughout the early and late stages of childhood.3ER340-351[SAC¶¶122-138];2ER79-91[Declaration of Miriam Grossman, M.D. ("Grossman") ¶¶9-45]; Golden, *supra*. It has recently been confirmed that the mother's relationship with her children during pregnancy results in significant changes in the mother's brain, and studies confirm that such changes are detectable in eleven different parts of her brain. Hoekzema, E., et al., "Pregnancy Leads to Long-lasting Changes in Human Brain Structure," Nature Neuroscience, 19 Dec. 2016; doi:10.1038/nn.4458. These changes in the mother's brain prepare her to better respond to her child's needs. *Id.* These physiological changes, in part, explain the differences between the way mothers and fathers provide care for a child. 3ER 344-351[SAC, ¶¶127-137]. It is cruel to deliberately plan to deprive the children of their mother. 3ER 346-351[SAC, ¶¶130-137]. The breaking of the bond between Melissa Cook and the three babies is detrimental to the welfare of the children. *Id*. *See* also, Bystrova K, Ivanova V, Edborg M, Matthiesen AS, Ransjo-Avidson AB, Mukhamedrakhimov R, Uvnas-Moberg K, Widstrom AM. (2009), Early Contact Versus Separation: Effects on Mother-infant Interaction One Year Later, Birth 36(2), 97-109.; Hardy LT. (2007), Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications, Journal of Child and Adolescent Psychiatric Nursing, 20(1), 27-39; Shonkoff JP, Garner AS, The Committee on Psychosocial Aspects of Child and

Family Health, Committee on Early Childhood, Adoption, and Dependent Care, and Section on Developmental and Behavioral Pediatrics; Siegel BS, Dobbins MI, Earls MF, et al. (2012), the Lifelong Effects of Early Childhood Adversity and Toxic Stress, Pediatrics. 129(1): e232-46.

The only criteria used to give sole custody of the children to C.M., is that C.M. paid for the children, despite the fact he was not capable of raising them. 3ER 352-353[SAC ¶¶143-144]. The use of a woman as a so-called gestational carrier is intrinsically exploitive and harmful to the woman as well as the child. 3ER 353-365[SAC ¶¶146-185]; 2ER 150-159[Declaration of Barbara K. Rothman, Ph.D., ("Rothman"), ¶¶9-36]. IVF techniques in embryo creation and transfer places the women at far greater risk of physical harm than normal pregnancy, and places the children at greater risk for anomalies and pre-term birth. 2ER 198-199[Caruso,¶¶6-9]. The mother is also subjected to abnormal and significant risks of the drug regimen. 2ER 201-203[Caruso, ¶¶18-25]; 3ER 317-319[SAC ¶¶54-62]. The exploitive nature of the agreement is exacerbated by the common practice of demanding "selective reduction," which poses great risk for the children and for the mother. 2ER 199-201; 203-204[Caruso, ¶¶10-17; ¶27].

C. Procedural History and Rulings Under Review

Introduction

The complaint in this case was filed in the federal district court on February 2, 2016, in response to the California Supreme Court dismissing petitioners' state court complaint *sua sponte* and refusing to address the constitutional claims asserted on behalf of Cook

and the three babies. Cook's state court complaint was filed on January 4, 2016, and dismissed *sua sponte* on January 7 because C.M. filed a petition in the California family court which he claimed was "uncontested." C.M.'s petition was filed after he had been served with Cook's complaint. The Superior Court instructed Cook to file her claims in a proceeding in which the family court had no jurisdiction to decide the federal constitutional questions. Forced to respond in the family court, petitioner Cook filed an answer and counterclaim on February 1, which raised all of the constitutional issues asserted in her original complaint. Because petitioner realized that the California state court signaled that it would not determine the constitutionality of its surrogacy statute, petitioner simultaneously prepared a federal complaint pursuant to 42 U.S.C. §1983, which was filed on February 2, 2016.

1. Proceedings in the Lower State Court

(a) Initial Pleadings and Proceedings

On January 4, 2016, Cook filed a Civil Complaint in the Superior Court of California, on her own behalf and on behalf of the three children. 2ER 291[Declaration of Michael Caspino, Esq. ("Caspino"), ¶3]. Petitioner sought a Declaration that California's Gestational Surrogacy contract was unconstitutional as violative of the rights of Cook and the three children she carried, sought injunctions and custody based on the best interests of the children. Complaint, *M.C. v. C.M.* (LC103726). It was served on C.M. at his home in Georgia on January 5, 2016. 2ER 291[Caspino, ¶4]. On January 7, 2016, Cook's attorney appeared *ex parte* seeking a temporary restraining order precluding C.M. from filing an uncontested Petition for

termination of Melissa Cook's parental rights. The family court process was established to enforce Cal. Fam. Code §7962 and is calculated to foreclose constitutional claims like Cook's. C.M.'s attorney appeared. 2ER 291[Caspino, ¶4.]

Despite the fact that C.M. was served with M.C.'s Complaint on January 5, and he was notified of the *ex parte* hearing on January 6, Mr. Walmsley filed a Petition (BF054159), representing that the Petition was uncontested and that Petitioner wanted her parental rights terminated. 4ER 543["Appearance, Stipulations, and Waivers Form FL-130" ("The parties agree that this cause may be decided as an uncontested matter;" "The parties waive their rights to notice of trial ... and the right to appeal;" and that "both parties have signed waiver of rights.")]. C.M. also submitted a "stipulation for entry of judgment" which stated: "The parties further agree that the Court make the following orders:"Declaration for Default or Uncontested Judgment" which stated "the parties have stipulated that the matter may proceed as an uncontested matter." 4ER 553. The form of judgment submitted stated that the case was uncontested. 4ER 555. Those representations were known by C.M. to be false. 2ER 291[Caspino, ¶5].

C.M.'s Petition states: "All parties have agreed that at all times relevant, the intent of each and every party to the surrogacy agreement was that the Petitioner is the natural, genetic, and sole legal parent of the children..." 4ER 531[Pet. ¶9]. That statement was false. C.M. also signed a sworn Declaration stating that he believed that Cook was willing to relinquish her parental rights. 4ER 540[Dec of C.M. ¶10]. C.M. knew that was a false statement

based upon communications with Cook. Based on those false statements, the family court scheduled a proceeding for February 9, 2016, for entry of an uncontested judgment terminating the rights of Melissa Cook and the children. 2ER 291[Caspino ¶5]. On January 7, the Honorable Russell Kussman dismissed Cook's complaint, instructing Cher to file her pleadings in the family court. 2ER 291[Caspino, ¶6].

On February 1, Cook filed her verified answer to C.M.'s petition, separate defenses, and verified counterclaim. 2ER 291[Caspino,¶7]; 4ER 459-526[answer and counterclaim]. Cook's verified counterclaim contained twelve causes of action, seeking among other things: (a) declaratory judgment that Fam. Code §7962 violates the Due Process and Equal Protection rights of Baby A, Baby B, and Baby C guaranteed by the Fourteenth Amendment of the United States Constitution as it is applied to them, and on its face; (b) declaratory judgment that Fam. Code §7962 violates the Due Process and Equal Protection rights of Cook guaranteed by the Fourteenth Amendment as it is applied to her, and on its face; (c) declaratory judgment that the surrogacy contract cannot form the basis to terminate Petitioner's parental rights and the children's relationship with their mother; and related injunctive relief and an Order awarding immediate legal and physical custody of Baby C to Melissa Cook and scheduling a hearing to place Baby A and Baby B based on their best interests.

Melissa Cook filed her Complaint in the Federal District Court the next day on February 2.

(b) The Proceedings in Family Court on February 8 and 9, 2016

Petitioners filed an *ex parte* application on February 4, seeking a continuance of the uncontested hearing scheduled for February 9th, and other relief. 2ER 291[Caspino, ¶8]; 4ER 445-458[*Ex Parte* Application]. That *Ex Parte* Application disclosed that Petitioners had filed a Verified Answer and Counterclaim, and that C.M. had no intention of raising all three children, that he was probably not capable of raising any children, and that he intended to surrender at least one child to an "adoption." 4ER 449-453[*Ex Parte* Application].

The family court scheduled the hearing on the ex parte application for February 8th. What ensued was a stunning denial of any semblance of Due Process. Judge Amy Pellman denied Petitioner's application for the continuance, proceeded as if the petition was uncontested with Cook's consent, and summarily ruled that C.M. was entitled to a judgment terminating the relationship between the three children and Cook. 3ER 396-402[Transcript of court proceedings 2/9/16, Pp.91:16-97:28].

The Court refused to consider the counterclaim. 3ER 389-390[Transcript of court proceedings 2/9/16, Pp.25:26-26:2]; 3ER 412-413[Transcript of court proceedings 2/8/16, Pp.16:16; 16:27-28; 17:15; 17:27-28].

Judge Pellman barred Cook from producing any evidence. 3ER 410[Transcript, 2/8/16, P.14:11-21]. Counsel for Cook asked if the Court would take any evidence on Cook's allegations that C.M. did not intend to, and cannot,

accept, legal responsibility to raise the children. The Court responded:

> "There's no need for home study. There's no need for representation of the children. There's no need for any of that under the code," stating that is "not relevant to my particular hearing." 3ER 410-411[Transcript of court proceedings 2/8/16, Pp.14:26-15:1; 15:2-3].

When counsel asked whether the well-being of the children was going to be considered by the Court. 3ER 411[Transcript of court proceedings 2/9/16, P.15:6-9], Judge Pellman stated:

> "...*What is going to happen to these children once they are handed over to C.M., that's none of my business. It's none of my business. And that's not part of my job.*" (Emphasis added). 3ER 412[Transcript of court proceedings 2/8/16, P.16:3-6].

The court observed a best interests determination is required in other actions, but "surrogacy" is the one exception. 3ER 412[Transcript of court proceedings 2/8/16, P.16:6-8].

There was a total deprivation of Due Process in a proceeding that terminated the fundamental constitutional rights of Melissa Cook and the three babies she carried. Mr. Caspino inquired: "I ask how the court is going to dispose of our Counterclaim ..." 3ER 412[Transcript of court proceedings 2/8/16, P.16:9-10].

The court admitted that the entire case was disposed of without the court ever reviewing Cook's verified answer and counterclaim. 3ER 412-413[Transcript of court proceedings 2/8/16, Pp.16:16; 16:27-28; 17:15; 17:27-28]. On February 9th, Mr. Caspino again asked the court: "May I inquire as to how the court is handling our counterclaim." 3ER 390[Transcript of court proceedings 2/9/16, P.26:3-5].

The court refused to consider the verified answer and counterclaim stating that she was only dealing with a "petition to determine parentage. That's it." 3ER 392[Transcript of court proceedings 2/9/16, P.28:1]. The court refused to consider the constitutional claims. The court insisted that the hearing on C.M.'s petition continue uncontested and conclude before she addressed the counterclaim. 3ER 393[Transcript of court proceedings 2/9/16, P.84:22-24]. Judge Pellman stated:

> "And so, therefore, the Court denies, if there are counterclaims ...the Court denies them." 3ER 394[Transcript of court proceedings 2/9/16, P.89:10-12].

It was clear from this and other comments that the court never read or knew the content of the verified answer and counterclaim, because she held that she had no jurisdiction to entertain the claims. The court entered final judgment terminating the rights of the three children and those of Melissa Cook. 3ER 394-396[Transcript of court proceedings 2/9/16, Pp.89:10-91:15].

The court signed the form of the order for an uncontested proceeding originally submitted by C.M. with the petition. That order did not recite that Melissa Cook

opposed the petition, or that she filed a verified answer and counterclaim. It did not even recite that Mr. Caspino appeared on behalf of Melissa Cook. The order was the same one submitted by C.M. The two orders are identical. See and compare, 4ER 557-563[Verified Petition, Pp.1-7] with 4ER 437-443[Judgment, P.1-7].

Following the proceedings of February 9, Petitioner gave birth on February 22, 2016. That day, Defendant Kaiser refused to even allow Petitioner to see any of the three babies as they were being born. She was not permitted to know their condition, or even their weights. The hospital posted two security guards to prevent Petitioner from seeing the children, and required all visitors show identification. 2ER 233-234[Cook, ¶¶53-56]; 2ER 292[Caspino, ¶¶12-14].

C.M. stayed in Georgia while the children were in the hospital for eight weeks without a parent. 2ER 234[Cook, ¶58]. The entire experience was dehumanizing to Petitioner, and after she left the hospital, she refused to accept any of the $19,000 she was owed by C.M., under the terms of the contract, because she would be taking money in exchange for the children she had come to love. 2ER 234[Cook, ¶57;¶59]. Shortly after February 9, the Petitioner filed a Notice of Appeal in the California Court of Appeal.[1]

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1. Petitioner can proffer that upon remand it can be shown that the three babies were scheduled to be discharged from the hospital on or about April 22, 2016. However, when C.M. arrived at the hospital, the doctors and staff would not release the children directly into his care. The hospital required C.M., because of his demonstrated inability, to keep the children in the hospital for an additional 7 to 10 days so the hospital could give him parenting

2. Proceedings in the Federal District Court

All of the Defendants filed motions to dismiss the federal complaint filed on February 2, 2016, solely on the basis that a case was pending in the State Court, and that the *Younger* Abstention Doctrine required dismissal of Cook's Federal Complaint.

Oral argument was conducted before Judge Otis Wright, III, on May23, 2016. On June 6, 2016, Judge Wright committed reversible error by entering a final order dismissing the complaint based upon the *Younger* Abstention Doctrine. The district court failed to address the controlling decision of the U.S. Supreme Court in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 585 (2013). At the time that order was entered, the court knew that Cook's state court complaint was dismissed, that her counterclaim in the family court was ignored, and that both state courts had refused to decide any of the federal constitutional issues. The Federal District Court, ignoring *Sprint Communications* altogether, refused to discharge its obligation to decide the federal issues because the court asserted that one of the upper state courts might do so in the future.

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classes. At the end of that period, his incompetence was such that the hospital provided three nurses to fly to Georgia with him to insure they arrived safely. Georgia's children's services conducted an investigation. These facts are relevant to the as applied constitutional issues upon remand. Cook filed a motion in the U.S. Court of Appeals seeking an order allowing supplementation of newly discovered facts that proved that the children had been abused and neglected and that C.M. is an unfit parent. That motion was denied, but upon remand they can be proven by competent evidence.

3. Proceedings in the Ninth Circuit

Petitioner Cook timely filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit. After the case was fully briefed, but before oral argument on January 26, 2017, the California Court of Appeal rendered a decision affirming the family court's determination that it lacked jurisdiction under California law, to consider the constitutional issues they raised, and that the California statute was, in effect, immune from constitutional scrutiny. On January 12, 2018, the U.S. Court of Appeals, while ruling that the U.S. district court committed reversible error in abstaining from deciding the federal claims, affirmed the decision on the basis that the California Court of Appeal purported to decide those federal issues. In fact, the Doctrine of Issue Preclusion does not apply in this case and the Ninth Circuit effectively abstained.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Introduction

This case involves some of the most important fundamental rights and liberties protected by the Fourteenth Amendment, and illustrates the importance of citizens being able to litigate their federal constitutional claims in a federal court pursuant to 42 U.S.C. §1983. The California state courts evidenced a jealous guardianship of California law and policy which promotes surrogate contract arrangements without prior regard or determination of its constitutionality. The state family court held California's statute was not subject to constitutional scrutiny. The

California Court of Appeal affirmed that holding. Indeed, the California Court of Appeal expressed concern that if the state statute were to be found constitutionally deficient it would likely negatively affect the California surrogacy trade.

> "Permitting a surrogate to change her mind about whether the intended parent would be a suitable parent ... would undermine the predictability of surrogacy arrangements. We agree ... 'we are at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could ... 'decide' ... [to] challenge their parenting abilities in court.'" *C.M. v. M.C.*, (2017) 7 Cal. App. 5th 1188, 1203 (Ct.App. 2d D.Div. 1).

The primary concern must be the constitutional rights of the mother and children, not whether California's surrogacy marketplace will be adversely impacted.

> "The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law 'whether that action be executive, legislative or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1975).

This Court has pointed out that it was clear that the intent of §1983 was to protect individuals from the failure of the state courts to protect their federal rights. *Id.* at 240-243; *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980); *see, also, Ex Parte Virginia*, 100 U.S. 339, 346-348 (1879).

The California Superior Court dismissed Petitioner Cook's complaint *sua sponte*, forcing her to file a counterclaim, in the family court which lacked the jusdiction to decide the constitutional issues. Realizing that the state courts were refusing to entertain her constitutional claims, she filed this §1983 action the day after filing her counterclaim. She sought protection from the state's refusal to consider the federal constitutional rights of the children or herself.

I. The Decision of the United States Court of Appeals in this Case Conflicts with the Relevant Decisions of this Court Relating to Important Public Issues and the Ninth Circuit Decided an Important Federal Question that has not Been, But Should Be, Decided by This Court.

This issue arises here in the context of a 47 year old mother, pregnant with triplets, seeking the protection of the courts against the violation of the most basic of intrinsic human rights. After being exploited and abused, she sought review of laws that had, as one of its central purposes, the destruction of the mother-child relationship – a relationship which is the touchstone and core of all civilized society – without regard for the harm it causes the children and the mothers who carries them, and how it violates some of their most fundamental intrinsic constitutional rights.

The federal courts (and clearly the state courts) failed in its obligations to Cook and the children; first, the U.S. district court when it refused to obey this Court's clear mandate in *Sprint Communications Inc.*, when it inexplicably abstained, and then the U.S. Court of Appeals

when it failed to decide the federal issues or remand the case for fact finding, ignoring controlling precedent of this Court.

A. The Decision of the Ninth Circuit Conflicts with the Decisions of this Court Concerning Issue Preclusion

1. The California Family Court's Refusal to Consider the Federal Issues in the Counterclaim, Provide a Hearing, or Make Findings of Facts Relevant to the Constitutional Claims, Renders the State Court's Proceeding Without Preclusive Effect

"Issue preclusion...bars 'successive litigation of an issue of fact or law *actually* litigate and *resolved* in a valid court determination...'" *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001) (emphasis added).

This Court has explained that the doctrine of issue preclusion applies only where the right, question or fact put in issue is "directly determined" by the first court. *Montana v. United States*, 446 U.S. 147, 153 (1979) (citing *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)). A prior litigation only precludes a court in the second case from deciding the issues if the litigant had a *full and fair opportunity* to litigate." *Taylor*, 553 U.S. at 892 (emphasis added). *See, also, Montana v. United States*, 44 U.S. at 153.

Thus, it is not enough that the plaintiff had "an opportunity" to list her claims in a pleading. An opportunity to litigate her claims must be a "full and fair" one, meaning a full opportunity to present facts, fully raise pertinent legal issues, *and* the prior court had to *actually* decide the Federal issues *directly*. The fact that Cook raised the issues in a counterclaim is irrelevant because the family court refused to consider the federal issues, refused to allow them to be presented, denied Cook an opportunity to present facts, and ruled that it had no jurisdiction under California law to consider the counterclaim.

The California Court of Appeal affirmed the family court's holding that no constitutional challenge can be brought against the statute, stating:

> "The record shows that the trial court gave M.C. the hearing that Section 7962 contemplates ... Section 7962 specifies that the only showing necessary to obtain an order ... extinguishing claims of parental rights by a surrogate is 'proof of compliance with this section.' (§7962 subdivision (f)(2).) Upon such a showing, the judgment or order 'Shall terminate any parental rights of the surrogate ... *without further hearing or evidence* ... [T]hus, Section 7962 does not leave room for litigating challenges to the parental rights of intended parents on any basis beyond the circumstances and content of the surrogacy agreement itself. The trial court therefore properly denied M.C.'s counterclaim under Section 7962 subdivision (f)(2) without further proceedings

> ... [the counterclaim] asserted broad claims challenging the legitimacy and constitutionality of surrogacy agreements ... Under Section 7962 subdivision (f)(2), no 'further hearing or evidence' was required to consider such claims." *C.M. v. M.C.*, 7 Cal. App. 5th 188, 1207-08 (emphasis in original).

As a result, the relevant facts have never been litigated or determined at all in the state court. There was never a fact finding hearing or a determination of facts relevant to the facial attack, and certainly no fact finding as it pertained to the constitutionality of the statute "as applied" to Babies A, B, and C, and Melissa Cook.

If allegations of facts were not subject to a trial, and no findings of fact were ever made, litigation of those facts is not precluded in a subsequent litigation even if the dispute was generally litigated. What was not actually and directly decided is not subject to preclusion. *Amadeo v. Principal Mutual Life Insurance Co.*, 290 F.3d 1152, 1159 (9th Cir. 2002) (citing *Arizona v. California*, 530 U.S. 392, 414 (2000)); *See, also*, *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980).

Amadeo cited this Court in *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955), for its holding that a "judgment dismissing previous suit unaccompanied by findings did not bind the parties on any issue," and *Englehardt v. Bell & Howell Co.*, 327 F.2d 30, 36 (8th Cir. 1964), holding that there is no preclusive effect of a prior case where there is no trial and no findings of fact.

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the U.S. Supreme Court held that a prior case could not preclude the subsequent litigation if the estoppel is "unfair" such as, that court noted, "when the second action affords the (litigant) procedural opportunities unavailable in the first action that could readily cause a different result." *Id.*, at 331-32.

In this case, the state court held it lacked jurisdiction and therefore: (1) failed to consider the counterclaim; (2) failed to hold a fact finding hearing pertaining to the counterclaim; (3) failed to make findings of fact; and (4) did not decide the constitutional issues.

The family court was an inadequate tribunal forced upon Cook when her complaint was dismissed *sua sponte*.

Among the facts relevant to the constitutional challenges were those that demonstrated the intrinsic harm the surrogacy arrangements have for the children, and the harm caused by the deliberate destruction of the mother-child relationship.

The facts and opinions set forth in the declarations of Melissa Cook's experts, Dr. Anthony Caruso, M.D. (A196-204), Dr. Miriam Grossman, M.D. (A77-99), Dr. Alma L. Golden, M.D., F.A.A.P. (A100-145), and Barbara Katz Rothman, Ph.D. (A146-195), are all relevant to both the facial and "as applied" challenges to the statute. The declarations pertain to the actual physical and psychological relationships of Melissa Cook with the three babies, harm to the children and Ms. Cook, facts relevant to the exploitation of both the mother and the children, which all relate to their Due Process and Equal

Protection claims. There are facts unique to petitioners' "as applied" claims, some relating to the unfitness of C.M., his conduct that is abusive to the children, all of which the state court stated was irrelevant to enforcement of its statute, and refused to consider them as they related to the constitutional issues.

2. The California Court of Appeal Did Not, and Could Not, Actually and Directly Decide the Federal Issues Such that its Holding Could Preclude their Litigation in the Federal Court

Cook advanced seven facial constitutional claims and seven "as applied" claims in her counterclaim filed in the family court. None of them were actually litigated or directly decided.

This Court held that federal courts must "give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

California courts employ a two-tier approach to determine if they should apply issue preclusion. Initially, the court determines whether threshold requirements are met, and if so, it then evaluates if "application of preclusion furthers the public policies underlying the doctrine." *In re Harmon*, 250 F. 3d 1240, 1245 (citing *Lucido v. Superior Court*, 795 P. 2d 1223, 1226 (Cal. 1990) (*en banc*).

> "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have

> been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits."

Lucido v. Superior Court, 795 P. 2d 1223, 1225 (Cal. 1990) (*en banc*) (emphasis added).

None of those requirements were met in this case.

The 9th Circuit totally ignored the fact that both the family court and the California Court of Appeal held that the law did not permit a hearing on the constitutional issues. It also ignored the fact that all the state appellate court did was hold that the statute was consistent with California's public policy as previously stated in *Johnson v. Calvert*, 5 Cal. 4th 846 (1993), which was decided 19 years before §7962 became law. *Johnson* did not decide any of the constitutional issues advanced by Cook. None of the constitutional issues presented by Cook were before the court in *Johnson. Johnson* merely held that surrogacy arrangements were consistent with California's public policy. But that was never in doubt. The question was whether California's public policy, as expressed through the enforcement provisions of §7962, was consistent with the U.S. Constitution.

Throughout its opinion, the California Court of Appeal in what it labeled as its "constitutional" analysis, continually referenced California's "public policy" and the fact that the Surrogacy Statute was consistent with that policy (as originally announced in *Johnson v. Calvert*, 5 Cal. 4th 846 (1993)). *See*, e.g. *C. M. v. M.C.,* 7

Cal.App. 5th 1188, 1202-1208 (there is no Due Process violation because the state's policy is to limit the hearing to technical compliance with the statute, which does not allow a constitutional challenge); *Id.* at 1209 (there can be no violation of the children's right to maintain a relationship with the only mother they had because "that result would conflict with the fundamental holding of *Calvert* that surrogacy agreements are not inconsistent with public policy"). *Id.* at 1209 (the constitutional claim that the Due Process rights of the children are violated by the state enforced sale is inconsistent with the state's public policy that prohibition for sale in adoptions does not apply to surrogacy, citing *Calvert*). There were numerous other references to California's public policies and acknowledgment by the California Court of Appeal that all *Calvert* did was announce California's public policy, recognizing that *Calvert* did not decide the constitutional issues raised by Cook. The California Court of Appeal admitted that it was merely reciting what the state's public policy is. "We do not believe that our Supreme Court would have held that surrogacy contracts in *Calvert* was consistent with public policy if it believed that the surrogacy arrangement violated a constitutional right." *C.M. v. M.C.*, at 1212, fn. 14.

The 9th Circuit refused to examine the basis for the Court of Appeal's decision, stating that it did not matter whether the Court of Appeal "relied on cases that addressed only public policy considerations or on no cases at all." *Cook v. Harding*, 879 F.3d 1035, 1042-43 (9th Cir. 2018). In determining whether an issue was "actually litigated," however, courts must "look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any

special jury findings or verdicts." *Hernandez v. City of Pomona*, 207 P.3d 506, 514 (2009).

As this "Court has repeatedly recognized[,]" issue preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

Similarly, the 9th Circuit, following the precedent of this Court, previously held that findings of facts are a necessary component of "actual litigation" *Amadeo v. Principal Mutual Life Insurance Co.*, 290 F.3d 1152, 1159 (9th Cir. 2002) (citations omitted).

"Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 (1982) (quoting *Montana v. United States*, 440 U.S. 147, 164, n.11 (1979)).

Moreover, this case is akin to the disfavored use of "offensive estoppel" in that Cook did not select the state court forum. As this Court has stated it can be unfair to apply offensive estoppel when "the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

> "If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage

> in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action."

Id. at 331, fn.15 (1979) (emphasis added) (citations omitted). That is the case here.

The principle which disfavors "offensive estoppel" is surely offended in this case where the state tribunal lacked jurisdiction to consider the federal issues. Ironically, the Ninth Circuit decision in *Shaw v. California Dept. of ABC*, 788 F.2d 600 (9th Cir. 1986), directly conflicts with its decision in this case. There it was held that a state appellate decision did not preclude the federal court from deciding a federal issue addressed by the state appellate court, where the lower tribunal had limited jurisdiction. It didn't matter that appellate courts possessed jurisdiction in *Shaw*, the Ninth Circuit stating:

> "In considering whether there was jurisdiction to determine an issue directly the first time it was decided, a court looks to the jurisdiction of the court that conducted the hearing or trial in which the issue was raised, and not the

> jurisdiction of the appellate court that reviewed the lower court's decision." *Id.* at 607.

This court has never before decided issues relating to a court of appeals refusing to decide a federal constitutional question based upon an alleged "preclusion" where the federal district court admittedly, improperly abstained from deciding federal constitutional claims. There needs to decide those issues where, as here, the state court dismissed petitioner's complaint and forced her to litigate in a state court which lacked jurisdiction to entertain the federal claims.

B. Applying the Doctrine of Issue Preclusion in this Case Undermines the Public Policies Underlying that Doctrine

In this case, even if petitioner's federal constitutional claims were actually litigated and necessarily decided – which they clearly were not – application of issue preclusion would subvert the very policies the doctrine seeks to further. Its purpose is to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); see also, *Lucido v. Superior Court*, 795 P. 2d 1223, 1227 (Cal. 1990) (*en banc*). None of those policies would be advanced by applying the doctrine in this case.

Before applying issue preclusion, a court must determine "whether its application in a particular circumstance would be fair to the parties and constitute sound judicial policy." *Lucido v. Superior Court*, 795 P. 2d 1223, 1226 (Cal. 1990) (*en banc*). In short, the "court must balance the need to limit litigation against the right

to a fair adversary proceeding in which a party may fully present his case." *Jackson v. City of Sacramento*, 117 Cal. App. 3d 596, 601 (Ct. App. 1981). Issue preclusion "is not an inflexible, universally applicable principle; policy considerations may limit its use where the limitation on relitigation underpinnings of the doctrine are outweighed by other factors." *Jackson v. City of Sacramento*, 117 Cal. App. 3d 596, 603 (Ct. App. 1981).

1. Application of Issue Preclusion to This Case Undermines the Integrity of the Judicial System.

The Ninth Circuit states: "[g]iving the Court of Appeal's opinion preclusive effect is in the interest of both comity and consistency." *Cook v. Harding*, 879 F.3d 1035, 1043 (9th Cir. 2018) (citing *Lucido v. Superior Court*, 795 P. 2d 1223, 1229 (Cal. 1990) (*en banc*)).

In light of the failure of the district court to discharge its obligations imposed by this Court in *Sprint Communications*, it was especially important for the Ninth Circuit to diligently adhere to the public policies behind the Preclusion Doctrine.

Here, any risk to public confidence in the integrity of the judicial system by potentially different results between the state and federal court systems is outweighed by the damage to the integrity of the judicial system which is caused when litigants are prevented from having their important federal constitutional claims heard by any court whatsoever.

In *Lucido*, the court refused to apply issue preclusion to bar the State from prosecuting Mr. Lucido even though the State had previously presented evidence and called witnesses on the same issue during Lucido's probation revocation hearing. *See, Lucido v. Superior Court*, 795 P. 2d 1223, 1233 (Cal. 1990) (*en banc*). *Lucido* held that "[p]robation revocation hearings and criminal trials serve different public interests, and different concerns may shape the People's pursuit of revocation and conviction." *Lucido v. Superior Court*, 795 P. 2d 1223, 1229-30 (Cal. 1990) (*en banc*). Undesirability of inconsistent results was outweighed by the greater risk of undermining the integrity of the judicial system "by displacing full determination of factual issues in criminal trials." *Lucido v. Superior Court*, 795 P. 2d 1223, 1229 (Cal. 1990) (*en banc*).

> "The rule urged by appellant would have the effect of barring full and fair litigation of the question of a defendant's criminal guilt due to a less formal proceeding which involved entirely different purposes, policies, procedures and issues."

Lucido v. Superior Court, 795 P. 2d 1223, 1227 (Cal. 1990) (*en banc*) (quoting *Chamblin v. Municipal Court*, 130 Cal. App. 3d 115, 121 (Ct. App. 1982) (emphasis added).

In this case, as outlined above, the family court proceeding was jurisdictionally limited to evaluating the parties' compliance with the technical requirements of Cal. Fam Code §7962, with no opportunity to be heard on the constitutional issues. The family court's less formal proceeding relating to C.M.'s "uncontested" petition

involved "entirely different purposes, policies, procedures, and issues" provided in a §1983 action. *Lucido v. Superior Court*, 795 P. 2d 1223, 1227 (Cal. 1990) (*en banc*) (quoting *Chamblin v. Municipal Court*, 130 Cal. App. 3d 115, 121 (Ct. App. 1982).

2. Application of Issue Preclusion to This Case Fails to Promote Judicial Economy.

The Ninth Circuit held that giving preclusive effect to the California Court of Appeal's opinion "preserves judicial resources by ending this two-year set of proceedings in which Cook chose to litigate her identical claims simultaneously in two forums." *Cook v. Harding*, 879 F.3d 1035, 1043 (9th Cir. 2018). This statement is factually incorrect, in that Cook never chose to litigate her claims in the family court.

Rather, C.M., by improperly filing his petition as an "uncontested" matter in the family court, which had no jurisdiction to decide the federal claims, after receiving notice that Cook filed her complaint in the California Superior Court, Cook was given no choice but to counterclaim to preserve her constitutional claims in the family court which had no jurisdiction to decide the federal issues. Cook was thus compelled, the very next day, to file the instant §1983 action in federal district court to have the ability to challenge the enforcement of §7962 as violative of the Fourteenth Amendment. Under these circumstances, Cook cannot be faulted for including her constitutional claims in her family court counterclaim, and should not be penalized for asserting claims that might have been deemed waived if she had not done so.

In addition, no judicial resources were spent on the constitutional claims, because no court ever considered them and uniformly acted to ensure that her constitutional claims were never heard.

Therefore, precluding Cook's claims would not promote judicial efficiency. If there was any waste of judicial resources, it was because all five of the courts which even purported to consider this matter assiduously avoided a hearing on the constitutional claims. Whatever efficiencies might be gained by applying issue preclusion, they are clearly offset by the importance of ensuring that weighty federal constitutional claims will be heard by the courts.

3. Applying Issue Preclusion in This Case Does Not Protect Litigants From Vexatious Litigation.

The "essence of vexatiousness is not … mere repetition," but "harassment through baseless or unjustified litigation." *Lucido v. Superior Court*, 795 P. 2d 1223, 1232 (Cal. 1990) (*en banc*). The district court had concurrent jurisdiction, and was unequivocally obligated to decide the case on the merits pursuant to controlling precedent in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (NOPSI) and *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013). The district court abstained and the 9th Circuit held that the district court "was wrong to abstain." *Cook v. Harding*, 879 F.3d 1035, 1041 (9th Cir. 2018). Accordingly, Cook's efforts to vindicate her constitutional claims in the federal courts were legitimate.

The 9th Circuit did not claim that Cook advanced the constitutional claims in order to harass, and conceded that "pursuit of her constitutional claims may not have been 'baseless or unjustified.'" *Cook v. Harding*, 879 F.3d 1035, 1043 (9th Cir. 2018) (quoting *Lucido v. Superior Court*, 795 P. 2d 1223, 1232 (Cal. 1990) (*en banc*)).

The state court held it had no jurisdiction to decide Cook's claim.

There has never been a full and fair opportunity to litigate the constitutional claims, and no court has directly decided them. Therefore, it is "neither vexatious nor unfair" for Cook to press the constitutional claims in the federal courts. *Lucido v. Superior Court*, 795 P. 2d 1223, 1232 (Cal. 1990) (*en banc*). Therefore, the 9th Circuit's application of issue preclusion did not advance the public policy of protecting litigants from vexatious litigation.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 12, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-55968

MELISSA KAY COOK, INDIVIDUALLY;
MELISSA KAY COOK, AS GUARDIAN *AD LITEM*
OF BABY A, BABY B, AND BABY C,

Plaintiffs-Appellants,

v.

CYNTHIA ANNE HARDING, M.P.H., DIRECTOR OF THE LOS ANGELES COUNTY DEPARTMENT OF PUBLIC HEALTH, IN HER OFFICIAL CAPACITY; JEFFERY D. GUNZENHAUSER, M.D., M.H.P., HEALTH OFFICER AND MEDICAL DIRECTOR FOR THE LOS ANGELES COUNTY DEPARTMENT OF PUBLIC HEALTH; DEAN C. LOGAN, REGISTRAR-RECORDER/COUNTY CLERK FOR LOS ANGELES COUNTY IN HIS OFFICIAL CAPACITY; EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA; KAREN SMITH, M.D., M.P.H., DIRECTOR AND STATE PUBLIC HEALTH OFFICER FOR THE CALIFORNIA DEPARTMENT OF PUBLIC

Appendix A

HEALTH; C. M., AN ADULT MALE BELIEVED TO BE THE GENETIC FATHER OF BABY A, BABY B AND BABY C; KAISER FOUNDATION HOSPITAL; PANORAMA CITY MEDICAL CENTER; PAYMAN ROSHAN, SENIOR VICE PRESIDENT AND PATIENT ADMINISTRATOR OF PANORAMA CITY MEDICAL CENTER; XAVIER BECERRA,* ATTORNEY GENERAL,

Defendants-Appellees.

November 9, 2017, Argued and Submitted,
Pasadena, California
January 12, 2018, Filed

Appeal from the United States District Court for the Central District of California. D.C. No. 2:16-cv-00742-ODW-AFM. Otis D. Wright II, District Judge, Presiding.

Before: Stephen Reinhardt and Kim McLane Wardlaw, Circuit Judges, and Wiley Y. Daniel,** District Judge. Opinion by Judge Reinhardt.

REINHARDT, Circuit Judge:

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* Xavier Becerra is substituted for his predecessor, Kamala Harris. Fed. R. App. P. 43(c)(2).

** The Honorable Wiley Y. Daniel, United States District Judge for the U.S. District Court for Colorado, sitting by designation.

Appendix A

OPINION

The California legislature enacted California Family Code Section 7962 ("Section 7962") to codify California cases that found gestational surrogacy contracts enforceable.[1] Among other matters, Section 7962 authorizes the judicial determination of legal parentage in accordance with the terms of a gestational surrogacy agreement prior to the birth of any child so conceived.

Melissa Cook entered into a gestational surrogacy agreement with C.M. pursuant to Section 7962. By the terms of the 75-page contract, titled "In Vitro Fertilization Surrogacy Agreement" ("Agreement"), Cook agreed to the implantation of embryos created with ova from an anonymous woman and sperm from C.M., to carry any pregnancy to term, and to surrender upon birth the child or children to C.M. Under the contract, Cook's parental rights would be terminated by court order prior to the birth of any child or children in accordance with Section 7962, and C.M. would be declared the only legal parent. Following the embryo transfer, Cook became pregnant, and eventually learned that she was carrying three fetuses. Cook's relationship with C.M. soured when they disagreed during her pregnancy about selective reduction of the fetuses. Triplets were born on February 22, 2016.

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1. *See* Cal. Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011-2012 Reg. Sess.) as amended April 26, 2011, at pp. 1-3; Cal. Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011-2012 Reg. Sess.) as amended June 11, 2012, at p. 4.

Prior to the birth, Cook began her legal quest to challenge the constitutionality of Section 7962. On January 4, 2016, she filed a complaint in the Los Angeles County Superior Court alleging that Section 7962 was unconstitutional and seeking a parentage declaration. The court struck this complaint because it was filed in the wrong court and without proper service. On January 6, 2016, C.M. filed a petition in the Children's Court within the Los Angeles County Superior Court to enforce the contract and be declared the sole legal parent of the children. On February 1, 2016, Cook filed a counterclaim in response to C.M.'s petition, again challenging the validity of the Agreement and the constitutionality of Section 7962. The following day, she filed a nearly identical complaint in federal district court against C.M. as well as state and county personnel, raising her constitutional claims under 42 U.S.C § 1983. The district court abstained pursuant to *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), and dismissed the case. *Cook v. Harding*, 190 F. Supp. 3d 921, 938 (C.D. Cal. 2016). Cook appealed.

DISCUSSION

"We review a district court's decision to abstain under *Younger* de novo and do not defer to the view of the district judge." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727 (9th Cir. 2017). We conduct the *Younger* analysis "in light of the facts and circumstances existing at the time the federal action was filed." *Potrero Hills Landfill, Inc. v. Cty. of Solano*, 657 F.3d 876, 881 n.6 (9th Cir. 2011).

"We may affirm the district court on any ground[] supported by the record." *Schechner v. KPIX-TV*, 686 F.3d 1018, 1022-23 (9th Cir. 2012).

I. *Younger* Abstention

"*Younger* 'abstention remains an extraordinary and narrow exception to the general rule that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."'" *Nationwide*, 873 F.3d at 727 (quoting *Potrero Hills*, 657 F.3d at 882 (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) ("*NOPSI*"))). Abstention in civil cases "is appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (citing *Sprint Commc'ns., Inc. v. Jacobs*, 134 S. Ct. 584, 593-94, 187 L. Ed. 2d 505 (2013)).

At issue is the second prong of the *ReadyLink* test: whether this case falls within either of the two types of civil cases—quasi-criminal enforcement actions or cases involving a state's interest in enforcing the orders and judgments of its courts—in which *Younger* abstention is appropriate. The district court ignored Supreme Court precedent and our circuit's controlling law when it abstained without conducting this required analysis.

See Cook, 190 F. Supp. 3d at 934-38. Instead, it relied on previous applications of *Younger* abstention to family law cases and the state's unique interest and sole jurisdiction in the law of domestic relations. *See id.* We write to clarify that *Younger* abstention is improper in civil cases outside of the two limited categories referred to above, regardless of the subject matter or the importance of the state interest.

We explained in *ReadyLink* that the extension of *Younger* began shortly after that case was decided. *See* 754 F.3d at 758. This steady expansion included the application of *Younger* abstention to family law cases. *Moore v. Sims*, 442 U.S. 415, 435, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979) (abstaining from constitutional challenge to state custody removal proceedings); *see also, e.g., H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613-14 (9th Cir. 2000) (abstaining where plaintiff sought injunction to vacate child custody determinations). As the class of cases in which federal courts abstained pursuant to *Younger* continued to grow, at least some eminent jurists objected that this thwarted the federal courts' "virtually unflagging obligation," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), to exercise the jurisdiction vested in them by Congress. *See, e.g., Juidice v. Vail*, 430 U.S. 327, 343-44, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977) (Brennan, J., dissenting) ("It stands the § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum . . . . Rather than furthering principles of comity and our federalism, forced federal abdication in this context undercuts . . . the protection and vindication of important and overriding federal civil rights . . . .").

After more than forty years of unchecked doctrinal expansion, the Supreme Court changed course and made clear that *Younger* abstention was appropriate only in the two "exceptional" categories of civil cases it had previously identified: (1) "civil enforcement proceedings"; and (2) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 134 S. Ct. at 591 (quoting *NOPSI*, 491 U.S. at 368). Our circuit soon adapted our law to comply with this holding. We explained that *Sprint* resolved any "interpretive dilemmas" about the types of proceedings to which *Younger* applies when it "squarely" held that abstention in civil cases is limited to these two categories. *See ReadyLink*, 754 F.3d at 759. Other circuits have done the same. *See, e.g., Doe v. Univ. of Ky.*, 860 F.3d 365, 369 (6th Cir. 2017); *Google, Inc. v. Hood*, 822 F.3d 212, 222 (5th Cir. 2016); *Banks v. Slay*, 789 F.3d 919, 923 (8th Cir. 2015); *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 189, 191-93 (1st Cir. 2015); *Falco v. Justices of the Matrimonial Parts of Sup. Ct. of Suffolk Cty.*, 805 F.3d 425, 427-28 (2d Cir. 2015); *Mulholand v. Marion Cty. Election Bd.*, 746 F.3d 811, 815-16 (7th Cir. 2014); *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 129, 132-38 (3d Cir. 2014).

We emphasize that federal courts cannot ignore *Sprint*'s strict limitations on *Younger* abstention simply because states have an undeniable interest in family law. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004); *see also Moore*, 442 U.S. at 435. *Sprint* gave us cause to once more "believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper

subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967) (citation omitted). Indeed, the law of domestic relations often has constitutional dimensions properly resolved by federal courts. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). We must enforce the mandated constraints on abstention so that such constitutional rights may be vindicated.

This case does not fall within either category of civil cases which *Sprint* held warrant *Younger* abstention. 134 S. Ct. at 593-94; *ReadyLink*, 754 F.3d at 759. First, Cook's state court constitutional challenge to Section 7962 is not a civil enforcement proceeding. In *Sprint*, the Court explained that civil enforcement proceedings are generally "akin to a criminal prosecution" in "important respects":

> Such enforcement actions are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act. In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action. Investigations are commonly involved, often culminating in the filing of a formal complaint or charges.

134 S. Ct. at 592 (internal citations omitted). *Sprint* cited *Moore* as an example of a quasi-criminal enforcement action. *Id.* In *Moore*, parents challenged the constitutionality of parts of the Texas Family Code that permitted removal of their children following allegations of child abuse. *See* 442 U.S. at 418-20. Prior to the parents' action, the state had initiated proceedings alleging child abuse, leading to an investigation and subsequent custody hearings. *See id.* Although this case, like *Moore*, involves a constitutional challenge to a state family law scheme, none of the characteristics of an enforcement proceeding exemplified in *Moore* are present here.

Defendants nonetheless argue that the state court proceedings are "a civil enforcement proceeding brought by C.M. to enforce the terms of a properly executed assisted reproduction agreement." We have squarely foreclosed this broad interpretation of an enforcement proceeding: "If the mere 'initiation' of a judicial . . . proceeding were an act of civil enforcement, *Younger* would extend to every case in which a state judicial officer resolves a dispute between two private parties." *ReadyLink*, 754 F.3d at 760. The interpretation of a provision of the California Family Code also does not transform this into a civil enforcement proceeding because "litigants request that a court . . . interpret a statute, a regulation, or the common law" in most every case. *Id.*

Second, Cook's state action is not within the category of cases that involve "the State's interest in enforcing the orders and judgments of its courts." *ReadyLink*, 754 F.3d at 759 (citations omitted). Defendants contend that

the case falls within this category because challenges to parentage determinations could impede the state courts' ability to make other decisions based on that parental status, such as custody and child support. This is an argument regarding the state courts' power to apply its laws in subsequent proceedings and the state's interest in its interrelated family laws. It does not relate to the state courts' ability to enforce compliance with judgments already made. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (abstaining from challenge to state court's procedures regarding bonds on appeal after entry of a monetary judgment); *Juidice*, 430 U.S. at 336 (abstaining from challenge to state court's civil contempt process).

Following *Sprint*, we have made clear that the category of cases involving the state's interest in enforcing its courts' orders and judgments does not include cases involving "a 'single state court judgment' interpreting [a private agreement] and state law" because such cases do not implicate "the process by which a state 'compel[s] compliance with the judgments of its courts.'" *ReadyLink*, 754 F.3d at 759 (quoting *Potrero Hills*, 657 F.3d at 886). Cook does not question the *process* by which California courts compel compliance with parentage determinations under state law. Rather, she alleges that Section 7962 is unconstitutional. Cook accordingly challenges the legislative prescriptions of Section 7962. As the Court held even before *Sprint, Younger* does not "require[] abstention in deference to a state judicial proceeding reviewing legislative . . . action." *NOPSI*, 491 U.S. at 368.

This case does not fall within the two limited categories of civil cases that "define *Younger*'s scope." *Sprint*, 134 S. Ct. at 591. The district court thus was wrong to abstain.

II. Preclusion

We may not consider events after the filing of the complaint for purposes of our *Younger* analysis, *Potrero Hills*, 657 F.3d at 881 n.6, but we must consider subsequent developments for purposes of preclusion, *see ReadyLink*, 754 F.3d at 760-61. Here, the subsequent state court decision on the merits of Cook's constitutional claims precludes further litigation of these issues in federal court. On February 9, 2016—just one week after Cook filed her complaint in federal court—the Children's Court denied Cook's counterclaim to C.M.'s parentage petition, which included her constitutional claims. Cook appealed to the California Court of Appeal, which affirmed in a published opinion on January 26, 2017. *C.M. v. M.C.*, 7 Cal. App. 5th 1188, 213 Cal. Rptr. 3d 351 (Ct. App. 2017). The California Supreme Court denied review, and the Supreme Court denied certiorari, *M.C. v. C.M.*, 138 S. Ct. 239, 199 L. Ed. 2d 189 (2017), cert. denied.

We must give the same preclusive effect to the California Court of Appeal's judgment as California courts would. *Gonzales v. Cal. Dep't of Corrs.*, 739 F.3d 1226, 1230-31 (9th Cir. 2014). "Issue preclusion 'bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim.'" *ReadyLink*, 754 F.3d at 760 (quoting

Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)). California's test for issue preclusion has five threshold requirements:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Id. at 760-61 (quoting *Lucido v. Superior Court*, 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223, 1225 (Cal. 1990) (in bank)).

Cook does not and could not credibly argue that the issues in the two proceedings are different; the factual allegations she made in both state and federal court are almost identical in the literal sense of the word. *See Hernandez v. City of Pomona*, 46 Cal. 4th 501, 94 Cal. Rptr. 3d 1, 207 P.3d 506, 514 (Cal. 2009) ("The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." (quoting *Lucido*, 795 P.2d at 1225)). Nor does Cook dispute the finality of the Court of Appeal's opinion or that she was a party in the state court proceeding. Instead, her

arguments against issue preclusion appear to be directed at the second and third requirements: whether the issues were actually litigated and necessarily decided in the state court proceeding.

In the context of issue preclusion, an issue is actually litigated "[w]hen [it] is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *People v. Sims*, 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321, 331 (Cal. 1982) (quoting Rest. 2d, Judgments (1982) § 27, com. d, p. 255); *see also Hernandez*, 207 P.3d at 514. To be necessarily decided, California law requires "only that the issue not have been 'entirely unnecessary' to the judgment in the initial proceeding." *Lucido*, 795 P.2d at 1226. The two requirements are therefore interrelated. Inasmuch as an issue was necessarily decided in a prior proceeding, it was also actually litigated. *See In re Baldwin*, 249 F.3d 912, 919 (9th Cir. 2001); *see also In re Harmon*, 250 F.3d 1240, 1248 n.9 (9th Cir. 2001) (explaining that the converse proposition is not true).

Cook's position is that her constitutional claims "have never been directly addressed and decided." This is baseless in light of the Court of Appeal's thorough and well-reasoned opinion, which devotes over eight pages to addressing each of her constitutional challenges in turn. *See C.M.*, 213 Cal. Rptr. 3d at 363-70. The relevant section of the opinion begins with the heading "[Cook]'s Constitutional Challenges Fail." *Id.* at 363. After finding that Cook had standing, the Court of Appeal explicitly proceeded to the merits of her constitutional claims, *id.*

at 366 ("We therefore proceed to the merits of [Cook]'s constitutional claims."), and finally concluded "that the Agreement did not violate the constitutional rights of [Cook] or the children," *id.* at 370. On the basis of this language and the Court of Appeal's analysis, there is no question that any and all constitutional claims were necessarily decided in the state court proceeding.

Cook nevertheless insists that the Court of Appeal did not decide her claims because it relied upon prior California cases that were decided on public policy rather than constitutional grounds. She argues that because the cited precedent did not address or decide all of the constitutional issues she raised, the Court of Appeal's decision is likewise limited and engaged in no further, independent analysis. We need not parse Cook's reading of the earlier California cases. Whether the Court of Appeal relied on cases that addressed only public policy considerations or on no cases at all, it still had the authority to decide Cook's constitutional claims, *see* Cal. Const. Art. 6, §§ 1, 3; *see also, e.g., Schmoll v. Chapman Univ.*, 70 Cal. App. 4th 1434, 1436, 83 Cal. Rptr. 2d 426 (1999) (deciding establishment and free exercise issues of first impression); *People v. Bye*, 116 Cal. App. 3d 569, 573, 172 Cal. Rptr. 186 (1981) (deciding due process issue of first impression); *In re David G.*, 93 Cal. App. 3d 247, 250, 155 Cal. Rptr. 500 (1979) (deciding equal protection issue of first impression), and it unequivocally decided them here. Moreover, it squarely addressed this exact argument:

> [W]e are not persuaded by [Cook]'s assertion that "the public policy considerations raised in

> [*Johnson v. Calvert*, 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (Cal. 1993) (in bank)] are not applicable to a constitutional challenge." We do not believe that our Supreme Court would have held that the surrogacy contract in *Calvert* was consistent with public policy if it believed that the surrogacy arrangement violated a constitutional right.

C.M., 213 Cal. Rptr. 3d at 370 n.14; *see also id.* at 368 n.12. Throughout its lengthy opinion, the Court of Appeal acknowledged the limits of *Calvert* before extending *Calvert*'s reasoning to Cook's claims and completing its own constitutional analysis. *See id.* at 367-70. We thus find that all of Cook's constitutional claims were necessarily decided as well as actually litigated.

If the threshold requirements of issue preclusion are met, a court must consider "whether preclusion would be consistent with the 'preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.'" *ReadyLink*, 754 F.3d at 761 (quoting *Lucido*, 795 P.2d at 1227). Preclusion in this case furthers these "public policies underlying the doctrine." *Lucido*, 795 P.2d at 1226. Giving the Court of Appeal's opinion preclusive effect is in the interest of both comity and consistency. *See id.* at 1229. It preserves judicial resources by ending this two-year set of proceedings in which Cook chose to litigate her identical claims simultaneously in two forums. Finally, Cook's pursuit of her constitutional claims may not have been "baseless or unjustified," *see id.* at 1232, but

the legally irrelevant and deeply disparaging allegations about C.M's ability, intellect, and socioeconomic status throughout her pleadings are wholly inappropriate. For these reasons, we decline to "tackle anew the precise legal issue[s] resolved by the California Court of Appeal." *ReadyLink*, 754 F.3d at 762.

CONCLUSION

The district court was wrong to abstain pursuant to *Younger*. Notwithstanding this error, we **AFFIRM** the dismissal of the complaint because the California Court of Appeal's decision precludes further litigation of Cook's constitutional claims.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED JUNE 6, 2016

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:16-cv-00742-ODW (AFM)

MELISSA KAY COOK, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF BABY A, BABY B, AND BABY C,

Plaintiff,

v.

CYNTHIA ANNE HARDING; JEFFREY D. GUNZENHAUSER; DEAN C. LOGAN; EDMUND G. JERRY BROWN, JR.; KAREN SMITH; KAISER FOUNDATION HOSPITAL; PANORAMA CITY MEDICAL CENTER; PAYMAN ROSHAN; AND C.M.,

Defendants.

June 6, 2016, Decided
June 6, 2016, Filed

Appendix B

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS [44, 46, 54, 60]

OTIS D. WRIGHT, II, UNITED STATES DISTRICT JUDGE.

I. INTRODUCTION

Plaintiff Melissa Kay Cook ("Cook"), individually and as Guardian Ad Litem for Babies A, B, and C, brings suit against Governor Jerry Brown, Karen Smith (Director and State Public Health Officer for the California Department of Public Health), Cynthia Harding (Director of Los Angeles County Public Health Department), Jeffrey Gunzenhauser (Medical Director for Los Angeles County Public Health), and Dean Logan (Registrar-Recorder for Los Angeles County) in their official capacities, as well as Kaiser Foundation Hospital, Panorama City Medical Center, Payman Roshan (Senior Vice President and Patient Administrator for Panorama City Medical Center), and C.M. (the genetic father and intended parent of Babies A, B, and C).

Cook brings as-applied and facial constitutional challenges under 42 U.S.C. § 1983, alleging that California Family Code section 7962, the enabling statute affording protection to surrogacy contracts in the state, violates the Substantive Due Process, Procedural Due Process, and Equal Protection rights of surrogate mothers and the children they carry to term. She seeks declaratory and injunctive relief. (Second Amended Complaint ("SAC"), ECF No. 25.)

Now before the Court are four Motions to Dismiss. (ECF Nos. 44, 46, 54, 60.) Each asks this Court to refrain from retaining jurisdiction over Cook's case based on myriad abstention and jurisdictional doctrines. Because the Motions raise similar arguments, the Court will address all four in this Order. For the reasons discussed below, the Court finds it necessary to abstain, and accordingly **GRANTS** dismissal of the matter in its entirety with prejudice under Rule 12(b)(1).

II. FACTUAL BACKGROUND

A. Surrogacy Contracts in California

At the heart of Cook's claims lies the Family Code provision that allows for the enforceability of surrogacy contracts in California. (SAC ¶ 1.) However, in order to understand the current scientific and legal landscape in which Cook and the Defendants find themselves, a history lesson is appropriate.

In 1975, California adopted the Uniform Parentage Act in an effort to eliminate the legal distinction between legitimate and illegitimate children. *See Johnson v. Calvert*, 5 Cal. 4th 84, 88-89, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (1993). In the wake of several Supreme Court decisions mandating the equal treatment of children regardless of the marital status of their parents, the Act instead based parent and child rights on the existence of a parent-child relationship, rather than on the marital status of the parents. *See id.* (citing *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968)) (state could not deny

illegitimate children the right to bring a tort action for wrongful death of the parent if it gave a legitimate child the same right); *Glona v. Am. Guarantee Co.*, 391 U.S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968) (state could not deny the parent of an illegitimate child the right to bring a tort action for wrongful death of a child if it gave the parent of a legitimate child the same right).

The Act became part 7 of division 4 of the California Civil Code, sections 7000-7021, defining the "parent and child relationship" as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations," and applying the definition "equally to every child and to every parent, regardless of the marital status of the parents." Cal. Civ. Code §§ 7001-7002. Under state law, the "parent and child relationship" would thus encompass two kinds of parents, both "natural" and "adoptive." *Id.*; *see also Calvert*, 5 Cal. 4th at 89.

The Act, of course, did not imagine the myriad ways in which technology and human ingenuity would expand our notions of family and parentage. Louise Brown, the first human to be born via in vitro fertilization, or IVF,[1]

1. IVF refers to the complex series of procedures used to treat infertility. First, mature human ova, or eggs, are collected from a woman's ovaries and fertilized by male sperm in a laboratory setting. The now-fertilized embryo is then implanted into the female uterus, where it ideally will mature into a healthy baby. Mayo Clinic Staff, *In vitro fertilization (IVF)*, Mayo Clinic, http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/definition/prc-

was born three years after California adopted the Act; the first American born via IVF was born in 1981.[2] Today, nearly two percent of all children born are conceived through IVF or other forms of assisted reproductive technologies.[3] Adding an additional layer to the twenty-first century notion of the family, several children are born not from their mother, but from a third party surrogate. Surrogacy, however, is nothing new; would-be parents yearning for a child of their own have enlisted the help of others since biblical times.[4] Coupling the help of a third party surrogate and IVF technology, a woman may bear a child with whom she has no genetic relationship.[5]

20018905 (last visited June 3, 2016).

2. Walter Sullivan, *First 'Test-Tube' Baby Born in U.S., Joining Successes Around the World*, N.Y. Times (Dec. 24, 1981), http://www.nytimes.com/learning/general/onthisday/big/1228.html#article .

3. Karen Caplan, *More than 1.5% of American babies owe their births to IVF, report says*, L.A. Times (Mar. 3, 2015), http://www.latimes.com/science/sciencenow/la-sci-sn-ivf-live-births-success-rate-20150303-story.html .

4. *See* Genesis 16:2 ("And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai."); Genesis 30:3 ("And [Rachel] said, Behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her.").

5. This does not mean all surrogates are, or must be, strangers. For example, gay couples wishing to pass along the genetic traits of both fathers may seek the help of a sister or cousin, or sisters may serve as surrogates for their heterosexual brothers. Such arrangements are neither uncommon nor unrepresented in pop culture. *See* Adam P. Plant, *With A Little Help from My Friends:*

Appendix B

Today, thousands of children are born through surrogacy arrangements.[6] In *Calvert*, the California Supreme Court

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The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement, 54 Ala. L. Rev. 639, 642 (2003)

> ("The following dialogue from the episode [of popular sit-com Friends] where Phoebe was asked to act as Frank and Alice's carrier shows well the human element incumbent in cases of gestational carrier surrogacy. Upon learning that Frank and Alice had eloped, Phoebe remarked:
>
> Phoebe: . . . So, I gotta get you a gift now. Is there anything you need?
>
> Frank: Uhh, yeah.
>
> Alice: We've been trying to get pregnant, uh pretty much ever since we got engaged, we thought we'd get a jump on things, y'know no one's getting any younger.
>
> Frank: See the thing is umm, we're not able to y'know, uh, conceive.
>
> Alice: And we've tried everything, we've seen a bunch of doctors.
>
> Frank: Yeah, and they—and they say that our—that our only chance to have a baby is that if they take my sperm, her egg and put it together in a dish and then put it into another girl. So we were wondering if you could be the girl that we could put it into.
>
> Phoebe: (shocked) That's a really nice gift. I was thinking of like a gravy boat.")

6. The Centers for Disease Control estimates that 19,218 births have resulted from surrogacy arrangements as of 2010 in California

held that such arrangements are permissible and that, in light of the Uniform Parentage Act's definition of parentage, the intended mother—and not the surrogate—should be deemed a child's mother. 5 Cal 4th at 90-97.

Surrogacy arrangements began and continued in California without any statutory authorization until, in 2012, the California legislature passed the statute at issue here. 2012 Cal. Legis. Serv. (West). Under section 7962 of the California Family Code, where a gestational surrogate or carrier[7] and the intended parent(s) enter into a contract that meets certain specifications, and where that contract is presented before a court, the intended parents will be listed on the issued birth certificate and all parental rights of the surrogate will be severed. *See* Cal. Fam. Code § 7962. (*See also* SAC ¶ 23.)

Presenting a valid surrogacy agreement to the

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alone, with a nationwide estimate of 137,482. Magdalina Gugucheva, *Surrogacy in America*, Council for Responsible Genetics (2010), http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf , at 10.

7. California law distinguishes between so-called "traditional surrogates" and "gestational carriers." A gestational carrier is one "who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her," whereas a traditional surrogate is "a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents." Cal. Fam. Code § 7960(f)(1)-(2). Section 7962's failure to mention traditional surrogacy in its framework indicates that only gestational carrier arrangements, wherein the surrogate has no genetic tie to the fetus(es), will be afforded legal protection.

court rebuts any presumptions that the surrogate and her spouse are the legal parents of the child or children. § 7962. For a surrogacy contract to be valid under the statute, the contract must have the following information:

1. The date the contract was executed;

2. The names of the persons from which the gametes [ova and sperm] originated, unless anonymously donated;

3. The name(s) of the intended parent(s); and

4. A disclosure of how the medical expenses of the surrogate and the pregnancy will be handled, including a review of applicable health insurance coverage and what liabilities, if any, that may fall on the surrogate.

Furthermore, this agreement must be entered into before any embryo transfer begins; both the intended parent(s) and the surrogate must be represented by separate, independent counsel before executing the agreement; and the agreement must be signed and notarized. *Id.*

The statute also establishes that, upon proof of a valid surrogacy agreement, the court will terminate the parental rights of the surrogate and her spouse "without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief" that the

agreement or accompanying attorney declarations were not executed in accordance with § 7962. *Id.* Surrogacy contracts will be deemed "presumptively valid" and cannot be rescinded or revoked without a court order. *Id.*

The statute places no conditions on who can serve as a surrogate (beyond requiring that she not be genetically related to the fetuses) or who may solicit the services of a gestational carrier. (SAC ¶ 39.) No minimum levels of income, intelligence, age, or ability are required for either the surrogate or the intended parent(s). (*See id.* ¶¶ 30, 38.) The statute does not require that the intended parents shoulder all costs associated with surrogacy, and only states that the financial accommodations necessary for the arrangement are to be detailed in the surrogacy contract.

B. Cook's Contract and Pregnancy

Cook is a California resident. (*Id.* ¶ 12.) Cook enlisted the help of Surrogacy International, Inc., a California-based surrogacy broker, to offer her services for a hopeful family. (*Id.* ¶ 44.) The broker matched her with C.M., though at no point to date has Cook ever met C.M. or even spoken with him via telephone. (*Id.* ¶ 45.) Cook does not believe that Surrogacy International or the physician who performed the embryo transfer, Dr. Jeffrey Steinberg, conducted a home study of C.M.'s living arrangements to determine his parenting capabilities. (*Id.* ¶¶ 49, 52.) At the time of the embryo transfer, Cook was 47 years old. (*Id.* ¶ 12.) She gave birth to C.M.'s triplet boys (Babies A, B, and C) on February 22, 2016. (*Id.* ¶ 2.)

The intended parent and genetic father, C.M., resides

in Georgia. C.M. is a fifty year old postal worker who is single, deaf, and lives with his two elderly parents. He is the biological and legal father of Babies A, B, and C. (*See* Section 7962 Order, State Defs.' Req. for Judicial Notice ("RJN"), Ex. B, ECF No. 55.)

The two parties entered into a contract on May 31, 2015 for Cook to serve as a gestational surrogate, with an anonymous ova donor and C.M. providing the necessary genetic material. (SAC ¶¶ 19, 50.) Surrogacy International drafted a 75-page surrogacy agreement and the broker's owner and attorney, Robert Walmsley, served as C.M.'s counsel. (*Id.* ¶ 50.) As per the surrogacy agreement, C.M. paid Lesa Slaughter of The Fertility Law Firm to represent Cook.

Cook began the agreed-upon intensive hormone treatment on June 13, 2015, in advance of the embryo transfer. (*Id.* ¶ 54.) Knowing of Cook's advanced age and C.M.'s request that multiple embryos be transferred, on August 17, 2015 Dr. Steinberg implanted three six-day-old fertilized male embryos into Cook's uterus. (*Id.* ¶¶ 64, 69.) On August 31, 2015, her viable pregnancy with triplets was confirmed. (*Id.* ¶ 65.) Up until this point, it appears that neither party to the surrogacy agreement had any reservations.

Cook and C.M.'s fractured and tenuous relationship began a few weeks later. On September 16, 2015, C.M. emailed Cook and mentioned the possibility of her reducing the pregnancy, and asked her how much longer she would have to obtain a legal abortion. (*Id.* ¶ 67.) The

next day, C.M. emailed the fertility clinic monitoring Cook's pregnancy, requesting that Cook's medical visits be "less often, because [he] gets a bill that costs [him] a lot of money." (*Id.* ¶ 68.) He also expressed his concern that he may not be able to afford triplets, or perhaps even twins. (*Id.*) The clinic insisted that Cook's high-risk pregnancy required weekly visits. (*Id.* ¶ 69.) On September 18, 2015, C.M. emailed Walmsley at Surrogacy International to reiterate his financial concerns about the cost of the medical visits. (*Id.* ¶ 70.) While he said that he did not want to reduce two of the pregnancies, his financial situation left him considering terminating all three pregnancies. (*Id.*) According to Cook, at this time it became apparent that CM. had depleted his life savings paying for the infertility doctors, surrogacy broker, the anonymous ova donor, the attorneys, and Cook's surrogate trust account. (*Id.* ¶ 71.)

Over the course of the next week, Cook and CM. exchanged several emails, wherein CM. reiterated that he was concerned about his financial strain. (*Id.* ¶¶ 73-76.) While Cook offered to care for the three boys for a few months after their birth so CM. could financially prepare, on September 22, 2015, CM. requested that Cook reduce the pregnancy by one fetus, citing their surrogacy agreement's "Selective Reduction" clause. (*Id.* ¶¶ 75, 77.) Cook refused, citing her anti-abortion beliefs. (*Id.* ¶ 78.)

CM. and the surrogacy broker then attempted to convince Cook to abort one of the fetuses. (*Id.* ¶ 79.) CM. reiterated that he was worried about his financial situation, and also stressed that the high-risk pregnancy could jeopardize the health of all three fetuses if the

pregnancy is not reduced. (*Id.*) Cook, in turn, stressed that the fetuses were all healthy, and was adamant that she would not have an abortion. (*Id.*)

On October 28, 2015, CM. advised Cook via email that he may consider looking for adoptive parents for one or more of the children. (*Id.* ¶ 80.) On November 12, 2015, Cook responded and said that if he was considering adoption, she would happily raise one of the babies herself. (*Id.* ¶ 81.) Again, CM. firmly requested that Cook terminate one of the pregnancies. (*Id.* ¶ 82.) He reiterated his request multiple times between November 16, 2015 and November 27, 2015. (*Id.* ¶¶ 83-84.)

After CM.'s September 22 reduction request, Cook contacted Lesa Slaughter, the attorney she used when signing the surrogacy contract. (*Id.* ¶ 85.) By the end of November 2015, Cook and CM. were communicating through counsel. (*Id.* ¶ 88.) CM.'s attorney informed Cook in writing that, by refusing to reduce, she was in breach of the contract and liable for money damages thereunder. (*Id.*) On November 30, 2015, Cook again emailed CM. and said she would not terminate any of the pregnancies, and instead "decided" that she would raise one of the boys herself. (*Id.* ¶ 90.) CM. refused to accept that decree and, as the biological parent of the three boys, said he intended to put one of them up for adoption if she did not terminate. (*Id.* ¶ 91.) Despite their obvious difference of opinion and Cook's firm belief that CM. could not adequately care for even one of the Babies, Cook continued the pregnancy and CM. continued to pay her medical expenses.

As explained below, CM. filed the requisite paperwork under section 7962 with the California Children's Court in January 2016 and, on February 9, 2016, the court granted C.M.'s petition to terminate Cook's legal relationship with the Babies and to name CM. as the sole parent. (*Id.* ¶¶ 179, 184; Section 7962 Order.) The court's order would then be given to Kaiser Permanente's Panorama City Medical Center for its enforcement. (SAC ¶ 186.) On February 9, 2016, the date of the Children's Court's § 7962 order, Cook informed CM. that she would no longer accept payments from him, claiming it felt "wrong" to accept payment for carrying the Babies. (*Id.* ¶ 93.) As of that date, CM. still owed Cook $19,000 under the surrogacy contract. (*Id.*)

The Babies were born prematurely (at 28 weeks gestation) on February 22, 2016, and they remained in the Neonatal Intensive Care Unit at Panorama City Medical Center for seven weeks. (*Id.* ¶¶ 2, 187.) Cook repeatedly tried to see the Babies and obtain their private medical information; for the security of the Babies and to ensure C.M.'s privacy, Panorama City Medical Center installed additional security on Cook's hospital floor. (*Id.* ¶¶ 8, 20, 190-94.)

III. PROCEDURAL BACKGROUND

Cook first filed a Complaint in the Los Angeles Superior Court (Van Nuys) on January 4, 2016, alleging state law violations as well as violations of her and the Babies' Equal Protection and Due Process rights. (SAC ¶ 5; *CM. v. M.C.*, No. BF 054159 ("Sup. Ct. Compl."), State Defs.' RJN, Ex. A, ECF No. 55.) She also sought to

enjoin C.M. from filing a section 7962 petition before the court ruled on her constitutional claims. (Sup. Ct. Compl.) On January 6, 2016, C.M. filed a petition under section 7962 in the California Children's Court to terminate the parental rights of Cook and name C.M. as the sole parent of the yet-to-be-born Babies. (Section 7962 Order.) The Superior Court then dismissed Cook's action *sua sponte* without prejudice, finding that (1) her application for a civil harassment order against C.M. was filed in the wrong court (it should have been filed in the Children's Court or Family Court, not Superior Court), and (2) she did not properly serve her *ex parte* injunctive relief application, and in any event the application was mooted by C.M.'s January 7, 2016 section 7962 petition. (*C.M. v. M.C.*, No. BF 054159 Minute Order ("Sup. Ct. Order"), State Defs.' RJN, Ex. A, ECF No. 55.)

Cook then filed an Answer and Counterclaim to C.M.'s petition on February 1, 2016, as well as an *ex parte* application to continue the petition hearing on February 4, 2016; that *ex parte* application was denied. (Section 7962 Petition Answer, Plf.'s RJN, Ex. 10, ECF No. 84; *Ex Parte* Hearing, Plf.'s RJN, Ex. 8, ECF No. 84.) On February 9, 2016, Judge Amy Pellman of the Children's Court granted C.M.'s petition and severed Cook's parental rights. (Section 7962 Order.) Based on her reading of section 7962, Judge Pellman barred Cook from raising facts that arose during the pregnancy to demonstrate that C.M. would not and should not accept legal responsibility for the Babies, and held that the statute did not allow the court to consider the best interests of the children or for Cook to offer her opinions concerning C.M.'s parenting abilities. (SAC ¶¶ 181-85.) Cook, in turn, argues that Judge

Pellman failed to consider her timely filed Answer and Counterclaim, and that she was given no opportunity to contest the petition. (*Id.*)

On February 2, 2016, after the Superior Court's *sua sponte* dismissal of her Complaint but before C.M.'s section 7962 petition was granted, Cook filed suit in this Court. (Compl., ECF No. 1.) She has since amended her Complaint twice, and the SAC claims that the statute:

1. Violates the Babies' substantive Due Process rights by denying them a relationship with their "mother." She further alleges that the Babies have a Fourteenth Amendment right "to be free from being treated as a commodity or as chattel";

2. Fails to allow for a consideration of the best interests of the Babies, where the placement of minor children in other custody-related disputes would allow consideration their interests, and thus violates the Babies' Equal Protection rights. She also claims that § 7962 unconstitutionally deems children born to surrogates a "class of motherless children" in violation of the Fourteenth Amendment;

3. Violates her substantive and procedural Due Process rights, as she has a fundamental interest in continuing her relationship with the children she bares, and that no contract that terminates her parental rights before birth is constitutionally enforceable;

4. Violates her substantive Due Process right to be free from state-authorized exploitation of her and her reproductive capacity, and that she has a fundamental interest in the best interests of the children she carries;

5. Fails to provide her with the same treatment as other "mothers" subject to a parental rights termination proceeding, as required by the Equal Protection Clause;

6. Violates the procedural Due Process rights of both herself and the Babies by denying them a fact-finding hearing before the termination of their relationship;

7. Violates the substantive Due Process rights of both herself and the Babies by allowing a state-authorized surrogacy contract to expose them to significant health risks; and

8. Violates state and federal laws against servitude and peonage.

(ECF No. 25.)

Cook seeks injunctive and declaratory relief, and asks the Court to enjoin enforcement of section 7962. (*Id.*) She requests an interim injunction that:

1. Bars the State Defendants from enforcing the § 7962 judgment against her;

2. Bars the Hospital Defendants from limiting her access to the Babies;

3. Compels C.M. to provide equal parenting time, restrains him from taking the children out of state, and:

    a. Permanently enjoins him from surrendering custody of any of the children;

    b. Directs him to give Cook permanent custody of one of the Babies; and

    c. Requires C.M. to submit to the jurisdiction of the state court system for a final custody determination of the other two Babies.

(*Id.*)

On February 23, 2016, Cook appealed Judge Pullman's February 9 judgment. (Notice of Appeal, Plf.'s RJN, Ex. 14, ECF No. 84.) On March 30, 2016, she filed a Petition for Writ of Supersedeas, as well as several *ex parte* applications to see the children at the hospital. (Writ, Plf.'s RJN, Exs. 15, 17, ECF No. 84.) The applications were denied. (Writ Denial, Plf.'s RJN, Ex. 18, ECF No. 84.) The Court of Appeal initially stayed the case and prohibited all parties from removing the Babies from California. (App. Ct. Stay, Plf.'s RJN, Ex. 16, ECF No. 84.) However, on April 14, 2016, the appellate court denied the Writ Petition and lifted the stay. (App. Ct. Denial, Plf.'s RJN, Ex. 19, ECF No. 84.) That same day, the Babies were released

to the care of their father, C.M.; they are no longer in the care of Panorama City Medical Center. (Hosp. Defs.' Mot. 3, ECF No. 60.)

Pending before the Court now are four Motions to Dismiss. Governor Brown and Karen Smith ("the State Defendants"); Cynthia Harding, Jeffrey Guzenhauser, and Dean Logan ("the County Defendants"); Kaiser Foundation Hospital, Panorama City Medical Center, and Payman Roshan ("the Hospital Defendants"); and C.M. each move for dismissal under Federal Rules of Civil Procedure 12(b)(1) and (6). (ECF Nos. 44, 46, 54, 60.) Cook filed a timely joint opposition to the State, County, and Hospital Defendants' Motion and a timely, separate opposition to C.M.'s Motion. (ECF Nos. 74-75.) Each Defendant tendered a timely Reply. (ECF Nos. 86-89.) Their Motions are now before the Court for decision.

IV. LEGAL STANDARD

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the court must dismiss a complaint when it lacks subject matter jurisdiction. Once a party has moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the opposing party bears the burden of establishing the court's jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). Where, as here, a defendant makes a facial attack on subject matter jurisdiction, the court must accept the plaintiff's allegations as true and draw all reasonable inferences in

the plaintiff's favor when determining whether the facts alleged are sufficient to establish federal jurisdiction. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). Should the plaintiff fail to satisfy every element necessary for subject matter jurisdiction, the Rule 12(b)(1) motion should be granted. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Generally, a court should freely give leave to amend a complaint after granting a dismissal. Fed. R. Civ. P. 15(a). However, a court may deny leave to amend when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see also Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

V. DISCUSSION

Cook's claims touch on some of the most personal and binding relationships that a person will have in his or her lifetime: the bond between a parent and a child. At the heart of her suit, she asks this Court to assess the constitutionality of how a state defines parenthood and to hold that no state can afford respect and force of law to a private contract between consenting adults for the gestation of a human being, no matter the biological relationship (or lack thereof) of the surrogate mother and the fetus she carries to term.[8] She seeks both parental

8. Cook's arguments are a matter of first impression, even if surrogacy contracts are no stranger to California courts. Cook insists that the preeminent case on this subject, *Johnson v. Calvert*,

rights for herself and, perhaps, the end of recognized, binding surrogacy contracts in the State of California.[9]

A. Justiciability

While acknowledging the gravity of her claims, Defendants assert that such claims are nonjusticiable in this Court. Each have filed Motions to Dismiss, and each raise arguments unique to the individual Defendant while also arguing that various abstention doctrines should be applied to the case at bar. (ECF Nos. 44, 46, 54, 60.) Defendants contend that Cook's claims implicate duties involving state judicial processes that cannot be properly determined by a federal court, and that Cook

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5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (1993), establishes that surrogates have maternal rights—just, perhaps, not as strong as those belonging to the intended mother. (Plf.'s Opp'n to C.M. Mot. 4, ECF No. 75.) Setting aside whether Cook correctly interprets *Calvert*, the legal dance at bar requires the Court to accept a premise which no court in California has yet to do: that where there is no intended mother present in a child's life, a surrogate with no biological relationship with the fetus then carries the maternal mantle and has parental rights of her own.

9. Should Cook ultimately prevail, the Court is at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could, at her whim, "decide" that the intended parent or parents are not up to snuff and challenge their parenting abilities in court. Surely Cook's normative world would be one far different today's; after all, "[w]hat a far different experience life would be if the State undertook to issue children to people in the same fashion that it now issues driver's licenses. What questions, one wonders, would appear on the written test?" *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1298 n.29 (D. Utah 2002).

seeks remedies that cannot be molded without violating established principles of comity and federalism. (*See* State Defs.' Mot. 15-16, ECF No. 54.)

"The judicial power of the United States defined by Art[icle] III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian Coll. v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). Rather, Article III limits "the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Id.* at 472 (quoting *Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Cases are thus nonjusticiable when the subject matter of the litigation is inappropriate for federal judicial consideration. *Baker v. Carr*, 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). In determining whether a case is justiciable, "consideration of the cause is not wholly and immediately foreclosed; rather, the [c]ourt's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* "It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as

to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). These basic concerns are heightened when a lawsuit challenges core activities of state responsibility. *Rizzo v. Goode*, 423 U.S. 362, 378-79, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976).

Special considerations are at play when related litigation appears in both state and federal court. "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). This desire is premised upon the fundamental and vital role of comity in the formation of this country's government and "perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism.'" *Id.* at 44. Our Federalism demonstrates "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Id.* It represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

It is within the context of this foundational concept of comity, which strikes at the heart of the country's governing principles, that the court must view this case. The Court is cognizant of the gravity of Cook's claims, should they have merit. But the Court is equally cognizant of the profound and consequential principles of federalism implicated by this case. Accordingly, it is with careful attention to these two significant but conflicting interests that the court undertakes its analysis of justiciability under *Younger v. Harris* and its progeny.[10]

B. *Younger* Abstention

In *Younger v. Harris*, the Supreme Court declined to enjoin a pending state criminal prosecution under the state's criminal syndicalism law, which the plaintiff argued violated the First Amendment. 401 U.S. at 40-41. The Court "observed that Congress over the years has

10. Defendants also contend that Cook lacks standing to bring her claims, both as to specific Defendants and more generally. (State Defs.' Mot. 8-11; C.M. Mot. 12-15, ECF No. 46.) Defendants' arguments concerning abstention and standing relate to whether Cook's claims are properly before the Court and within the confines of the judicial authority conferred by Article III. Indeed, assuming that Cook has sufficiently alleged injury in fact and causation, something Defendants vehemently refute, the Court's conclusions relating to its ability to redress such injury, as set forth *infra*, "obviously shade into those determining whether the complaint" sufficiently presents a real case or controversy for purposes of standing. *O'Shea v. Littleton*, 414 U.S. 488, 499, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974). Accordingly, the Court declines to address Defendants' injury and causation arguments, as *Younger* dictates that the federal court should not be the body to provide redress.

manifested an intent to permit state courts to try state cases free of federal interference. It identified two sources for this policy: the constraints of equity jurisdiction and the concern for comity in our federal system." *Gilbertson v. Albright*, 381 F.3d 965, 970 (9th Cir. 2004). Principles of equity prevent erosion of the role of juries within our judicial system and the duplication of legal proceedings where one suit can adequately safeguard the rights asserted. Comity, on the other hand, pays respect to legitimate state functions. Of these two principles, comity proves to be the more "vital consideration." *Id.* at 971 (quoting *Younger*, 401 U.S. at 43-45); *see also New Orleans Pub. Serv., Inc. v. Council of New Orleans* (*NOPSI*), 491 U.S. 350, 364, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (stating that *Younger* rested "primarily on the 'even more vital consideration' of comity"); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (noting comity as *Younger*'s second and "even more vital" explanation for its decision); *Juidice v. Vail*, 430 U.S. 327, 334, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977) (emphasizing that comity is the "more vital consideration").

These values still bolster the so-called *Younger* doctrine, which has expanded beyond its original roots. Now, generally speaking, federal courts should abstain from granting declaratory or injunctive relief where doing so would interfere with a pending state judicial proceeding, criminal or civil, that touches on matters of state concern. *Hirsh v. Justices of the Supreme Ct. of Cal.*, 67 F.3d 708, 712 (9th Cir. 1995) (citing *Younger*, 401 U.S. at 40-41); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975) (holding that the *Younger* principles likewise counsel abstention from state civil proceedings); *Samuels v. Mackell*, 401 U.S.

66, 72, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971) (extending *Younger* to declaratory actions because "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid.").

In order for a federal court to provide declaratory or injunctive relief where there is related, ongoing state court litigation, the case must fit within *both* an exception to the Anti-Injunction Act[11] and an exception to the *Younger* doctrine. Section 1983 is an exception to the Act in that it constitutes an express authorization for injunctions, and thus Cook's claims clear this initial hurdle. *See Mitchum v. Foster*, 407 U.S. 225, 242-43, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972). However, the Court finds that no exception to *Younger* exists, and thus this Court is barred from offering the relief Cook seeks.

The *Younger* doctrine has evolved since its inception, and today, absent "extraordinary circumstances," abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing; (2) implicate important state interests; (3) provide the plaintiff an adequate opportunity to litigate her federal claims; and (4) where the federal court's involvement would interfere in a way that *Younger* disapproves. *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007); *see also Middlesex Cnty. Ethics Comm. v. Garden State*

11. Dating back to 1793, the Anti-Injunction Act prevents federal courts from enjoining pending state court litigation unless the case satisfies a specific statutory exception. *See Mitchum v. Foster*, 407 U.S. 225, 231-236, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972).

Bar Ass'n, 457 U.S. 423, 432, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). Even where the first three elements are satisfied, federal courts should not abstain absent a *reason* to abstain—"i.e., if the court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings." *AmerisourceBergen*, 495 F.3d at 1149. Where these standards are met, a federal court "may not exercise jurisdiction," and there is no discretion to do otherwise. *San Jose Silicon Valley Chamber of Comm. Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008). In fact, "[w]here *Younger* abstention is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, *Younger* abstention requires *dismissal* of the federal action." *Beltran v. State of Cal.*, 871 F.2d 777, 782 (9th Cir. 1988) (emphasis in original).

The Supreme Court has held that *Younger* abstention is appropriately applied to challenges to state custody and parentage proceedings. *See Moore v. Sims*, 442 U.S. 415, 423, 99 S. Ct. 2371, 60 L. Ed. 2d 994(1979).[12] In

12. Cook argues that *Younger* abstention is inappropriate here because her state case is not criminal in nature, not a civil enforcement proceeding, and not a proceeding that involves orders that are "uniquely in furtherance of the state court's ability to perform judicial functions." (Joint Opp'n 36, ECF No. 74 (quoting *NOPSI*, 491 U.S. at 368).) Describing *Younger* solely in terms of those limitations ignores the current breadth of the doctrine, which counsels abstention where important state issues are at play. As was made clear in *Moore*, abstention is appropriate in "civil proceedings in which important state interests are involved," including disputes over the constitutionality of state family law provisions. 442 U.S. at 423.

Moore, a husband, his wife, and their three minor children sought a declaration that parts of the Texas Family Code unconstitutionally infringed upon family integrity after a juvenile court judge entered an emergency *ex parte* order that gave temporary custody of the children to the State Department of Public Welfare. *Id.* at 419-20. The appellees moved to terminate that temporary custody order. *Id.* at 420. However, instead of moving to expedite the custody hearing in state court or request an earlier hearing before a state trial or appellate court, the family filed suit in federal court challenging the constitutionality of the relevant state statutes. *Id.* at 421. After walking through the elements of *Younger* abstention, the Supreme Court held that the family's broad challenge to a state statutory scheme "militated in favor of abstention, not against it." *Id.* at 427.

Moore is illustrative. Just as there, Cook challenges the constitutionality of a family court order, and seeks to do so in federal court while her state court appellate case is pending. Finding *Moore* persuasive, this Court is likewise "unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation." *Id.* at 435.

1. Ongoing State Proceedings

In order to invoke *Younger* abstention, the County must demonstrate as a threshold matter that "state proceedings, judicial in nature, are pending." *Middlesex*, 457 U.S. at 432. Significantly, "the question is not whether the state judicial proceedings are still ongoing,

but whether they were underway before initiation of the federal action." *Young v. Schwarzenegger*, No. C-10-03594-DMR, 2011 U.S. Dist. LEXIS 6813, 2011 WL 175906, at *2 (N.D. Cal. Jan. 18, 2011) (citing *Gilbertson*, 381 F.3d at 969 n.4). Moreover, proceedings will be deemed ongoing until state appellate review is completed. *Gilbertson*, 381 F.3d at 969 n.4. This first prong is easily met here.

Cook filed the case at bar after C.M. filed his section 7962 in the Children's Court and before Judge Pellman's order. (ECF No. 1.) Accordingly, the Court finds that a state judicial proceeding was ongoing at the time of the federal filing. *See Beltran*, 871 F.2d at 782 (stating that abstention requires proceedings to be ongoing at the time plaintiff initiates federal proceedings). This state proceeding continues on today, as Cook appealed the February 9, 2016 judgment granting C.M.'s section 7962 petition on April 14, 2016. (Notice of Appeal, Plf.'s RJN, Ex. 14, ECF No. 84.) That appeal remains before the California Court of Appeal, and no longer appears to be stayed. (Supersedeas Denial, Kaiser RJN, Ex. A, ECF No. 62.) Until appellate review of the section 7962 judgment is complete, the Court must deem the matter "ongoing."

2. Important State Interests

Myriad state interests are at play here, each of which satisfies the second step of the *Younger* analysis.

Cook is asking this Court to declare that a state court judgment is unconstitutional and to enjoin its enforcement. (SAC.) Setting aside the fact that Cook seeks federal court interference in family law matters, California still

maintains an important interest in enforcing orders and judgments of its judicial system. *Gilbertson*, 381 F.3d at 973 (citing *Pennzoil*, 481 U.S. at 14 (holding that, so long as challenges to the process by which state judgments are obtained relate to pending state proceedings, "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand")). This reason alone satisfies *Younger*'s second step.

Of even greater state importance is the subject matter of this suit. The underlying state interest here is, perhaps, is one of a state's most precious. Cook is asking this Court to redefine parenthood under state law, and surely no area of law is of greater interest to the state than that devoted to the domestic realm. The power of a state to determine the custody of its youngest members is unique to the state, and accordingly federal courts should abstain from interference. *Moore*, 442 U.S. at 435 ("Family relations are a traditional area of state concern."); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968) ("As Justice Holmes said . . . It has been understood that, 'the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.'" (internal citations and quotation marks omitted)).

3. Opportunity to Present Federal Claims

The Family Court interpreted section 7962 to bar consideration of Cook's constitutional claims—or consideration of any facts that do not touch on the four corners of the surrogacy contract itself. (Section 7962

Order.) Looking just to the Family Court's actions, then, it would appear that Cook has no recourse to present her federal claims in the state judicial system. But such a conclusion is misguided; Cook has every ability to—and, indeed, already has—appeal Judge Pellman's refusal to entertain Cook's constitutional arguments during the section 7962 hearing.

Judicial review is inadequate only when state procedural law bars presentation of the federal claims. *See Moore*, 442 U.S. at 430 & n.12 (1979) (finding abstention appropriate because state law did not impose procedural barriers to raising constitutional claims). Cook, in turn, argues that neither Judge Pellman nor the California Superior Court were willing to entertain her constitutional claims, and thus the state court system is inadequate to hear her pleas. (Joint Opp'n 37.)

However, neither the fact that the Superior Court declined to accept Cook's initial filing nor Judge Pellman's refusal to assess her counterclaims in the section 7962 petition here mean that the state system is inadequate. *See Hirsh*, 67 F.3d at 713 (the fact that review is discretionary does not bar presentation of federal claims); *Beltran*, 871 F.2d at 781, 783 (opportunity to present federal claims in a writ petition is sufficient to trigger *Younger* abstention, even though the court of appeal simply "denied the petition without elaboration"); *Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, 1352, 1354 (9th Cir. 1986), *amended on other grounds*, 791 F.2d 799 (9th Cir. 1986) (opportunity to raise federal claims in petition for review satisfied the requirements of *Younger* even though a reviewing court could deny the petition summarily); *Fresh*

Int'l Corp. v. ALRB, 805 F.2d 1353, 1362 (9th Cir. 1986) (finding abstention applicable because plaintiff "could have presented [its federal claim] to the court of appeal in its petition for review").

The nuances of family law do not counsel a different result. Again, *Moore v. Sims* is illustrative. In *Moore*, the Supreme Court explicitly reversed a district court order that declined to abstain where the litigation was "multifaceted," involved child custody determinations, and where the litigation was the "product of procedural confusion in the state courts." *Moore*, 442 U.S. at 422-43. This Court can think of no terms more apt to describe the case at bar than "multifaceted" and the "product of procedural confusion." *Id.* Cook's claims hinge on parentage determinations, contract interpretation, and constitutional law. She seeks both a declaratory judgment that she is the legal mother of three children to whom she has no biological tie, to enjoin the state from both recognizing a contract she willingly entered into, and to prevent the enforcement of a family court order. In the crosshairs sit three young infants and their biological and legal father. To say this case is "multifaceted" is an understatement.

Younger requires no more than the opportunity for the presentation of federal constitutional claims in the state proceeding; nothing presented to this Court implies that the California Court of Appeal is barred from entertaining Cook's constitutional claims. Moreover, this Court will not contradict decades of precedent and find that a state court is incompetent to adjudicate federal constitutional claims. *See id.* at 430-32; *Gilbertson*, 381 F.3d at 972. Accordingly,

the Court holds that the state judicial system affords Cook an adequate forum to seek relief.

4. Interference

Finally, even where all three *Younger* elements are met, the Ninth Circuit requires this Court to determine whether federal court involvement would interfere in a way that *Younger* disapproves. *AmerisourceBergen*, 495 F.3d at 1149. If this Court's continued participation in the litigation "would enjoin, or have the practical effect of enjoining, ongoing state court proceedings," abstention is required. *Id.*

The policies supporting *Younger* abstention are present here. If Cook prevailed, Judge Pellman's section 7962 Judgment would be enjoined, and the appellate process would be put on hold while this Court wades into California's family law scheme. The Court therefore declines to even touch a toe into this state's domestic code.

5. Exceptional Circumstances

Although a federal court is normally required to abstain if the prongs of the *Younger* test are satisfied, abstention is inappropriate in certain "extraordinary circumstance[s]." *See Gibson v. Berryhill*, 411 U.S. 564, 577-79, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (abstention inappropriate where state tribunal is incompetent by reason of bias). "Bias exists were a court has prejudged, or reasonably appears to have prejudged, an issue." *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992). Establishing bias is no minor hurdle; "one who alleges bias

'must overcome a presumption of honesty and integrity in those serving as adjudicators.'" *Id.* at 333 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)). Cook does not allege that the justices on the appellate panel have a personal or financial stake in this manner, and thus this Court finds no "exceptional circumstances" warranting federal jurisdiction.

Because Cook's claims would interfere with ongoing state court proceedings that implicate important state interests, and because Cook has an adequate opportunity to pursue her federal claims in those proceedings and has failed to overcome the presumption of honesty and integrity in those serving as adjudicators, the Court must abstain from adjudicating these claims pursuant to *Younger v. Harris* and dismiss the matter. *Beltran*, 871 F.2d at 782.

VI. CONCLUSION

For the above reasons, the Court **GRANTS** Defendants' Motions to Dismiss and directs the Clerk of Court to close this case.

IT IS SO ORDERED.

June 6, 2016

/s/ Otis D. Wright, II
OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE COURT OF APPEAL OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION ONE, FILED JANUARY 26, 2017

COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B270525

C.M.,

Plaintiff and Respondent,

v.

M.C.,

Defendant and Appellant.

January 26, 2017, Opinion Filed

APPEAL from an order of the Superior Court of Los Angeles County, No. BF054159, Amy M. Pellman, Judge.

LUI, J.

Defendant and appellant M.C. (M.C.) appeals from a judgment declaring plaintiff and respondent C.M. (Father) to be the sole legal parent of triplet children (the Children) and finding that M.C. has no parental rights. M.C. was the gestational carrier for the Children, who

were conceived in vitro using Father's sperm and ova from an anonymous donor. Father and M.C. entered into the surrogacy arrangement pursuant to a written "In Vitro Fertilization Surrogacy Agreement" in 2015 (the Agreement). Each party was represented by separate counsel in negotiating the Agreement.

Despite the Agreement, during the pregnancy M.C. developed reservations about the arrangement. She sought rights as the Children's mother and custody of at least one of the Children. When Father filed a petition pursuant to Family Code section 7962 to be declared the sole parent of the Children, M.C. opposed the petition.[1] Following a hearing on the petition on February 9, 2016, the trial court entered judgment in favor of Father.

On appeal, M.C. raises various substantive and procedural challenges to the judgment. The challenges amount to an all-out attack on the constitutionality and enforceability of surrogacy agreements in California.

We conclude that M.C.'s arguments are foreclosed by specific legislative provisions and by a prior decision by our Supreme Court. In view of the well-established law in this area, our role on appeal is limited to reviewing whether the legislative requirements for establishing an enforceable surrogacy agreement were met in this case. We find no error in the trial court's ruling on that issue, and we therefore affirm.

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1. Subsequent undesignated statutory references are to the Family Code.

Appendix C

BACKGROUND

1. The Agreement

M.C. executed the 75-page Agreement on May 31, 2015; Father executed the agreement on June 3, 2015. The Agreement identified Father as the "Intended Parent" and M.C. as "Surrogate."

M.C. was 47 years old at the time she entered into the Agreement. She represented in the Agreement that she has four children of "childcare age," and that she "has previously been a surrogate mother and is familiar with the undertaking." She stated that she did "not desire to have a parental relationship" with any children born pursuant to the surrogacy arrangement and that she "believes any Child conceived and born pursuant to this Agreement is/are morally, ethically, contractually and legally that of Intended Parent." The Agreement stated that the underlying intent of all parties to the Agreement was that "any Child conceived and/or born pursuant to the conduct contemplated under this Agreement shall be treated, in all respects, as the sole and exclusive natural, biological and/or legal Child of Intended Parent. It is also the intent of all Parties to this Agreement that Surrogate and her Partner shall not be treated as a natural, biological and/or legal parent of any Child conceived and/or born pursuant to the conduct contemplated under this Agreement."

The Agreement stated that the parties were "informed and advised of the California Supreme Court decision in

Johnson v. Calvert, and the Court of Appeal decision in *In re Marriage of Buzzanca*, and agree that these decisions apply to and govern this Agreement and the conduct contemplated thereby.[2] Specifically, each Party agrees that the intent to bear and raise the Child conceived and born pursuant to this Agreement shall be determinative of Parentage, to wit: that Intended Parent shall be treated as the legal, natural, and biological parent of any Child(ren) conceived and born pursuant to this Agreement." The parties further acknowledged that sections 7960 and 7962 "apply to this Agreement," and represented that "in entering into this Agreement they have taken steps to execute this Agreement in compliance with sections 7960 (as amended) and 7962."

The Agreement contained a disclosure that the "ova/eggs were provided by an anonymous donor," and that the embryos "will be created through the use of sperm provided by Intended Parent with ova/eggs anonymously donated to Intended Parent for his exclusive use." The parties agreed that "the donated ova/eggs shall be deemed as being the property of Intended Parent and as having come from Intended Parent."

In addition to describing the compensation that M.C. was to receive for her "discomfort, pain, suffering and for pre-birth child support," the Agreement addressed medical costs. It provided that medical expenses would be paid through a combination of "Surrogate's insurance

2. *Johnson v. Calvert* (1993) 5 Cal.4th 84 [19 Cal. Rptr. 2d 494, 851 P.2d 776] (*Calvert*); *In re Marriage of Buzzanca* (1998) 61 Cal. App.4th 1410 [72 Cal. Rptr. 2d 280] (*Buzzanca*) (discussed *post*).

and Intended Parent's direct payment for such uncovered costs."

M.C. promised in the Agreement that she would "freely and readily assist Intended Parent in legalizing his parent-child relationship with the Child." The parties stated their understanding that, "based upon the current law in the State of California, an action to terminate the Parental rights of Surrogate is not necessary and Intended Parent is entitled to a judicial determination of his Parentage, notwithstanding any objection to the contrary by Surrogate."

M.C. was represented by separate counsel, Lesa Slaughter, in negotiating the Agreement. Father agreed to pay the costs of M.C.'s counsel up to an amount of $1,000 for legal advice with respect to the Agreement and up to $500 for review and advice with respect to the legal documents "necessary to establish the Intended Parent's parentage." The Agreement contained a disclosure and waiver of the potential conflict of interest from Father's payment of M.C.'s legal counsel fees.

M.C. initialed each page of the Agreement, and her signature was notarized. Attorney Slaughter transmitted the executed and notarized Agreement to Father's counsel with a transmittal letter dated May 31, 2015. The letter stated that Slaughter had "independently represented [M.C.] and my consultation and review with her is now complete." She reported that her consultations with M.C. and M.C.'s signature to the Agreement "prove to me that my client has a clear and informed understanding of the

nature of the Gestational Surrogacy Contract and agrees to be fully bound by its terms." Slaughter provided her "full legal clearance to proceed with medication in this matter."

2. Proceedings to Determine Parentage

An embryo transfer took place on August 17, 2015. A subsequent pregnancy test confirmed a pregnancy, and an ultrasound on September 8, 2015, revealed that M.C. was carrying triplets.

On January 16, 2016, before the Children were born, Father filed a "Verified Petition to Declare Existence of Parent-Child Relationship Between the Children to be Born and Petitioner, and Non-existence of Parent-Child Relationship Between the Children to be Born and Respondent/Surrogate" (Petition). The Petition was supported by declarations from Father, Father's counsel, and a doctor who was responsible for the embryo creation and transfer procedure. Father also lodged a copy of the Agreement and filed a memorandum of points and authorities in support of the Petition (Memorandum).

Father's submission did not include a declaration from M.C. or her counsel. The Memorandum stated that "[i]n conjunction with the Petition it was anticipated Respondent, [M.C.], would comply with the [In Vitro Fertilization Surrogacy] Agreement and provide her Declaration in support of the Petition and a Stipulation admitting that she was not the parent of the Children at issue and did not wish to have a parental relationship with the Children. At this time that may not be."

Appendix C

A hearing on the Petition was noticed for February 9, 2016. On February 1, 2016, M.C. filed a 65-page verified answer and counterclaim responding to Father's Petition. The answer and counterclaim sought a range of relief, including that (1) M.C. be declared "the legal parent and mother" of the Children; (2) Father be declared "not the sole parent" of the Children and "not entitled to the benefits" of section 7962; (3) M.C. be awarded sole custody of one of the Children, and a custody trial be scheduled to determine "what custody arrangement will be in the best interests" of the other two Children; (4) a declaration that section 7962 violates the due process and equal protection rights of the Children and of M.C.; (5) a declaration that the Agreement cannot form the basis for terminating the parental rights of M.C.; and (6) an order that Father submit to DNA testing to determine whether he is the genetic father of the Children.

The counterclaim described a series of e-mail communications from Father in which he allegedly sought to abort at least one of the fetuses, first for financial reasons and then out of an allegedly pretextual concern for the health of the Children. M.C. refused to abort any of the fetuses, stating that she is "pro-life." She offered to raise one of the Children.

The counterclaim also alleged that Father was single, 50 years old, deaf, employed as a postal worker in Georgia, and responsible for caring for his elderly parents, with whom he lives. M.C. alleged that Father is "not capable of raising three children by his own admission, and may not be capable of raising even one or two children." M.C.

claimed that she learned for the first time while pregnant that the organization that facilitated the surrogacy arrangement had never done a "home study" to determine whether Father "is capable of raising any children."

After filing the counterclaim, M.C. moved ex parte on February 4, 2016, to continue the date for the hearing on the Petition, requesting a schedule for discovery concerning Father's willingness and ability to raise the Children. The ex parte application recited many of the same factual allegations concerning M.C.'s communications with Father that were included in M.C.'s counterclaim.

The trial court heard the ex parte application on February 8, 2016. The court denied the application, finding that M.C. had been aware of the Petition for a month and the ex parte proceeding was therefore not justified. The court also summarized the content and the circumstances of the Agreement and the Petition, referred to the decisions in *Calvert* and *Buzzanca* and the requirements of section 7962, and observed that Father "has complied with these requirements other than submitting the declaration of [M.C.] and her attorney." Father's counsel indicated that he might have to call M.C.'s former counsel, Slaughter, to testify in lieu of a declaration.

The hearing on Father's Petition took place on February 9, 2016. Father's counsel explained that he had not been able to obtain a declaration from Slaughter because she had previously represented M.C. However, Father had served her with a subpoena and she was present in court. The court permitted her to testify.

Slaughter testified that she had "probably represented over a thousand surrogates." She previously represented M.C. with respect to two surrogacy arrangements, including the Agreement with Father. M.C. initially waived the attorney-client privilege to permit Slaughter to testify about her representation, but then revoked the waiver when Father's counsel began to question Slaughter concerning the first surrogacy arrangement. Over objections, the court permitted Slaughter to authenticate her May 31, 2015 transmittal letter, and to testify that the contents were "true and correct." Slaughter also testified that it was her standard practice to review surrogacy contracts with her clients thoroughly and to discuss any questions they might have. When asked if she had employed her standard practice with M.C., Slaughter responded that she has "not varied my practice regarding surrogates or intended parents or egg donors, for that matter, whenever I undertake representation."

On cross-examination, Slaughter testified that she had about 15 telephone conversations with M.C. concerning the surrogacy arrangement with Father, including revisions to the Agreement. She testified that she "withdrew my representation when … it became obvious [M.C.] was not following my legal advice." Over objection, the trial court admitted the May 31, 2015 transmittal letter as an exhibit.

Prior to ruling on the Petition, the trial court also questioned M.C. under oath. In response to the court's questions, M.C. confirmed that she had signed the Agreement and initialed each page.

3. The Trial Court's Ruling

The court found that Father "substantially complied" with section 7962, "the holding of the Supreme Court in *Johnson v. Calvert*, and the holding of" *Buzzanca*. Specifically, the court found that M.C. "read and reviewed every page of the gestational agreement"; that she initialed and signed "the Agreement"; that "her agreement was voluntary"; and that "all the other provisions of 7962 have been satisfied." The court entered a detailed judgment establishing that Father is the sole parent of the Children.

With respect to M.C.'s counterclaim, the trial court initially observed that it appeared to be "procedurally improper," and that the court did not believe that "counsel is even entitled to counterclaim." However, the court declined to strike the counterclaim. The court concluded that the documents M.C. submitted in support of the counterclaim were, "essentially, challenges to the petition." The court denied the counterclaim on the merits "even if it were proper."

M.C. filed her notice of appeal on February 23, 2016.[3]

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3. M.C. also filed a petition for a writ of supersedeas, which this court denied on April 14, 2016. In addition to these proceedings in state court, M.C. filed an action on February 2, 2016, in federal court, asserting various alleged constitutional violations. (See *Cook v. Harding* (C.D.Cal., 2016) 190 F.Supp.3d 921, 930–931 [2016 U.S.Dist. Lexis 73466, pp. *18–*20] (*Harding*).) The federal court dismissed that action on June 6, 2016, on abstention grounds. (*Id.* at p. *39.)

Appendix C

DISCUSSION

(1) Section 7962 establishes a procedure for a summary determination of parental rights when specific requirements for an enforceable surrogacy agreement are met. The section requires that an "assisted reproduction agreement for gestational carriers" contain (1) the date on which the agreement was executed; (2) the identity of the persons "from which the gametes originated," unless anonymously donated; (3) the identity of the "intended parent or parents"; and (4) disclosure of how the "intended parents" will "cover the medical expenses of the gestational carrier and of the newborn or newborns." (§ 7962, subd. (a)(1)–(4).) The section also requires that the surrogate and the intended parent be represented by separate counsel with respect to the agreement; that the agreement be executed and notarized; and that the parties begin embryo transfer procedures only after the agreement has been fully executed. (§ 7962, subds. (b)–(d).)

(2) An action to "establish the parent-child relationship between the intended parent or parents" and the child conceived pursuant to an assisted reproduction agreement may be filed before the child's birth. (§ 7962, subd. (e).) The parties are to "attest, under penalty of perjury, and to the best of their knowledge and belief," as to their compliance with section 7962 in entering into their agreement. (§ 7962, subd. (e).) A notarized agreement signed by all parties "with the attached declarations of independent attorneys" lodged with the court in accordance with section 7962 "shall rebut any presumptions" of parenthood contained in various specified code sections. (§ 7962, subd. (f)(1).)

Section 7962 also provides that, on petition by any party to a properly executed agreement, the court shall issue a judgment or order establishing "the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement," subject to proof of compliance with the section. (§ 7962, subd. (f)(2).) That judgment shall also establish that "the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children." (*Ibid.*) The judgment "shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section." (*Ibid.*)

In light of these well-defined criteria and procedures and despite the range of M.C.'s arguments, there are ultimately only two questions that determine the outcome of this appeal. First, did Father comply with the requirements for establishing a parent-child relationship and for terminating M.C.'s claimed parental rights under section 7962? Second, was the trial court's application of section 7962 here consistent with the constitutional rights of M.C. and the Children? We conclude that the answer to both questions is yes.

1. Standard of Review

Neither party addresses the appropriate standard of review to apply to M.C.'s challenges to the judgment.

We employ well-accepted principles in reviewing M.C.'s various arguments. Most of M.C.'s arguments focus on the interpretation and constitutionality of statutes, which we review under a de novo standard. (See *Herbst v. Swan* (2002) 102 Cal.App.4th 813, 816 [125 Cal. Rptr. 2d 836] [constitutionality of statute]; *In re D.S.* (2012) 207 Cal.App.4th 1088, 1097 [143 Cal. Rptr. 3d 918] [statutory interpretation].) To the extent that M.C.'s arguments involve a challenge to the trial court's findings of fact relevant to M.C.'s claimed parental rights, we apply the substantial evidence standard. (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717 [57 Cal. Rptr. 3d 259] [applying substantial evidence standard to factual findings concerning biological father's right to object to adoption].)

2. M.C. Is Not Estopped from Challenging the Legal Effect or Validity of the Agreement

Before reaching the merits of M.C.'s arguments, we consider Father's claim that M.C. is estopped from making those arguments by the terms of the Agreement. Father argues that M.C. is precluded from claiming that she has any parental rights concerning the Children because she promised in the Agreement that she would not assert any such rights. In support, Father cites cases holding that parties can be estopped from seeking an unfair benefit by manipulating or taking inconsistent positions in judicial proceedings.

The principle involved in those cases does not apply here. Those cases focus on the need to protect the integrity

of judicial proceedings.[4] The conduct that Father argues should result in estoppel here was not a position taken in a judicial proceeding but rather commitments made in a written Agreement before the Children had been conceived and before any judicial action had been initiated. What Father seeks is not estoppel, but rather enforcement of the Agreement. Father asks us to find the promises that M.C. made in the Agreement enforceable on their own terms, before even considering whether such summary enforcement is appropriate here under the governing statute and the constitutional arguments that M.C. has made.

We decline that approach. M.C.'s arguments challenge the proper interpretation and validity of the Agreement. Whatever the merits of those arguments, the doctrine of

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4. In *In re Griffin* (1967) 67 Cal.2d 343 [62 Cal. Rptr. 1, 431 P.2d 625], the court held that a defendant accused of a probation violation could not obtain dismissal as a result of his conduct in requesting a continuance that extended beyond the period of his probation. A contrary rule would "'permit the parties to trifle with the courts.'" (*Id.* at p. 348, quoting *City of Los Angeles v. Cole* (1946) 28 Cal.2d 509, 515 [170 P.2d 928].) *In re Marriage of Hinman* (1992) 6 Cal.App.4th 711, 716 [8 Cal. Rptr. 2d 245], held that a wife could not challenge a judgment in a dissolution action awarding joint custody of her two children from a prior marriage where she stipulated to the judgment. Similarly, in *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156 [33 Cal. Rptr. 3d 81, 117 P.3d 690], one lesbian partner was estopped from arguing that her estranged partner was not the parent of their child when she had previously stipulated to a judgment declaring them both the "'joint intended legal parents.'" (*Id.* at p. 161.) Again, the court was concerned that a contrary result would """"trifle with the courts."""" (*Id.* at p. 166, quoting *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1269 [284 Cal. Rptr. 18].)

estoppel does not provide a ground to ignore them. We will not require enforcement of the Agreement without first considering whether it is enforceable. (Cf. *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1235 [30 Cal. Rptr. 2d 893] [there is "no doubt that enforcement of a surrogacy contract prior to a child's birth presents a host of thorny legal problems"]; *Buzzanca, supra*, 61 Cal.App.4th at p. 1422 ["There is a difference between a court's *enforcing* a surrogacy agreement and making a legal determination based on the intent *expressed in* a surrogacy agreement"].) We therefore reach the merits of M.C.'s appeal.

3. The Trial Court Correctly Ruled That the Agreement Substantially Complied with the Requirements of Section 7962

The Agreement contained all the information required by section 7962. It included (1) the dates it was executed; (2) the source of the gametes to be used for the embryos (Father and an anonymous egg donor); (3) the identity of the intended parent (Father); and (4) disclosure of how medical expenses would be covered. (§ 7962, subd. (a).) Father and M.C. were represented by separate counsel in negotiating the Agreement. (§ 7962, subd. (b).) The parties' signatures were notarized. (§ 7962, subd. (c).) And M.C. did not undergo an embryo transfer procedure or begin medication to prepare for such a procedure until after the Agreement had been executed. (§ 7962, subd. (d).)

Father also substantially complied with the procedural requirements under section 7962 for

summary determination of parentage pursuant to the Agreement. Father lodged a copy of the Agreement. (§ 7962, subd. (e).) Because M.C. opposed the petition to declare Father the sole parent, she did not provide a declaration attesting under penalty of perjury that the parties complied with section 7962 in entering into the Agreement. (*Ibid.*) However, she signed the Agreement itself under penalty of perjury, affirming that the contents of the Agreement were "true and correct except as to those matters which are based on information and belief, and as to those matters, we believe them to be true." The Agreement states that sections 7960 and 7962 "apply to this Agreement," and that the parties "are also informed and hereby represent that they have taken active steps to execute this Agreement in compliance with Sections 7960 (as amended) and 7962." M.C. also confirmed under oath at the hearing on the Petition that she had signed the Agreement and initialed each page.

Father also did not provide a declaration from M.C.'s lawyer for the Agreement, Slaughter, as required under section 7962, subdivision (f)(1) to rebut various statutory presumptions concerning parenthood. However, Father explained to the trial court that Slaughter was not in a position to provide such a declaration supporting the Petition in light of her prior representation of M.C., and he subpoenaed Slaughter to testify at the hearing on the Petition. At the hearing, Father elicited testimony from Slaughter showing that she had provided M.C. with independent representation with respect to the Agreement; that M.C. had a "clear and informed understanding of the nature of the [Agreement];" and that she had entered into

the Agreement "freely and voluntarily" and had agreed to be "fully bound by its terms."[5]

Under these facts, Father substantially complied with each requirement in section 7962 to obtain the orders concerning parenthood authorized by that section. The Agreement itself contained M.C.'s affirmation under oath that she intended to comply with section 7962 in entering into the Agreement. And Slaughter's testimony under oath was the functional equivalent of a declaration. Indeed, it was arguably a better procedural vehicle for testimony about M.C.'s capacity and intent, as it provided an opportunity for cross-examination.

(3) In the analogous area of consent to adoption, courts have concluded that substantial compliance with regulatory requirements is sufficient to provide enforceable consent, so long as the purpose of the requirements is met. (See *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 540 [35 Cal. Rptr. 2d 291] [partial noncompliance with details of regulations for providing consent to adoption did not vitiate consent where the "purpose of assuring voluntary and knowing decisionmaking by the

5. In her opening brief, M.C. states that she contended below that she "did not receive independent legal advice concerning the contract." It is unclear whether she intended to raise this claim on appeal. If so, she has forfeited the claim, as she has not provided any argument or citations to authority or to the record in support. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [42 Cal. Rptr. 2d 543, 897 P.2d 481].) We therefore need not consider whether her argument about the adequacy of the legal counsel she received was relevant to the requirements of section 7962 and, if so, whether the trial court erred in rejecting her argument below.

parents" was fulfilled]; *Adoption of Baby Boy D.* (2001) 93 Cal.App.4th 1, 12–13 [112 Cal. Rptr. 2d 760] [evidence showed that birth mother "substantially complied with every reasonable objective of the statute and regulations" despite inadvertent failure to check one of the boxes on a consent form].) Similarly, the evident purpose of the detailed requirements in section 7962 is to ensure that the parties to an assisted reproduction agreement enter into the agreement knowingly and voluntarily. Where, as here, there is substantial compliance with section 7962's requirements showing that the parties' Agreement was knowing and voluntary, the purpose of the statute is met.

Despite the evidence that the Agreement complied with the requirements of section 7962, M.C. argues that it could not provide the basis to establish Father's parenthood under that section for several reasons. First, M.C. claims that, even if all the requirements of section 7962 are met, that is not sufficient to rebut the presumption of parenthood that is established by giving birth. Section 7610, subdivision (a) provides that "[b]etween a child and the natural parent," a parent and child relationship "may be established by proof of having given birth to the child." M.C. correctly points out that this subdivision is not included in the list of presumptions that are rebutted by lodging a notarized assisted reproduction agreement "with the attached declarations of independent attorneys" under section 7962, subdivision (f)(1).[6]

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6. Subdivision (f)(1) of section 7962 states that lodging an executed and notarized agreement and attorney declarations "shall rebut any presumptions contained within Part 2 (commencing with Section 7540), *subdivision (b) of Section 7610*, and Sections 7611 and

Appendix C

Neither the text nor the legislative history of section 7962 provides any indication of why the evidence of parenthood recognized under section 7610, subdivision (a) was omitted from the list of rebutted presumptions under section 7962, subdivision (f)(1).[7] Indeed, its omission seems inconsistent with the purpose of the provision. A claim that a gestational carrier is the "birth mother" is the argument one would most likely expect a surrogate to make to establish a parent and child relationship. In summarizing the bill that became section 7962, the Assembly Committee on the Judiciary explained that "if a woman undergoes in vitro fertilization, under a physician's supervision, using eggs donated on behalf of intended parent or parents and the woman agrees to that in a writing signed by the woman and the intended

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7613, as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children." (Italics added.) Thus, the list of rebutted presumptions includes only subdivision (b) of section 7610, which concerns establishing a parent and child relationship between a child and "an adoptive parent."

7. Father suggests that section 7962, subdivision (f)(1) does not mention section 7610, subdivision (a) because that subdivision does not actually create a presumption. The basis for this argument is unclear. The subdivision states that giving birth to a child may establish a parent-child relationship. Moreover, our Supreme Court in *Calvert* characterized section 7610, subdivision (a)'s predecessor statute (Civ. Code, former § 7003) as establishing a presumption of motherhood, and rejected the argument that the statute could not apply to a gestational carrier who is not genetically related to the child. (See *Calvert, supra*, 5 Cal.4th at pp. 92–93 & fn. 9.) Father also does not explain why, if section 7610 does not contain any presumptions, section 7610, subdivision (b) would be included in the list of rebutted presumptions under section 7962, subdivision (f)(1).

parents prior to creation of the embryo, then the woman is not treated as the natural parent of the child and the intended parents are presumed to be the child's natural parents." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011–2012 Reg. Sess.) as amended April 26, 2011, pp. 1–2 (Assembly Analysis).) Similarly, an analysis by the Senate Judiciary Committee explained that the bill would provide that "any agreement that is executed in accordance with the provisions of the bill is presumptively valid and shall rebut any presumptions that the surrogate, and her spouse or partner, are the parents of the child." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1217 (2011–2012 Reg. Sess.) as amended June 11, 2012, p. 4 (Senate Analysis).)

(4) We need not attempt to resolve this apparent discrepancy. Whether or not section 7962, subdivision (f)(1) rebuts a presumption of parenthood based upon giving birth, the subsequent subpart of subdivision (f) makes clear that a surrogate has no parental rights when an assisted reproduction agreement complies with the requirements of the section.

Section 7962, subdivision (f)(2) states that, in ruling on a petition, "[s]ubject to proof of compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children." This directive is quite clear. Compliance with the requirements of an

assisted reproduction agreement and submitting the proof identified in section 7962 is all that is necessary to establish a parent-child relationship for the intended parent or parents and to extinguish any claim of parenthood by the surrogate.

M.C. argues that this subdivision does not support the trial court's order here because Father's alleged conduct in requesting an abortion of one fetus and allegedly threatening to surrender one of the Children through adoption showed that he did not "intend" to be a parent. Whatever its merits, the argument is foreclosed by the language of the subdivision, which provides that the "intended parent or intended parents *identified in the surrogacy agreement*" are to be declared the sole parents of children born to a surrogate. (§ 7962, subd. (f)(2), italics added.) There is no doubt here that Father was the intended parent identified in the Agreement.

The conclusion that Father is the intended parent for purposes of section 7962 is also supported by the definition of "'[i]ntended parent'" in section 7960, subdivision (c). That provision identifies an "intended parent" as an individual "who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction." The Agreement clearly assigns that responsibility to Father.

Apart from these explicit statutory provisions, M.C.'s argument is inconsistent with the apparent purpose of section 7962 to provide a certain and reliable procedure to determine the parent-child relationship *before* the

parties enter into a surrogacy agreement. (See Senate Analysis, *supra*, at p. 7 [as a result of the bill enacting § 7962, "intended parents, surrogates, and courts would arguably have a clear procedure to follow in creating and enforcing surrogacy agreements and determining parental rights"].) Permitting a surrogate to change her mind about whether the intended parent would be a suitable parent—or requiring a court to rule on whether the intended parent's conduct subsequent to executing an assisted reproduction agreement is appropriate for a prospective parent—would undermine the predictability of surrogacy arrangements. We agree with the observation of the federal court in *Harding*, that, were M.C.'s position to be accepted, we are "at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could, at her whim, 'decide' that the intended parent or parents are not up to snuff and challenge their parenting abilities in court." (*Harding, supra*, 190 F.Supp.3d at p. 932, fn. 9 [2016 U.S.Dist. Lexis 73466 at p. *23, fn. 9].)

4. M.C.'s Constitutional Challenges Fail

(5) M.C. makes various constitutional arguments challenging the procedure for establishing a parent-child relationship under section 7962 and the legitimacy of surrogacy arrangements generally. It is important to note at the outset that our Supreme Court has already rejected constitutional challenges to surrogacy agreements and ruled that such agreements are consistent with the public policy of California. (See *Calvert, supra*, 5 Cal.4th at pp. 95, 98–100.) Indeed, the Legislature's stated intent

in enacting section 7962 was to codify the decisions in *Calvert* and *Buzzanca, supra*, 61 Cal.App.4th 1410. (See Assembly Analysis, *supra*, at p. 2 ["Case law in California makes clear that the intended parents are the natural parents and this bill clarifies and codifies that case law"]; Senate Analysis, *supra*, at p. 4 ["California case law establishes that even without a genetic link, the parties who intended to bring a child into the world are the child's legal parents [citing *Calvert* and *Buzzanca*]. This bill, with respect to surrogacy agreements, seeks to codify and clarify that case law by requiring parties to enter into surrogacy agreements, as specified, prior to the commencement of any medical treatment related to the surrogacy arrangement"].)

In *Calvert*, the court considered competing claims of parental rights by a surrogate and a husband and wife who contracted with the surrogate to give birth to a child for them. The child was conceived with sperm from the husband and an egg from the wife. The parties executed a contract providing that the child would be taken into the couple's home as "'their child,'" and that the surrogate would relinquish "'all parental rights.'" (*Calvert, supra*, 5 Cal.4th at p. 87.) The relationship between the parties deteriorated before the child was born, leading to competing lawsuits seeking a declaration of parental rights. (*Id.* at pp. 87–88.)

The *Calvert* court examined the competing parenthood claims under the Uniform Parentage Act (the Act), which was the only statutory framework available at the time

for assessing the parties' parenthood claims.[8] The court concluded that both the surrogate and the wife who donated her egg had plausible claims for parental rights under the Act. In that circumstance, the court gave effect to the parties' intent for parentage as expressed in their agreement. The court noted that, "[b]ut for their acted-on intention, the child would not exist." (*Calvert, supra*, 5 Cal.4th at p. 93.) The court observed that "[n]o reason appears why [the surrogate's] later change of heart should vitiate the determination that [the wife] is the child's natural mother." (*Ibid.*) The court rejected the public policy and constitutional objections that the surrogate raised to the parties' contract, concluding that giving effect to the parties' intent "does not offend the state or federal Constitution or public policy." (*Id.* at pp. 87, 95–100.)[9]

M.C. attempts to distinguish *Calvert* and limit the scope of its holding by noting that the court in that case

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8. The Act is now codified at section 7600 et seq.

9. In *Buzzanca*, the Fourth District Court of Appeal applied the reasoning of *Calvert* to a situation where a surrogate gave birth to a child conceived with the sperm and egg of anonymous donors at the instigation of a husband and wife who subsequently separated. In that case, neither the surrogate nor the husband claimed parental rights, and the trial court concluded that the child had *no* parents. The Court of Appeal reversed. The court held that the wife in that case was "situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child." (*Buzzanca, supra*, 61 Cal.App.4th at p. 1421.) Therefore, just as in *Calvert*, motherhood could plausibly be established in two women, and the conflict should be resolved by giving effect to the intention of the parties. (*Ibid.*)

resolved competing claims of parenthood by two claimed *mothers*: The gestational carrier and the genetic mother of the child. The court acknowledged that "[b]oth women … adduced evidence of a mother and child relationship as contemplated by the Act," but concluded that "for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible." (*Calvert, supra*, 5 Cal.4th at p. 92.) Here, of course, the dispute is not between two claimed mothers, but between a claimed mother and Father, the intended parent under the Agreement.

M.C.'s argument misses the broader implication of the holding in *Calvert*. The court held that it could give effect to the parties' intentions for the parentage of the child as expressed in their surrogacy contract because the agreement was "not, on its face, inconsistent with public policy." (*Calvert, supra*, 5 Cal.4th at p. 95.) That holding is ultimately dispositive for all of the constitutional arguments that M.C. raises here. Section 7962 permits the parties to a surrogacy arrangement to enter into a legally binding contract—subject to specific statutory safeguards—that determines the parentage of children conceived pursuant to the arrangement. There is no constitutional impediment to giving effect to the parties' intent expressed in such a contract.

a. M.C. has standing to assert constitutional claims on behalf of the Children

Father argues that M.C. does not have standing to assert the Children's constitutional rights on appeal

because she is not a parent. Like his estoppel theory, this argument is inextricably bound up in the merits of M.C.'s appeal.

But for the Agreement, M.C. would have a colorable claim to motherhood based on the fact that she gave birth to the Children. (See § 7610, subd. (a); *Calvert, supra*, 5 Cal.4th at pp. 89–90; *Robert B. v. Susan B.* (2003) 109 Cal. App.4th 1109, 1115 [135 Cal. Rptr. 2d 785] [woman who gave birth to a child from an embryo belonging to another couple that was mistakenly implanted by a fertility clinic "clearly established a mother-child relationship by the undisputed fact that she gave birth" to the child].) Thus, Father's standing argument depends upon a conclusion that the Agreement is valid and that by executing it M.C. surrendered any claims to motherhood that she might have. One of the challenges that M.C. seeks to assert to the Agreement's validity is the claimed constitutional rights of the Children to a parent-child relationship with her. Whatever the merits of this claim, concluding that she has no standing to assert it because she is not a parent would assume that her argument fails before it is even considered. We do not believe that Father's standing argument compels such a circular result.

Father relies on the rule that only a "party aggrieved" has standing to appeal under Code of Civil Procedure section 902. That rule does not help him. We "liberally construe the issue of standing and resolve doubts in favor of the right to appeal." (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 948 [124 Cal. Rptr. 2d 688] [parent had standing to raise the sibling relationship exception to termination of parental rights].)

(6) M.C. has standing to assert her own claimed statutory and constitutional rights to a parent-child relationship with the Children. (See § 7650, subd. (a) ["Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship"]; *Calvert, supra*, 5 Cal.4th at pp. 89–90; see also *In re Rauch* (1951) 103 Cal.App.2d 690, 694–695 [230 P.2d 115] [father had standing to appeal an order declaring his child to be a ward of the court despite a previous order appointing other relatives as guardians and giving them custody of the child].) M.C.'s interest in a relationship with the Children is intertwined with the Children's alleged interest in a relationship with her. She may therefore assert the Children's interests along with her own. "Where the interests of two parties interweave, either party has standing to litigate issues that have a[n] impact upon the related interests. This is a matter of first party standing." (*In re Patricia E.* (1985) 174 Cal.App.3d 1, 6 [219 Cal. Rptr. 783] [father had standing to raise the issue of his minor daughter's right to counsel in a dependency proceeding because "independent representation of the daughter's interests impacts upon the father's interest in the parent-child relationship"], disapproved on other grounds in *In re Celine R.* (2003) 31 Cal.4th 45, 60 [1 Cal. Rptr. 3d 432, 71 P.3d 787].)[10]

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10. Father also relies on federal cases discussing whether parties had standing to raise constitutional claims under the constitutional and prudential standing requirements in *federal* court. He does not explain the relevance of those cases to this proceeding. To the extent such cases are analogous, they also do not support Father's argument. The United States Supreme Court has found that foster parents had standing to argue their view of the constitutional interests of minor children in a state's foster care

In other contexts, courts have found that persons who had no claim to be natural or genetic parents had standing to assert the interests of minor children. (See, e.g., *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1314, fn. 24 [112 Cal. Rptr. 2d 692] [foster parents could raise the constitutional claims of a minor in a custody dispute under the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.) even though they did not themselves possess a fundamental interest in a relationship with the minor under a substantive due process analysis]; *Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1152–1153 & fn. 7 [101 Cal. Rptr. 2d 364] [appellant could pursue a guardianship proceeding on behalf of a minor who previously lived with her and her partner, despite appellant's status as a nonparent who was a "former participant in a lesbian relationship"].) The fact that the Children are not parties to this appeal and therefore cannot assert their own interests provides further reason to consider M.C.'s arguments on their behalf. (Cf. *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1342 [176 Cal. Rptr. 3d 468] [de facto parents lacked standing to raise constitutional challenges to the ICWA on minor's behalf where the minor's counsel and guardian ad litem "sought an outcome consistent with the ICWA's requirements"].)

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procedures, even when the children and parents were separately represented parties. (*Smith v. Organization of Foster Families* (1977) 431 U.S. 816, 841, fn. 44 [53 L. Ed. 2d 14, 97 S. Ct. 2094].) But for the Agreement, M.C. would have at least as much interest as a foster parent in the Children's alleged constitutional right to a parent-child relationship with her. (See *Calvert, supra*, 5 Cal.4th at p. 99, fn. 13 [citing *Smith* and noting that the trial court in *Calvert* had analogized the surrogate's relationship with the child to "that of a foster mother"].)

We therefore proceed to the merits of M.C.'s constitutional claims.

b. Procedural due process

M.C. claims that the trial court denied her due process rights and the due process rights of the Children under the United States and California Constitutions by failing to consider her counterclaim and failing to give her a hearing prior to terminating her claimed parental rights. We reject the argument.

The record shows that the trial court gave M.C. the hearing that section 7962 contemplates. Section 7962, subdivision (f)(2) provides that, "[u]pon motion by a party to the assisted reproduction agreement for gestational carriers, the matter shall be scheduled for hearing before a judgment or order is issued." The trial court did conduct a hearing to determine if the requirements of section 7962 had been met. With respect to the one procedural element of the statute that had not yet been met—a declaration from M.C.'s former attorney—the court heard the attorney's testimony and permitted M.C. to cross-examine.

(7) Section 7962 specifies that the only showing necessary to obtain an order establishing the parentage of the intended parent(s) and extinguishing claims of parental rights by a surrogate is "proof of compliance with this section." (§ 7962, subd. (f)(2).) Upon such a showing, the judgment or order "shall terminate any parental rights of the surrogate and her spouse or partner

without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section." (*Ibid.*, italics added.) Thus, section 7962 does not leave room for litigating challenges to the parental rights of intended parents on any basis beyond the circumstances and content of the surrogacy agreement itself.

The trial court therefore properly denied M.C.'s counterclaim under section 7962, subdivision (f)(2) without further proceedings. The counterclaim did not challenge whether the Agreement fulfilled the requirements of section 7962 or allege that the Agreement was "not executed in accordance with" section 7962. Rather, it asserted broad claims challenging the legitimacy and constitutionality of surrogacy agreements and contesting Father's fitness and intention to be a parent. Under section 7962, subdivision (f)(2), no "further hearing or evidence" was required to consider such claims.[11]

M.C.'s procedural due process claim therefore amounts to a challenge to the constitutionality of section

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11. In attacking the legitimacy of section 7962 in her counterclaim, M.C. in fact acknowledged the limited showing necessary to terminate a surrogate's claimed parental rights under section 7962: "California's Surrogacy Enabling Statute, C.F.C. § 7962(f)(2) authorizes the court to terminate the parental rights of [M.C.] based solely upon proof that the 'gestational' surrogate signed a surrogacy contract which complies with § 7962 and nothing more."

7962. The crux of the claim is that the statutory scheme improperly permits a surrogate's parent-child relationship to be denied based only upon the intentions expressed in a surrogacy contract without further consideration of the surrogate's post-birth wishes, the intended parent's fitness to be a parent, or the best interests of the children. The substance of M.C.'s procedural due process claim is therefore indistinguishable from her substantive due process and equal protection claims, which are discussed below.

c. Alleged violation of the Children's substantive due process rights

M.C. argues that the termination of her claimed parental rights under section 7962 violates the Children's liberty interest in (1) their relationship with their mother and (2) freedom from "commodification." We conclude that both of these arguments are foreclosed by the court's opinion in *Calvert*.

M.C.'s argument fails in light of her own agreement surrendering any right to form a parent-child relationship with the Children. Her argument amounts to a claim that she either (1) had no right to make such a promise or (2) was permitted to later change her mind about that promise based upon the best interests of the Children. Both claims are inconsistent with the court's decision in *Calvert*.

The first claim is a direct challenge to the legitimacy of surrogacy arrangements. If a child's liberty interest in

a relationship with its birth mother trumps the surrogate's right to enter into a contract agreeing to surrender the child to intended parents, then no surrogacy arrangement is possible. That result would conflict with the fundamental holding in *Calvert* that surrogacy agreements are not inconsistent with public policy. (*Calvert, supra*, 5 Cal.4th at pp. 87, 95.) It would also run afoul of the court's observation that "[t]he argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law." (*Id.* at p. 97.)

(8) The second claim conflicts with the court's rejection of the adoption paradigm for surrogacy arrangements. By analogy to the statutes governing adoption, the surrogate in *Calvert* argued that a prebirth waiver of her parental rights was unenforceable. The court rejected that argument, concluding that "[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes." (*Calvert, supra*, 5 Cal.4th at pp. 95–96.) The court also held that a decision on the parentage of children born to a surrogacy arrangement is separate from determining custody based upon the best interests of the children, which should be left to the dependency laws. (*Id.* at pp. 93–94, fn. 10.)

The opinion in *Calvert* also precludes M.C.'s argument that surrogacy agreements impermissibly result in the "commodification" of children by permitting their sale. The court in *Calvert* expressly rejected the concern that

"the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will." (*Calvert, supra*, 5 Cal.4th at p. 97.) Moreover, the court rejected the argument that payments to the surrogate in that case were in exchange for the surrender of her parental rights, instead concluding that they were "meant to compensate her for her services in gestating the fetus and undergoing labor." (*Id.* at p. 96.) Similarly, here, payments to M.C. under the Agreement were for the stated purpose of "compensation for her discomfort, pain, suffering and for pre-birth child support" and for living expenses. Moreover, M.C.'s argument that she could not enter into the surrogacy arrangement in exchange for compensation also amounts to a wholesale attack on the legitimacy of surrogacy contracts, which is inconsistent with the holding in *Calvert*.[12]

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12. M.C. argues that *Calvert* did not decide this issue because it only considered whether the payment of money to the surrogate in that case violated this state's public policy, not whether it was constitutionally permissible. The argument ignores the source of public policy against which the validity of contractual provisions is measured. A court's understanding of the public policy affecting a contract is generally derived from constitutional and statutory provisions. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777, fn. 53 [62 Cal. Rptr. 3d 527, 161 P.3d 1095] [courts "may, in appropriate circumstances, void contracts on the basis of public policy," but "'[t]he determination of public policy of states resides, first, with the people as expressed in their Constitution and, second, with the representatives of the people—the state Legislature,'" quoting *Jensen v. Traders & General Ins. Co.* (1959) 52 Cal.2d 786, 794 [345 P.2d 1].) In light of this relationship, M.C.'s claim that surrogacy arrangements could be consistent with California public policy and yet violate the United States and/or California Constitutions is illogical.

d. Alleged violation of the Children's equal protection rights

M.C. argues that denying a parent-child relationship between her and the Children violated the Children's right to equal protection under the United States Constitution. M.C. claims that permitting the children of surrogates to be "placed" with intended parents based only upon the intent of the contracting parties without considering the best interests of the children denies such children the consideration given to children in other contexts involving state-sponsored placement, such as adoption and marital dissolution proceedings.

While the court did not consider this argument directly in *Calvert*, we believe that the court's opinion in that case forecloses it. As mentioned, the court concluded that the determination of *parentage* is separate from the question of *custody*. (See *Calvert, supra*, 5 Cal.4th at pp. 93–94, fn. 10.) Whether a particular custodial arrangement is harmful to a child is a subject for the state's dependency laws, not for the law governing surrogacy contracts.[13]

13. *Calvert* referred to California's dependency laws, which the court explained "are designed to protect *all* children irrespective of the manner of birth or conception." (*Calvert, supra*, 5 Cal.4th at p. 93, fn. 10.) Where, as here, an intended parent resides in another state, different dependency laws would likely apply, but the principle remains the same. One can imagine an extreme set of circumstances that might test the constitutional boundaries of section 7962's summary procedure, such as an intended parent with a history of child abuse who plans to take a child to another country that does not have a functioning dependency system. Hopefully such a case is hypothetical only. In any event, it is not the situation here.

Appendix C

As applied to M.C.'s equal protection argument, the court's conclusion means that a child's right to suitable *placement* by the state once born is not at issue. Rather, the issue is the extent of state control over individuals' decisions to give birth in the first place.

The court in *Calvert* recognized that the decision of the intended parents led to the birth of the child whose parentage was at issue. "But for their acted-on intention, the child would not exist." (*Calvert, supra*, 5 Cal.4th at p. 93.) A conclusion that children born to surrogates must be placed by the state using the same criteria that apply to adoptions or custody disputes would certainly affect—and perhaps eliminate—the willingness of intended parents to have children through surrogacy arrangements. "[I]t is safe to say that [the surrogate] would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother." (*Ibid.*)

(9) Thus, for purposes of an equal protection analysis, it is more appropriate to compare children born to surrogates with children born in a traditional manner to other parents than it is to compare children born to surrogates with children *placed* through adoption or family courts. Of course, the state does not regulate who is permitted to give birth. "'[W]hat a far different experience life would be if the State undertook to issue children to people in the same fashion that it now issues driver's licenses. What questions, one wonders, would appear on the written test?'" (*Harding, supra*, 190 F.Supp.3d at p. 932, fn. 9 [2016 U.S.Dist. Lexis 73466 at

pp. *23–*24, fn. 9], quoting *J.R. v. Utah* (D. Utah 2003) 261 F.Supp.2d 1268, 1298, fn. 29.)

Thus, M.C.'s equal protection argument on behalf of the Children does not provide any ground for reversal.

e. Alleged violation of M.C.'s constitutional rights

M.C. argues that the trial court's order terminating her claimed parental rights violated her substantive due process and equal protection rights in several respects. Her arguments can be grouped into two categories for purposes of discussion. First, she claims that she has a constitutionally protected liberty interest in a relationship with the Children that she could not waive before their birth. She argues that permitting such a prebirth waiver would also violate her equal protection right to be treated similarly to mothers who surrender their children through adoption. Second, she argues that surrogacy arrangements are impermissibly exploitative and dehumanizing. Again, we conclude that these arguments are foreclosed by *Calvert*.

M.C. argues that *Calvert* did not hold that a surrogate can never have a liberty interest in a relationship with the child that she bears. She correctly points out that the court's analysis in that case was colored by the need to weigh the surrogate's interests against the interests of the genetic mother, and that such balancing is not necessary here. (See *Calvert, supra*, 5 Cal.4th at p. 100 [the surrogate "fails to persuade us that sufficiently strong policy reasons exist 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 [the intended parents]"].)

(10) We need not determine the scope of the court's ruling on this issue, because the opinion otherwise makes clear that a surrogate can permissibly contract to surrender whatever parental rights she has. The court held that the surrogacy contract in that case was consistent with public policy.[14] The court rejected the argument that "a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents" as antiquated and dismissive of a woman's "equal economic rights." (*Calvert, supra*, 5 Cal.4th at p. 97.) Here, as in *Calvert*, there is no suggestion that M.C., who had children of her own and had previously served as a surrogate, "lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract." (*Ibid.*)

M.C.'s argument that, like mothers giving up children for adoption, she could not knowingly waive her parental rights until *after* she had given birth also fails in light of the Supreme Court's holding in *Calvert*. The court

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14. As discussed *ante*, we are not persuaded by M.C.'s assertion that "the public policy considerations raised in [*Calvert*] are not applicable to a constitutional challenge." We do not believe that our Supreme Court would have held that the surrogacy contract in *Calvert* was consistent with public policy if it believed that the surrogacy arrangement violated a constitutional right. Of course, the Legislature has also now expressed its view of the permissibility of surrogacy arrangements by enacting section 7962.

rejected the surrogate's argument in that case that the policies underlying California's adoption laws were violated by the surrogacy contract because it amounted to a "prebirth waiver of her parental rights." (*Calvert, supra*, 5 Cal.4th at p. 96.) The court concluded that "[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes." (*Ibid.*)

Finally, the court in *Calvert* expressly rejected the argument that surrogacy contracts violate public policy because they "tend to exploit or dehumanize women." (*Calvert, supra*, 5 Cal.4th at p. 97.) In particular, the court found that, "[a]lthough 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." (*Ibid.*) More generally, "[t]he limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants." (*Ibid.*)

(11) We therefore conclude that the Agreement did not violate the constitutional rights of M.C. or the Children. The trial court's ruling was consistent with the requirements of section 7962 and the court's decision in *Calvert*. M.C. has presented no ground to reverse the trial court's ruling.

Appendix C

DISPOSITION

The trial court's February 9, 2016 judgment is affirmed. Plaintiff and respondent C.M. (Father) is entitled to recover his costs on appeal.

Chaney, Acting P. J., and Johnson, J., concurred.

Appellant's petition for review by the Supreme Court was denied April 12, 2017, S240517.

APPENDIX D — RELEVANT PORTIONS OF THE JUDGMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, FILED FEBRUARY 9, 2016

ATTORNEY OR PARTY WITHOUT ATTORNEY
(Name, State Bar Number, and Address):

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ATTORNEY FOR *(Name)*: CM

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
201 Centre Plaza Dr.
Monterey Park, CA 91754

PETITIONER: CM

RESPONDENT: MC

JUDGMENT

* * *

2. a. This matter proceeded as follows:
☒ Default or uncontested ☒ By declaration
☐ Contested

* * *

Appendix D

d. ☐ Petitioner present
☒ Attorney present *(name)*: Robert R. Walmsley

f. **Petitioner**

* * *

(2) ☒ The petitioner signed *Advisement and Waiver of Rights Re: Establishment of Parental Relationship (*form FL-235)

* * *

g. **Respondent**

* * *

(2) ☒ The petitioner signed *Advisement and Waiver of Rights Re: Establishment of Parental Relationship (*form FL-235)

3. **THE COURT FINDS**

Name: CM ☐ Mother ☒ Father

is the parent of the following children:

Child's name	Date of birth
Moore Baby 1	Expected DOB 5/4/16
Moore Baby 2	Expected DOB 5/4/16
Moore Baby 3	Expected DOB 5/4/16

Appendix D

4. **THE COURT ORDERS**

a. ☒ Child custody and visitation are as specified in one or more of the attached forms:

(1) *Child Custody and Visitation Order Attachment* (form FL-341)
(2) *Stipulation for Order for Child Custody and/or Visitation of Children* (form FL-355)
(3) *Other (specify)*: Physical and Legal custody is awarded to Petitioner. No custody or visitation rights with respect to Respondent.

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APPENDIX E — 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.

APPENDIX F — CAL. FAM. CODE § 7962

§ 7962. Assisted reproduction agreements for gestational carriers; requirements; actions to establish parent-child relationship; rebuttal of presumptions; judgment or order; confidentiality; presumption of validity

(a) An assisted reproduction agreement for gestational carriers shall contain, but shall not be limited to, all of the following information:

(1) The date on which the assisted reproduction agreement for gestational carriers was executed.

(2) The persons from which the gametes originated, unless donated gametes were used, in which case the assisted reproduction agreement does not need to specify the name of the donor but shall specify whether the donated gamete or gametes were eggs, sperm, or embryos, or all.

(3) The identity of the intended parent or parents.

(4) Disclosure of how the intended parents will cover the medical expenses of the gestational carrier and of the newborn or newborns. If health care coverage is used to cover those medical expenses, the disclosure shall include a review of the health care policy provisions related to coverage for surrogate pregnancy, including any possible liability of the gestational carrier, third-party liability liens or other insurance coverage, and any notice requirements that could affect coverage or liability

of the gestational carrier. The review and disclosure do not constitute legal advice. If coverage of liability is uncertain, a statement of that fact shall be sufficient to meet the requirements of this section.

(b) Prior to executing the written assisted reproduction agreement for gestational carriers, a surrogate and the intended parent or intended parents shall be represented by separate independent licensed attorneys of their choosing.

(c) The assisted reproduction agreement for gestational carriers shall be executed by the parties and the signatures on the assisted reproduction agreement for gestational carriers shall be notarized or witnessed by an equivalent method of affirmation as required in the jurisdiction where the assisted reproduction agreement for gestational carriers is executed.

(d) The parties to an assisted reproduction agreement for gestational carriers shall not undergo an embryo transfer procedure, or commence injectable medication in preparation for an embryo transfer for assisted reproduction purposes, until the assisted reproduction agreement for gestational carriers has been fully executed as required by subdivisions (b) and (c) of this section.

(e) An action to establish the parent-child relationship between the intended parent or parents and the child as to a child conceived pursuant to an assisted reproduction agreement for gestational carriers may be filed before the child's birth and may be filed in the county where

the child is anticipated to be born, the county where the intended parent or intended parents reside, the county where the surrogate resides, the county where the assisted reproduction agreement for gestational carriers is executed, or the county where medical procedures pursuant to the agreement are to be performed. A copy of the assisted reproduction agreement for gestational carriers shall be lodged in the court action filed for the purpose of establishing the parent-child relationship. The parties to the assisted reproduction agreement for gestational carriers shall attest, under penalty of perjury, and to the best of their knowledge and belief, as to the parties' compliance with this section in entering into the assisted reproduction agreement for gestational carriers. Submitting those declarations shall not constitute a waiver, under Section 912 of the Evidence Code , of the lawyer-client privilege described in Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code .

(f)(1) A notarized assisted reproduction agreement for gestational carriers signed by all the parties, with the attached declarations of independent attorneys, and lodged with the superior court in accordance with this section, shall rebut any presumptions contained within Part 2 (commencing with Section 7540), subdivision (b) of Section 7610 , and Sections 7611 and 7613 , as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.

(2) Upon petition of any party to a properly executed assisted reproduction agreement for gestational carriers,

the court shall issue a judgment or order establishing a parent-child relationship, whether pursuant to Section 7630 or otherwise. The judgment or order may be issued before or after the child's or children's birth subject to the limitations of Section 7633. Subject to proof of compliance with this section, the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section. Upon motion by a party to the assisted reproduction agreement for gestational carriers, the matter shall be scheduled for hearing before a judgment or order is issued. Nothing in this section shall be construed to prevent a court from finding and declaring that the intended parent is or intended parents are the parent or parents of the child where compliance with this section has not been met; however, the court shall require sufficient proof entitling the parties to the relief sought.

(g) The petition, relinquishment or consent, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition filed in the office of the clerk of the court pursuant to this part shall

not be open to inspection by any person other than the parties to the proceeding and their attorneys and the State Department of Social Services, except upon the written authority of a judge of the superior court. A judge of the superior court shall not authorize anyone to inspect the petition, relinquishment or consent, agreement, order, report to the court from any investigating agency, or power of attorney or deposition, or any portion of those documents, except in exceptional circumstances and where necessary. The petitioner may be required to pay the expense of preparing the copies of the documents to be inspected.

(h) Upon the written request of any party to the proceeding and the order of any judge of the superior court, the clerk of the court shall not provide any documents referred to in subdivision (g) for inspection or copying to any other person, unless the name of the gestational carrier or any information tending to identify the gestational carrier is deleted from the documents or copies thereof.

(i) An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order. For purposes of this part, any failure to comply with the requirements of this section shall rebut the presumption of the validity of the assisted reproduction agreement for gestational carriers.