

No. 17-1487

**In The
Supreme Court of the United States**

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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.
GUNZEHAUSER, 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**

—◆—
**MOTION AND BRIEF OF CONCERNED
UNITED BIRTHPARENTS, INC. AND SAVING
OUR SISTERS – SOS INCORPORATED AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

—◆—
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May 30, 2018

**MOTION FOR LEAVE TO
FILE *AMICI CURIAE* BRIEF¹**

Although Petitioners and Respondents, Governor Brown and Karen Smith, M.D., have consented to the filing of this *Amici Curiae* Brief on Petitioners' behalf, the other Respondents have withheld their consent. Therefore, pursuant to Supreme Court Rule 37.2(b), *Amici Curiae*, Concerned United Birthparents, Inc. ("CUB") and Saving Our Sisters – SOS Incorporated ("SOS") move for leave to file this *Amici Curiae* Brief in support of Petitioners in the above-captioned matter for the following reasons:

Amici are nationally recognized organizations that are primarily focused on birthparents and all others affected by adoption or surrogacy. *Amici* serve all those affected by adoption or surrogacy and all who are concerned about adoption and surrogacy-related issues, including gestational mothers, intended contractual parents, adoptees, adoptive parents, and adoption and surrogacy professionals.

Amici's missions are to: 1) provide support for all family members separated by adoption or surrogacy contracts; 2) offer resources to help prevent unnecessary family separations; 3) educate society about the lifelong impact on all who are affected by adoption or surrogacy contracts; 4) advocate for fair, ethical, and constitutional adoption and surrogacy laws, policies,

¹ Much of this motion is derived from CUB's position paper on surrogacy, which was drafted by the late Carole J. Anderson, M.S.W., J.D., in 1987 and SOS's mission statement.

and practices; and 5) offer legal and financial assistance to those in need. As part of their missions, *Amici* assist birthparents and gestational mothers in litigation that involves significant adoption or surrogacy-related issues and the parents' constitutional rights and liberty interests in parenting their biological children, including those to whom they gave birth, but with whom they share no genetic link.

Like CUB, SOS is a nationwide, non-profit corporation made up of mothers of adoption loss, adoptees, and even adoptive parents who are experiencing the impacts of their adopted children being separated from their natural families. SOS is primarily focused on educating mothers and families considering adoption about their rights and the lifelong affects of the trauma to both mother and infant caused by separation. The biological connection between the child and mother is cellular and the child needs and wants only his or her mother.

Mothers who are considering adoption or surrogacy are intentionally not educated about the trauma that they or their baby will suffer by those who stand to profit from these industries. The adoption and surrogacy narratives are written by the very people who wish to profit at the expense of mothers and children. SOS provides a variety of resources and other supports to mothers and families considering surrogacy or suffering the aftermath of it. SOS is committed to educating those considering adoption and surrogacy about the potential negative impacts before it is too late.

Current technology allows the artificial insemination of a genetically-linked mother's eggs, even though the mother has never met the child's father. It also permits the transfer of an embryo into a woman who is genetically unrelated to the zygote. Thus, a child may now result from the sperm, egg, and uterus of three people who have never met.

Amici support research and techniques that permit infertile couples to conceive and bear genetically-related children. But, technology will not enable all people to create or bear children. Thus, some infertile couples seek to adopt while others work to create newborns by nontraditional, assisted reproductive methods, including surrogacy.

This case presents significant issues as to the constitutional rights and liberty interests implicated in surrogacy and the minimum due process and equal protection requirements that should be applied to lawful surrogacy contracts in the United States. As the only organizations that focus on the impacts upon birthparents, including gestational carriers, in adoption or surrogacy situations, *Amici* have a direct interest in the outcome of this case. As *Amici* know, mothers who surrender children for adoption suffer lifelong, detrimental consequences. Gestational mothers, who tend to be younger, less well-educated, and financially disadvantaged, who are separated from the children they gave birth to because of a surrogacy contract, have been known to suffer many of the same ill effects. They also face increased risks during pregnancy that

are often not properly considered by the agreement or the courts.

Amici provide information and assistance to expectant and birthparents looking for help and resources to prevent unnecessary family separations caused by adoption or surrogacy. *Amici's* membership and assisted populations have experienced firsthand the devastating and life-altering impacts caused by adoptions not only to birthparents, including gestational mothers, but also to adoptees and, in some cases, adoptive parents or intended, contractual parents who acquire children through surrogacy arrangements. Thus, *Amici* have an interest in ensuring that all adoption and surrogacy procedures comply with public policy and the United States Constitution.

Part of *Amici's* mission is to advocate for adoption and surrogacy-related reforms that protect the constitutional rights and liberty interests of expectant and birthparents, including gestational or surrogate mothers, as well as the children involved be they naturally-conceived adoptees or babies created pursuant to surrogacy contracts.

Infertility is a physical limitation not unlike blindness. Our society refuses to enforce contracts that require any person to sell her eyes. Those types of contracts are deemed void as against public policy. The concern is that the sellers would be poor and easily exploited, while the buyers would be rich and powerful. Society does not care whether the buyer of an eye is a well-known artist while the seller cannot read. Who

might make better use of an organ is irrelevant and does not justify those types of contracts. Also, the wealthy, well-educated, and powerful are unlikely to sell their spare organs to poor couples or individuals needing them.

The purchase of children has long been illegal in the United States because it treats the child as a commodity and exploits vulnerable women. The same considerations that make contracts for the sale of organs void apply equally to contracts for the sale of children created through assisted reproductive technologies. The surrogacy industry is just a poorly rationalized form of child trafficking and female exploitation.

Thus, public policy, law, ethics, and society should be concerned for the adults in these new child-bearing arrangements, but more importantly, for the children who are created with the expressed intention of separating them from their biological mothers, including the gestational surrogates who carried them to term. The separation of any child from a parent, but particularly a birthmother (whether genetically linked or not) is a tragedy with far-reaching consequences, not only for the individual child and the parent but also for the children of the gestational mothers who helplessly watch a baby brother or sister disappear.

Indeed, surrogacy contracts are neither intended nor designed to serve the best interests of the children involved. Rather, they are intended to supply a desirable product (*i.e.*, a baby with a genetic link or not) to an infertile, consuming couple. Very little consideration, if

any, is given to the potential long-term impacts to the children involved.

Consequently, *Amici* do not support any reproduction where a child is created with the express intention of separating him from his birthmother, which includes a mother who lacks any genetic link to the child. The woman who carries the child makes an essential biological contribution to the child's procreation, and the relationship between that mother and child is the most intimate and the one most worthy of protection in all human experience. Adoption of any child created through surrogacy should be handled in the exact same way as all other adoptions, which require considerations of actual voluntariness, revocation, waiting periods, expense reporting, home studies to approve the placement, and court approval. To do otherwise is to sanction baby selling and female exploitation, which is a violation of the gestational mother's and the child's constitutional rights and liberty interests.

As demonstrated by this case and as set forth in this *Amicus* Brief, if accepted, there is little consistency among the states with respect to surrogacy contracts and the gestational surrogate's rights post-birth. As a result, birthparents' constitutional rights and liberty interests in parenting their children are often violated by the application of those inconsistent state laws. Likewise, because the resulting children's best interests are completely removed from the equation, their liberty interests and constitutional rights are violated too. Because this case and so many others like it seriously impact the liberty interests and constitutional

rights of the numerous birthparents, including gestational surrogate mothers, and children created through surrogacy arrangements each year, and because of *Amici's* role in assisting these persons by providing resources, information, and support group counseling related to surrogacy matters, *Amici's* membership and assisted population have a direct stake in the outcome of this case.

THEREFORE, *Amici Curiae* respectfully request that this Court accept the attached *Amici Curiae* Brief in support of the Petitioners.

Respectfully submitted,

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May 30, 2018

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INTEREST OF THE *AMICI CURIAE*¹

Both *Amici*, Concerned United Birthparents, Inc. (“CUB”) and Saving Our Sisters – SOS Incorporated (“SOS”) are national organizations whose missions are to: 1) provide support for all family members separated through adoption or surrogacy agreements; 2) offer resources to help prevent unnecessary family separations; 3) educate society about the life-long impact on all who are affected by adoption and surrogacy contracts; 4) advocate for fair, ethical, and constitutional adoption and surrogacy laws, policies, and practices; and 5) provide financial and legal assistance to those involved in surrogacy and adoption arrangements. In furtherance of these missions, *Amici* serve all those who are affected by adoption or surrogacy arrangements and who are concerned about adoption and surrogacy-related issues. Although *Amici* focus primarily on expectant and birthparents, their membership and assisted populations also includes gestational carriers, traditional surrogate mothers (*i.e.*, women genetically linked to the child), children created through surrogacy contracts, intended contractual parents, adoptees, adoptive parents, and adoption

¹ The Petitioners and Respondents, Governor Brown and Karen Smith, M.D., have consented to the filing of this brief. The other Respondents have withheld their consent. Further, as required by Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *Amici Curiae*, its members, or its counsel. The parties were notified ten days prior to the due date of this brief of the intention to file.

and surrogacy professionals throughout the United States, including California, and Canada.

As part of their missions, *Amici* help birthparents, including gestational mothers like Melissa Cook, who are genetically unrelated to the children they delivered, in litigation that involves significant issues related to the parents' constitutional rights and liberty interests in parenting their children and avoiding unnecessary family separations caused by adoption or surrogacy contracts. *Amici* also provide support for the rights of children created through surrogacy.

Because this case presents significant issues as to the constitutional rights negatively impacted by surrogacy and, ultimately, the minimum due process and equal protection requirements that should be applied to surrogacy contracts throughout the United States, *Amici*, their members, and their assisted populations have a direct interest in the outcome of this case. Indeed, *Amici* actively provide information and assistance to expectant and birthparents, including gestational surrogates, looking for help and resources to prevent unnecessary family separations caused by adoption and surrogacy contracts. They also run active support groups to help pick up the pieces after a birthparent has been coerced, subtly, overtly, financially, or by a pre-conception surrogacy contract, into relinquishing a child for adoption or to contractual parents (who may not be fit to raise the child). *Amici's* membership and assisted populations have experienced these impacts firsthand. Therefore, they have a direct interest in the outcome of this case.

Amici advocate for adoption and surrogacy-related reforms that protect the constitutional rights of expectant and birthparents, including gestational surrogates, as well as adoptees and children procured through surrogacy contracts. *Amici* assert that all surrogacy contracts violate longstanding constitutional and public policies prohibiting slavery, human trafficking, and baby selling and, therefore, they should be void and unenforceable. The facts and reasons underlying *Amici*'s strong opposition to surrogacy also support the need for minimum due process and equal protection guidelines to be imposed upon all state-sanctioned surrogacy arrangements and procedures in the United States.

Because this case and so many others like it seriously impact the constitutional rights of birthparents, including gestational surrogates, adoptees, and children created through surrogacy contracts, and because of *Amici*'s unique role in assisting birthparents, including gestational mothers, faced with the difficult decision of whether to parent or to knowingly, voluntarily, and meaningfully consent to adoption or relinquishment, *Amici*, their members, and their assisted populations have a direct stake in the outcome of this case. Consequently, the resolution of the issues in this case are critical to the constitutional rights to equal protection and due process of expectant and birthparents, including gestational surrogates, their children (whether genetically linked or not), the stability of placements through adoption or surrogacy contracts, and the protection of hopeful adoptive or intended, contractual

parents, children, and professionals involved in surrogacy and adoption arrangements throughout the United States.



INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this case, this Court has a unique opportunity to require the lower courts to address the substantial, constitutional concerns raised by surrogacy contracts and procedures. Given the longstanding history, tradition, and constitutional prohibitions against slavery and indentured servitude and the existing federal and state public policies against baby selling and human trafficking, *Amici* believe that all surrogacy contracts should be deemed illegal, void, and unenforceable.

The same facts and reasoning underlying *Amici's* own policies against surrogacy also informs and fully supports the conclusion that surrogacy contracts raise substantial issues of national concern. Surrogacy fundamentally alters our society's understanding of motherhood and family, demeans women and children by exploiting them, and promotes the creation of children for sale without any regard for what is in their best interests. Thus, surrogacy contracts create substantial issues of constitutional proportion that should be addressed in this case.

The imposition of procedural safeguards and minimum constitutional guidelines would not protect women and children from exploitation. *Amici* believe

that these arrangements are inherently exploitative. The courts must carefully consider all the constitutional rights involved. To do otherwise would be to allow the profit incentive involved in the surrogacy industry to prevail and to reduce children to consumer products and women to breeding machines in violation of the United States Constitution.

At their core, surrogacy contracts are state-sanctioned child procurement and sales agreements. See Smolin, David M., *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, Samford University (2015).² Children are conceived in a petri dish with the intention of removing the child from the birthmother's custody and transferring the child to an intended parent or parents for a price. These arrangements are focused upon providing a product – a genetically-linked (or not) infant – to infertile people for money. This has necessarily generated an entire industry bent on profiting from what is essentially baby selling and the exploitation of vulnerable, disadvantaged women.

To satisfy a perceived human desire to create a child of our own genetic stock, we overlook the negative impacts to the gestational surrogate and do not even consider the potential harm to the child procured through surrogacy. Indeed, “the legal legitimation of commercial surrogacy in some jurisdictions,” including

² http://works.bepress.com/david_smolin/19/, last accessed on May 24, 2018.

California, which is a leading proponent of the practice, “is a profound step backwards in the legal progress against the interrelated practices of human trafficking and the sale of children.” Smolin, at 341.

Amici believe that, as in the case of many countries in the world, surrogacy contracts should be deemed illegal, void, and unenforceable as a matter of public policy. See *Surrogate Parenting: A Worldwide Industry, Lacking Global Rules*, Morning Edition, National Public Radio (June 11, 2015) (“In Europe, for example, it’s illegal in half a dozen countries, including France, Germany, Italy and Spain. It is permitted in a handful of other European nations – though there are major restrictions.”).³ Surrogacy contracts necessarily exploit vulnerable, financially disadvantaged women and reduce children to a product to be manufactured and sold with little regard for their best interests. Therefore, *Amici* oppose surrogacy.

The reasons *Amici* oppose surrogacy relate directly to the reasons why surrogacy in general and the California statute in particular violate the constitutional rights of the birthmothers and the children involved. This case demonstrates the need for thoughtful consideration of the constitutional rights impacted by surrogacy. Evaluating those constitutional concerns and outlining such minimum guidelines would prevent the wholesale violation of the equal protection and

³ <http://www.npr.org/sections/parallels/2015/06/11/413406325/surrogate-parenting-a-worldwide-industry-lacking-global-rules>, last accessed on May 24, 2018.

substantive due process rights of the gestational mother and the children involved in and affected by surrogacy contracts. Indeed, *Amici* believe that, at a minimum, surrogacy contracts and procedures should be subject to the same legal, ethical, and constitutional requirements as adoptions. To do otherwise is to unconstitutionally commodify women and children to their physical, psychological, and emotional detriment.

The California statute provides no adoption-like protections for the birthmothers and children involved. Therefore, this Court should require the lower courts to consider whether the mother's and the children's equal protection rights were violated either by the statute on its face or as it was applied to them in this case.

◆

ARGUMENT

Surrogacy arrangements like the one involved here are simply poorly rationalized baby selling. As a result, *Amici* believe they should be declared illegal, void, and unenforceable as a matter of public policy. For the same reasons *Amici* oppose surrogacy in general, this Court should require the lower courts to consider whether California's surrogacy statute violates minimum standards of due process and equal protection for the birthmothers and children involved. To allow surrogacy as California does not only violates the constitutional prohibition against slavery and indentured servitude, but it also runs afoul of long-standing

history, tradition, and public policies against human trafficking and baby selling. Moreover, it disregards the deep, bonded relationship between a birthmother (whether genetically linked or not) and the children she carries to term. Those bonds are extremely important to a child's healthy development and should be treated with seriousness and respect. To simply tear a child away from its mother for no reason other than profit and parental hubris and without regard to a child's best interests is morally wrong and constitutionally questionable. Therefore, this Court should grant the Petition.

I. Surrogacy Generally

Two types of surrogacy arrangements generally exist in the United States – traditional surrogacy and gestational surrogacy. *See Surrogacy Statistics, Modern Family Surrogacy.*⁴ In traditional surrogacy, the birthmother who carries the child to term provides the egg, which is fertilized either by the intended father or a sperm donor. *Id.* In gestational surrogacy, however, the birthmother whose womb carries the child to term has no genetic link to the child she delivers. *Id.* Rather, the child is either genetically related to both intended parents, one intended parent, or neither intended parent. As many as six adults may be involved in a child's conception and birth – the gestational/birthmother, her spouse or partner, the egg donor, the sperm donor,

⁴ http://www.modernfamilysurrogacy.com/page/surrogacy_statistics, last accessed on May 24, 2018.

the intended, contractual father, and the intended, contractual mother. In this case, three people were essential to the children's creation, C.M., the intended, sperm-donating father, an anonymous egg donor, and Petitioner Melissa Cook, the birthmother. Thus, the parties here engaged in gestational surrogacy. Gestational surrogacy is understandably complex and implicates many medical, moral, religious, social, and constitutional concerns. Therefore, it should not be considered without deep thought and sensitivity.

As infertility rates rise in the United States, the use of assisted reproductive technologies ("ART") and surrogacy arrangements increases too. *See* Cohen, Deborah L., *Surrogate Pregnancies On The Rise Despite Cost Hurdles*, Reuters (March 18, 2013).⁵ In 2011, the Society of Assisted Reproductive Technology (SART) tracked 1,593 babies born in the United States to gestational surrogates. *Id.* This number was up from 1,353 in 2009, and just 738 in 2004. *Id.* The numbers of total babies born to gestational surrogates could be slightly higher because some of the clinics handling these procedures do not report to SART. Currently, the estimate is that nine babies are born through surrogacy in each state, each year. But, given SART's 2011 numbers, that estimate seems too low. *Id.* Although the numbers may seem small, the societal and familial impacts are great.

⁵ www.reuters.com/article/us-parent-surrogate-idUSBRE92H11Q20130318, last accessed on May 24, 2018.

Surrogacy in the United States is an expensive proposition. Surrogacy professionals typically advise intended parents to have anywhere from \$75,000 to \$120,000 set aside for the entire process. Cohen, at 2-3. Those costs can be significantly higher in the event of miscarriages, multiple *in vitro* fertilization (“IVF”) attempts, or other complications related to the pregnancy or embryo transfer. *See id.*

In 2013, surrogates typically charged \$30,000 to \$35,000, excluding legal and medical fees, which amounts to approximately \$5.48 per hour for each hour she is pregnant, based upon a pregnancy of 266 days or 6,384 hours. *See Surrogacy: A 21st Century Human Rights Challenge*, The Center for Bioethics and Culture Network.⁶ This equals less than the minimum wage of \$7.25 per hour.⁷ But, as discussed below, despite the low wage, the money is nevertheless a major factor for many surrogates.

In addition, the surrogacy agency charges a fee of \$15,000 or more. *See* Cohen, at 3. The average journey of intended parents can be anywhere from \$68,000 at the low end to \$166,000 or more at the high end.⁸ One intended parent reported incurring expenses exceeding \$300,000. *See* Cohen, at 2. Thus, it tends to be only the wealthy who can utilize surrogacy arrangements.

⁶ www.cbc-network.org/issues/making-life/surrogacy/, last accessed on May 24, 2018.

⁷ <https://www.dol.gov/whd/minimumwage.htm>, last accessed on May 24, 2018.

⁸ <http://www.surrogacyadvisor.com/directory/agencyratings/>, last accessed on May 24, 2018.

Indeed, in 2005, most intended parents were married, white, and had incomes of over \$80,000 per year. See Ciccarelli, Janice C., *et al.*, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, *Journal of Social Issues* (Plenum Publishing Corp. March 22, 2005), at 7.⁹ Given inflation, that income would be just over \$103,000 today.¹⁰

When a significant amount of money is invested in a transaction, the parties' expectations increase. *Id.* at 7. In economic terms, it is natural for one who has invested significant dollars into an endeavor to expect positive results. *Id.* This monetary investment has led to the mentality that, not only can intended parents contract to purchase children, but they can also select children who are more likely to be attractive and to achieve social or academic success. *Id.* This mentality has been apparent for years in the egg donation industry, where egg donors are selected for high IQs and, for premium prices, for specific attributes and good looks. *Id.* (footnote omitted). Thus, the money involved in surrogacy raises the ugly specter of eugenics.

In contrast, it is not the very wealthy who are agreeing to act as gestational birthmothers or even traditional surrogates. As the court observed in *In re: Baby M*: “. . . it is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous

⁹ <http://claradoc.gpa.free.fr/doc/33.pdf>, last accessed on May 24, 2018.

¹⁰ <http://www.saving.org/inflation/inflation.php?amount=80,000>, last accessed on May 24, 2018.

among those women in the top twenty percent income bracket as among those in the bottom twenty percent. Put differently, we doubt that infertile couples in the low[-]income bracket will find upper income surrogates.” 537 A.2d 1227, 1249 (N.J. 1988). The court’s observations have proved true. Generally, surrogate mothers’ family incomes are modest and they come from working class backgrounds. See Ciccarelli, J., at 5. Surrogates tend to be younger, less well-educated, and to have a lower socio-economic status than intended parents. *Surrogate Motherhood: A Violation of Human Rights*, European Center for Law and Justice, Report at the Council of Europe, Strasbourg (April 26, 2016), at 7.¹¹

Generally, surrogates explain their willingness to participate in surrogacy by referring to “giving the gift of life” or empathy for childless couples. See Offerman-Suckerberg (ed.), *Gender in Transition: A New Frontier*, Chapter 9, Einwhoner, J., *Who Becomes a Surrogate Personality Characteristics* (Springer Science+Business Media New York 1989), pp. 131-40, at 133. Nevertheless, for many surrogates, the money is a motivating factor, even if it is not the only one. *Id.* In one study, forty percent of surrogates reported that the money was their main motivator. *Id.* at 138. Some experts believe, however, that those surrogates who claim money was not a factor in their decisions are parroting what they think is the socially acceptable answer rather than revealing their true, underlying

¹¹ <http://icolf.org/surrogate-motherhood-a-violation-of-human-rights/>, last accessed on May 24, 2018.

motivation. *See* Ciccarelli, at 4. Thus, surrogacy presents a prime opportunity to exploit young, vulnerable, financially disadvantaged women.

The commercial nature of surrogacy transactions also tends to force the parties into viewing pregnancy as a commercial transaction. *Surrogate Motherhood*, at 8. Most surrogate mothers say they try to detach themselves psychologically from the child during pregnancy to make it easier to relinquish the child after birth. *Id.* They think of their pregnancies as a job wherein they must keep emotions at bay. *Id.* Sadly, this negatively impacts the bond between mother and child.

II. Surrogacy Negatively Impacts The Mother-Child Bond Critical To Healthy Human And Familial Development

Thus, surrogacy undermines the fact that the bond between a pregnant mother and the fetus is vital to the future health and well-being of both. Indeed, even California recognizes that a true gestational surrogate is just as much a mother as any other woman who gives birth. *See* Cal. Fam. Code §7610(a). And, research has demonstrated that the strength of the mother-child bond during pregnancy impacts both parties' postpartum mental health. *See* T.W. Goecke, *et al.*, *The Association of Prenatal Attachment and Perinatal Factors with Pre- and Postpartum Depression in First-Time Mothers*, 286 ARCHIVES OF GYNECOLOGY 7 OBSTETRICS 309 (2012) (finding that the stronger the prenatal mother-fetal bond, the lower the incidence of

postpartum depression); M.A. White & M.E. Wilson, *The Swedish Family: Transition to Parenthood*, 13 SCANDINAVIAN JOURNAL OF CARING SCIENCES 171, 174 (1999) (showing that a mother's attachment to her unborn child is positively correlated with her infant's mood at eight months old); P. Fonagy, *et al.*, *Maternal Representations of Attachment during Pregnancy Predict the Organization of Infant-Mother Attachment at One Year of Age*, 62 CHILD DEVELOPMENT 891 (1991) (demonstrating that a one-year-old's response to stress is closely correlated with the quality of the prenatal mother-child attachment).¹²

The importance of this mother-child bond does not diminish after birth. One recent study showed that it was possible to improve infant mental health by teaching attachment skills to pregnant mothers and thereby improve the attachment between the mother and the child. See M. Akbarzadeh, *et al.*, *Teaching Attachment Behaviors to Pregnant Women: A Randomized Controlled Trial of Effects on Infant Mental Health from Birth to the Age of Three Months*, 36 ANNALS SAUDI MED. 175 (2016) (demonstrating that increasing maternal attachment behaviors reduces anxiety and improves infant mental health at birth and at three months old).¹³

¹² This paragraph was derived from the *Amicus Curiae* brief submitted by the American Association of Pro-Life Obstetricians and Gynecologists, *et al.* in *M.C. v. C.M.*, Case No. 17-129, United States Supreme Court (2017).

¹³ *Id.*

Thus, it should come as no surprise that the evidence is mounting that severance of the mother-child bond causes negative impacts to the developing child. For example, research has shown that children who are not securely attached to their mothers in infancy are less able to self-regulate in their toddler and preschool years. See G. Kochanska, *et al.*, *Interplay of Genes and Early Mother-Child Relationship in the Development of Self-regulation from Toddler to Preschool Age*, 50 *J. CHILD PSYCHOLOGY & PSYCHIATRY* 1331, 1336 (2009). Another study showed that, at the age of seven, children conceived by surrogacy had more adjustment problems than children conceived by gamete donation, “suggesting the absence of a gestational connection between parents and their child may be more problematic for children than the absence of a genetic relationship.” S. Gombolek, *et al.*, *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, 54 *J. CHILD PSYCHOLOGY & PSYCHIATRY* 653, 657 (2013).¹⁴

In some cases, the severance of the mother-child bond can even lead to serious attachment disorders like reactive attachment disorder (“RAD”), which can deprive the child of the ability to form normal, loving relationships. See L. Hardy, *Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications*, 20 *J. CHILD & ADOLESCENT PSYCHIATRIC NURSING* 27, 38 (2007). Children affected by RAD often struggle to establish and

¹⁴ *Id.*

maintain relationships throughout their lives. See M. Follan & M. McNamara, *A Fragile Bond: Adoptive Parents' Experiences of Caring for Children with a Diagnosis of Reactive Attachment Disorder*, 23 J. CLINICAL NURSING 1076-85 (2013). Children with severe attachment issues frequently have long-term difficulties with family and parental relationships, and these psychiatric issues can be devastating to families, requiring expensive therapies with limited effectiveness. See generally, National Child Traumatic Stress Network, *Impact of Complex Trauma* (2016) (noting that “[t]he importance of a child’s close relationship with a caregiver cannot be overestimated”).¹⁵ Thus, a surrogate’s attempts to detach from the fetus she carries during pregnancy could cause long-term negative impacts to the child’s future psychological well-being.¹⁶

In addition to the mental and physical health consequences for the infants who have been taken from their mothers, the mothers themselves suffer the emotional trauma of being immediately and irrevocably severed from the children they have nurtured and delivered. See Am. Soc’y Reprod. Med. Ethics Comm., *Consideration of the Gestational Carrier: A Committee Opinion*, 99 FERTILITY & STERILITY 1838 (2013).¹⁷ This case provides the best illustration of that trauma. Immediately after the birth of the babies, Ms. Cook

¹⁵ http://www.nctsn.org/sites/default/files/assets/pdfs/impact_of_complex_trauma_final.pdf, last accessed on May 24, 2018.

¹⁶ See footnote 12, *supra*.

¹⁷ [http://www.fertstert.org/article/S0015-0282\(13\)00341-5/pdf](http://www.fertstert.org/article/S0015-0282(13)00341-5/pdf), last accessed on May 24, 2018.

was prevented from seeing them, nursing them, supporting them when they were left alone in the hospital unattended by C.M. or any parental figure – all while fearing that C.M. was incapable of parenting the children and would likely relinquish one or more of them to a stranger for adoption.

Also, in *Amici*'s experience, some surrogates have found that during their pregnancy, they experienced conflicting emotions about relinquishing the baby after birth. Online articles exist which warn potential surrogates that during pregnancy, they may experience confusion, sadness, or even anger about the future relinquishment of the child. See Loop, Erica, *Emotional Issues for Surrogate Mother & Families*, Livestrong.com (June 13, 2017).¹⁸ Some mothers experience the conflicts between not wanting to relinquish the child they have nurtured during pregnancy, their empathy for the childless couple, the financial benefit to be gained, and the contractual promise made before they were even pregnant – a Hobson's choice.

Additionally, the exploitative effects of surrogacy on the surrogate mother often do not appear until after the baby is relinquished. *Surrogate Motherhood*, at 10. The surrogate mother is often cherished, cared for, and supported by the intended parents or the surrogacy agency during her pregnancy and labor. *Id.* But then, after the baby is relinquished, many intended parents withdraw their support. *Id.* at 10-11. Once the

¹⁸ <http://www.livestrong.com/article/233454-emotional-issues-for-surrogate-mothers-families/>, last accessed on May 19, 2018.

contractual parents get the baby they paid for, their interest in the surrogate mother's wellbeing disappears. *Id.* at 11. Thus, some surmise that the likelihood of a surrogate becoming dissatisfied with the arrangement increases as time passes and contact with the contracting couple diminishes. *Id.* This is part of the inherently exploitative nature of surrogacy that many mothers do not realize is a part of the transaction until it is too late.

Moreover, surrogacy affects not only the surrogates, but more importantly, it also impacts the children created by ART and separated from their birthmothers by contract. "Surrogacy compromises the dignity of the child by making the child the object of a contract – a commodity." *Surrogate Motherhood*, at 5. As in this case, a child is created and sold without regard to whether the purchasers will make good parents. *See In re Baby M*, 537 A.2d at 1241 (citing Baker, N., *Baby Selling: The Scandal of Black Market Adoption* (1978), at 7). Indeed, C.M. was not subjected to a home study and the facts seem to demonstrate that his home environment is less than suitable for triplets. Thus, no one other than Melissa Cook was really looking out for the children's best interests.

Further, as more medical and psychological studies highlight the importance of the links created during pregnancy between the mother and the child, and their importance for the child's development, even more questions arise regarding the propriety of surrogacy. Substantial evidence exists that babies are highly attuned to their mothers' bodies while *in utero*. *See*

Covington, Coline, *The Psychological Trauma Behind Surrogate Pregnancies*, *The Week* (May 6, 2009), at 2.¹⁹ Indeed, studies have demonstrated that unborn infants recognize and are excited by hearing their mother's voice. See Barbara S. Kiselvsky, Sylvia M.J. Hains, *et al.*, *Effects of Experience on Fetal Voice Recognition*, 14 *PSYCHOLOGICAL SCIENCE* 220-24 (May 2003). Similarly, studies show that unborn infants recognize the native language of their mothers versus other languages. See Christine Moon, Robin P. Cooper, *et al.*, *Two-day-olds Prefer Their Native Language*, 16 *Infant Behav. Dev.* 495-500 (1993). Fetuses also internalize their mothers' scent which may contribute to the infant's perception of the smell of the mother's breast milk. See Melissa B. Clark-Gambelunghe & David Clark, *Sensory Development*, 62 *PEDIATR. CLIN. N. AM.* 367-84 (2015). Likewise, the foods the mother eats during pregnancy influence the child's future taste in food. Julie A. Mennella, *et al.*, *Prenatal and Postnatal Flavor Learning by Human Infants*, 107 *PEDIATRICS* E88 (2001). Thus, the deep and enduring bond between mother and child is more dynamic than just the physical connection created by the umbilical cord and placenta – it actually impacts the child's preferred language and taste in food as well as the child's appearance, growth, and physiological capabilities. See R. Brian Oxman, *Maternal-Fetal Relationships and*

¹⁹ <http://www.theweek.co.uk/politics/23389/psychological-trauma-behind-surrogate-pregnancies>, last accessed on May 24, 2018.

Nongenetic Surrogates, 33 JURIMETRICS JOURNAL 387, 412 (1995).²⁰

Still, we do not yet know the full impact on the baby caused by the loss of its mother at birth except that it could likely exacerbate an experience that is already traumatic. Covington, at 2. Society's failure to recognize the importance of pre-natal attachment indicates a purposeful willingness to rationalize and minimize the importance of attachment, separation, and loss for the baby just so babies can be created and transferred to those unable to conceive for purchase. *Id.* at 4; *see also* Tehran, Hoda Ahmari, *et al.*, *Emotional Experiences in Surrogate Mothers: A Qualitative Study*, 12 Iran J. Reprod. Med. 7, at 471-80.

Indeed, one study suggests that children born through surrogacy are more likely to suffer depression than those carried by the mother who raises them. Innes, Emma, *Surrogate-Born Children Are More Likely To Suffer Depression Than Those Carried By Their Real Mother*, Daily Mail.com, at 1.²¹ They are more likely to display behavioral and emotional problems as their understanding of their creation increases. *Id.* They appear to have more difficulty coping with the idea that they were carried by another woman

²⁰ This paragraph was derived from the *Amicus Curiae* Brief of the American College of Pediatricians *et al.*, filed in *M.C. v. C.M.*, Case No. 17-129, United States Supreme Court (2017).

²¹ <http://www.dailymail.co.uk/health/article-2344362/Surrogate-born-children-likely-suffer-depression-carried-real-mother.html>, last accessed on May 24, 2018.

than with the fact that they are not genetically related to the parents raising them. *Id.* at 2.

And, in surrogacy, the rights of the child are almost never considered. *Surrogacy: Human Rights Challenge*, at 1.²² By transferring the duties of parenting from the birthmother to a contracting couple or individual, the child is denied any claim to its “gestational carrier” and to its biological parents if the egg or sperm do not belong to the intended parents. *Id.* In addition, the child loses all right to information about any siblings he may have, whether genetically linked or not. *Id.* Thus, given these potential psychological and long-term impacts, more consideration needs to be given to the rights of children born through surrogacy.

Despite (or perhaps because of) the profit incentive involved and the inherent risks of exploitation and baby selling, there is no national regulation of surrogacy in the United States. *See Surrogacy: A Human Rights Challenge*, at 1. The fifty states have an entire spectrum of policies and laws ranging from outright bans to no regulation whatsoever. *Id.* Consequently, a fertility-industrial complex has been created to cater to the eight million infertile women in the United States alone, who are spending approximately \$3 billion per year to help themselves conceive. *Id.* Even though the costs to intended parents are very high, the demand for qualified surrogates far outstrips the available supply. *Id.* Even foreign couples are now looking

²² www.cbc-network.org/issues/making-life/surrogacy/, last accessed on May 24, 2018.

to the United States to procure surrogate pregnancies. See Lewin, Tamar, *Coming to U.S. for Baby, and Womb to Carry It*, The New York Times (July 5, 2014).²³

In sum, surrogacy is just another form of exploiting women's bodies and commodifying children. *Id.* Surrogate services are advertised, surrogates are recruited, and operating agencies make large profits. *Id.* The increased commercialization of surrogacy raises legitimate concerns about encouraging black market baby sellers, breeding farms, turning impoverished women into baby producers, and breeding selectively for a price. *Id.* Sadly, surrogacy degrades a pregnancy by reducing it to a low-paid service job and a baby to a product to be manufactured (sometimes to specifications) and sold to the highest bidder. *Id.* It also weakens our society's understanding of motherhood and family. Thus, *Amici* believe surrogacy contracts should be void and unenforceable.

III. *Amici's* Opposition To Surrogacy Is Supported By Our Nation's History, Tradition, And Policies Against Slavery, Human Trafficking, And Baby Selling

Amici's policies against surrogacy are supported by the Constitution and long-standing history, tradition, and public policy. Pursuant to the Thirteenth Amendment to the United States Constitution,

²³ <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>, last accessed on May 24, 2018.

“[n]either slavery nor involuntary servitude . . . shall exist in the United States. . . .” Amend. XIII, U.S. Const. Likewise, federal law makes it illegal to engage in or to attempt to engage in human trafficking. *See* 18 U.S.C. §§1583, 1590, 1594. It is also unlawful to profit from human trafficking. *See* 18 U.S.C. §1593A. In California, the federal government prosecuted several prominent lawyers for being a part of a baby-selling ring. Smolin, at 328. In that case, the government concluded that because the lawyers first impregnated surrogates and thereafter offered the babies for purchase by intended parents, they were selling babies in violation of federal law and public policy. *Id.* at 328-29. This may explain why surrogacy contracts are signed before the surrogate is made pregnant, but the timing of the pregnancy should not make the practice any less illegal.

Indeed, baby selling and paying money for adoptions or agreements to terminate parental rights are also illegal in California because those acts violate California’s public policy as well as the federal ones. *See* Cal. Penal Code §273 (making it a crime to pay or receive anything of value for the placement for adoption or for the consent to the adoption of a child); Cal. Penal Code §181 (2011) (making it a crime to sell ownership of a human being). Thus, public policy abhors human trafficking and baby selling, which is what surrogacy fundamentally is. Consequently, *Amici* oppose all forms of surrogacy because it undermines and, indeed, violates the liberty interests and constitutional rights of gestational/birthmothers to parent their babies and

not to be exploited and the children's rights not to be commodified and to have their best interests considered and protected.

Because this case presents significant constitutional questions that have, so far, remained unheard and unresolved by any court, this Court should grant the petition for a writ of certiorari.



CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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