BUCHALTER NEMER
A Professional Corporation
Michael W. Caspino (SBN: 171906)
Email: mcaspino@buchalter.com
18400 Von Karman Avenue, Suite 800
Irvine, CA 92612-0514
Telephone: (949) 760-1121
Fax: (949) 720-0182

THE CASSIDY LAW FIRM
Harold J. Cassidy* (NJ SBN: 011831975)
Email: hjc@haroldcassidy.com
750 Broad Street, Suite 3
Shrewsbury, NJ 07702
Telephone: (732) 747-3999
Fax: (732) 747-3944
*Admitted Pro Hac Vice

Attorneys for Plaintiff,
MELISSA KAY COOK Individually and
MELISSA KAY COOK as Guardian ad
Litem of Baby A, Baby B and Baby C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

MELISSA KAY COOK Individually and MELISSA KAY COOK as Guardian *ad Litem* of Baby A, Baby B, and Baby C,

Plaintiffs,

vs.

EDMUND G. BROWN, JR., Governor of the State of California, et al.,

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES OF PLAINTIFF MELISSA COOK IN OPPOSITION TO MOTIONS TO DISMISS FILED BY DEFENDANTS HARDING GUNZENHAUSER, LOGAN, GOVERNOR EDMUND BROWN, JR., DR. SMITH, KAISER FOUNDATION HOSPITAL, PANORAMA CITY HOSPITAL AND PAYMAN ROSHAN

1

TABLE OF CONTENTS

2 TABLE OF CONTENTS i
3 TABLE OF AUTHORITIES iii
4 INTRODUCTION 1
5 STATEMENT OF FACTS 3
6 A. Facts Relating to the Underlying Dispute 3
7 B. The Cases Filed in California State Courts 8
8 1. Initial Pleadings and Proceedings 8
9 2. The Proceedings in Children's Court on February 8 and 9, 2016 11
10
LEGAL ARGUMENT 15
11
12 I. Melissa Cook is the Mother of Baby A, Baby B, and Baby C, as a Matter of Fact, and She is Recognized as their Legal Mother as a Matter of Law 15
13
14 II. This Case Presents a Number of Federal Constitutional of First Impression, which this Court is Uniquely Qualified to Determine 18
15
16 A. California's Gestational Surrogacy Statute, Fam. Code §7962, Violates the Constitutional Rights of Baby A, Baby B and Baby C 18
17
18 1. Plaintiff Melissa Cook has Standing to Litigate The Constitutional Rights of the Three Children 18
19 2. §7962, Violates the Children's Substantive Due Process Rights 19
20 INTRODUCTION 19
21
22 (a) The Statute Violates the Fundamental Liberty Interests of Baby A, Baby B And Baby C in their Relationship
23 With their Mother 20
24 (b) The Statute Violates the Children's Rights To be Free from Commodification and the
25 State Sanctioned and State Enforced Purchases Of their Familial Rights and Interests 21
26
27 3. §7962, Violates the Children's Right to the Equal Protection of the Law 24
28

B. §7962, Violates the Substantive Due Process and Equal Protection Rights of Melissa Cook and All Other "Gestational" Surrogate Mothers 28

1. The Statute Violates Melissa Cook's Substantial Due Process Fundamental Liberty Interests and Those of Other "Gestational" Surrogate Mothers 28

2. The Statute Violates the Equal Protection Rights Of Melissa Cook and All Other "Gestational Surrogate Mothers 32

III. The California Family Court Violated the Procedural Due Process Rights of Baby A, Baby B, and Baby C, and Those of Melissa Cook by Entering a Judgment Without a Pre-Judgment Hearing 33

IV. This Court has Jurisdiction in this Case, and Abstention is Inappropriate Under Established Controlling Principle 35

V. Karen Smith, M.D., M.P.H., as the Director and State Public Health Officer, State Registrar, is a Proper Party Defendant, as is Kaiser Foundation Hospital and Payman Roshan. Prospective Injunctive Relief is Necessary and Appropriate as to All of Them. 41

A. The Role of Defendants Smith, Kaiser Hospital and Roshan 42

B. The Hospital Defendants are Necessary and Appropriate Defendants 46

CONCLUSION 48

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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PAGE

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(4th Dist., Div. 3 1998) 11, 30

Caban v Mohammed, 441 U.S. 380 (1979) 28

Caplin & Drysdale v. United States, 491 U.S. 617 (1989) 18

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424 U.S. 800 (1976) 36

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Ex Parte Barents, 222 P.2d 488 (1950) 26

Exxon Mobil Corp. v. Saudi Pasic Indus. Corp.,
544 U.S. 280 (2005) 35

Ford v. Ford, 371 U.S. 187 (1962) 23, 24

F.S. Royster Guano Co.v. Virginia, 253 U.S. 412 (1920) 24
Fuentes v.Shevin, 407 U.S. 72 (1972) 28, 34, 47
Glona v. Amer. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) 24
Gomez v. Perez, 409 U.S. 619 (1973) 24
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133 F.3d 1220 (9th Cir. 1998) 39
Graham v. Richardson, 403 U.S. 365 (1971) 25
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Griffin v. Illinois, 351 U.S. 12 (1956) 24
Harper v. Virginia, 383 U.S. 663 (1966) 24
Huddleston v. Infertility Center of America, Inc.,
700 A.2d 453 (Sup. Ct. Pa. 1997) 27
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Kremer v. Chem Const. Corp., 456 U.S. 461 (1982) 37
Lassiter v. Department of Soc. Serv., 452 U.S. 18 (1981) 28, 33
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Loving v. Virginia, 388 U.S. 1 (1967) 25
Lowry v. City of Riley, 522 F.3d 1086 (10th Cir. 2008) 20, 21
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1
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3 *Mem. Hospital v. Maricopa County*, 415 U.S. 250 (1974) 25
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5 *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) 34
6 *Montana v. United States*, 440 U.S. 147 (1979) 38
7 *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) 19, 21, 22, 28
8 *Morrissey v. Brewer*, 408 U.S. 471 (1972) 34
9 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) 40
10 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 34
11
12 *New Orleans Pub. Serv. Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) 36
13 *N.J. Welfare Rights Organ. v. Cahill*, 411 U.S. 619 (1973) 24
14 *Palko v. Connecticut*, 302 U.S. 319 (1937) 19
15 *Plyer v. Doe*, 457 U.S. 202 (1982). 24
16 *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) 25
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19 *Potrero Hills Landfill, Inc. v. Cnty of Solano*, 657 F.3d 876 (9th Cir. 2011) 37
20
21 *ReadyLink Healthcare, Inc., v. State Comp. Ins. Fund*, 754 F.3d 754 (9th Cir. 2014) 36, 37, 38
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25 *Santosky v. Kramer*, 455 U.S. 745 (1982) 28, 33, 34
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California Family Code § 7610 15

California Family Code § 7960 12

California Family Code § 7962 . . . . . passim

California Family Code §8600 26

California Family Code § 8612 26

1 California Family Code §8801 32
2 California Family Code §8814.5 32
3 California Family Code §8815 32
4 California Health and Safety Code §102105 44
5 California Health and Safety Code §102110 44
6 California Health and Safety Code §102125 42
7 California Health and Safety Code §102135 42
8 California Health and Safety Code §102145 42
9 California Health and Safety Code §102175 43
10 California Health and Safety Code 102180 44
11 California Health and Safety Code § 02185 44
12 California Health and Safety Code §102190 44
13 California Health and Safety Code §102195 44
14 California Health and Safety Code §102205 44
15 California Health and Safety Code §102220 43
16 California Health and Safety Code §102275. 43
17 California Health and Safety Code §102305 43
18 California Health and Safety Code §102315 43
19 California Health and Safety Code §102345 43
20 California Health and Safety Code §102400 42
21 California Health and Safety Code §102405 42
22 California Health and Safety Code §102425 44
23 California Health and Safety Code §102445 44
24 California Health and Safety Code §102725 . . . . 44, 45
25 California Penal Code §181 . . . . 22, 26, 33
26 California Penal Code §273 . . . . 26, 33
27 28 U.S.C. §1331 35
28 28 U.S.C. §1343 35

28 U.S.C. §1738 37

42 U.S.C. §1983 .... 1, 35

CONSTITUIONAL AUTHORITIES

Article III of the Constitution of the United States of America 18

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INTRODUCTION

This case involves Federal Constitutional issues of broad public importance. Plaintiffs filed their Complaint under 42 U.S.C. §1983, which challenges the constitutionality of California's "Gestational" Surrogacy Statute, Cal. Fam. Code §7962, on its face and as applied to Plaintiffs Melissa Cook, Baby A, Baby B and Baby C.

Melissa Cook gave birth to the three babies on February 22, 2016, by an emergency Caesarean Section, in Kaiser Hospital in Panorama City, California. The three baby boys were twenty-eight weeks old post-conception on the day of their birth and were not released from the hospital until April 20.

This case is uniquely suited for litigation in the Federal Court. The substantial Federal Constitutional issues presented in this case have never before been resolved by a Federal Court, or even a State Court. The Plaintiffs assert that California's Gestational Surrogacy Statute violates the Substantive Due Process Rights of Baby A, Baby B and Baby C, violating their Fundamental Liberty Interests in their relationship with their mother; and the children's Due Process Liberty Interest to be free from commodification and state sanctioned and state enforced purchase of their familial rights, interests and control over their persons.

Under California's Gestational surrogacy Statute, children are purchased and placed with an adult designated as the so-called "intended" parent regardless of whether that adult is capable of properly raising or caring for the children, or whether such placement is in the best interests of the children; and regardless of whether their mother, who seeks to protect their welfare, is better able to care for the children and wishes to do so.

Among the constitutional issues of first impression is the Statute's violation of the children's Equal Protection rights. California refuses to place children of surrogate mothers based upon what is in their best interests, as it does for all other children in all other disputed situations. The California Statute has been construed

to mean that it does not matter that placement with the "intended" parent is harmful to the children, and the children cannot be placed based upon their best interests.

This case also presents substantial Federal Constitutional issues involving issues of First Impression concerning Melissa Cook's own Fundamental Due Process Liberty Interests in her relationship with her three children she carried, and her Liberty Interests in not being exploited. The Statute also violates her Equal Protection Rights.

Defendants Harding, Gunzenhauser, and Logan ("County State Defendants") allege (without any discussion or analysis) that the California Supreme Court, in the case of *Johnson v. Calvert*, 5 Cal.4th 846, 98-100 (1993), decided the constitutional issues presented in this case. That assertion is completely incorrect. *Johnson* not only did not decide the issues, five of the six constitutional issues raised in this case were not raised in that case, and were, therefore, not addressed in that case. The one constitutional issue raised and decided in *Johnson*, was raised in a context far different from this one and the *Johnson* Court did purport for the narrow holding in that context to have applicability in other contexts, and it does not. As is discussed below, *Johnson* is inapplicable on that one constitutional issue which it did address.[1]

Defendants urge that this Court abstain from exercising its jurisdiction. As discussed below, this Court has jurisdiction. There is no exception here which makes abstention appropriate. Further, there is no court order or judgment obtained after Due Process, and no State Court has even considered, no less decided, any of the Federal issues (or even state law issues).

While the defendants wish to rely upon an unconstitutional and void Order of

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[1]Even if a State Court squarely addressed a Federal Constitutional issue (which is not the case here with *Johnson*) that decision is not binding on a Federal Court. *Watson v. Estelle*, 886 F.2d 1093, 1095 (9th Cir. 1989); *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1171 (5th Cir. 1979). In Johnson, the fact that Mrs. Calvert had a clear constitutional right to her relationship with her child, a right that would have been compromised or sacrificed, led the Court to conclude that Mrs. Johnson's rights were not of the same magnitude of those of Mrs. Calvert. No such conflict or consideration exists here.

the State Court to urge abstention, this Court cannot. The State Court proceeding may be the most egregious example of a complete denial of Due Process, deprecating some of the most important substantive Due Process rights of newborn children and their mother. The Court awarded sole parentage to C.M., a single fifty year old man who lives in Georgia, who has admitted that he is unable to care for three children, and has stated that he plans to give one or more to a stranger in an adoption.

Plaintiff sought custody of the children based upon their best interests. The Children's Court Judge construed Fam.Code §7962 to mean that a "gestational surrogacy" contract signed two and a half months before the children were conceived, and before their protected relationship with their mother existed, operated as a complete waiver of all future constitutional rights of future children and those of the mother. Consequently, the Court denied Melissa Cook and the children a pre-judgment hearing, and preceded on the basis that the Plaintiffs in this case had no right to be heard at all.

In refusing to hear any facts, evidence, legal argument, or consider Mrs. Cook's Answer and Counterclaim, Judge Amy Pellman stated from the bench:

> "... what is going to happen to these children once they (Baby A, Baby B, and Baby C) 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." (See, Transcript, February 8, 2016; Exhibit 7, 1RJN, Ex. 7, P.25, L.3-6).

Defendants' Motion to Dismiss must be denied.

STATEMENT OF FACTS

A. Facts Relating to the Underlying Dispute

Plaintiff Melissa Cook is forty-eight years old. Declaration of Melissa Cook (hereafter "Dec. Cook"), 1. Surrogacy International (hereafter "S.I.") is a California surrogacy broker which solicited Plaintiff to act as a surrogate for C.M., a single fifty year old man. Plaintiff has never met C.M. or spoken with him on the telephone. Dec. Cook, ¶¶9-11. C.M. is deaf, has never been married, and lives in Georgia with two

1 elderly parents. His mother is ill, confined to bed, and needs nursing care. Second
2 Amended Complaint (SAC) ¶19; ¶¶44-47. C.M. does not speak. Affidavit of
3 Eduardo Alford 7. C.M. is a postal worker who has stated that he is not capable of
4 raising three children. S.I., which brokered the arrangement, did not arrange for a
5 home study to determine whether C.M. was capable of raising any children, let alone
6 triplets. SAC, ¶¶46-49.

7 S.I. is partly owned and operated by an attorney, Robert Walmsley, who drafted
8 the seventy-five page surrogacy contract signed by Cook and C.M. By the terms of
9 the contract, ova donated by an anonymous woman was to be fertilized with sperm
10 donated by C.M., and Plaintiff was to submit to a long series of hormone injections,
11 and an "embryo transfer," was to carry the children to term, give birth and surrender
12 the children to C.M. Melissa Cook's parental rights, and the rights of the children,
13 were to be terminated pursuant to Family Code §7962, and C.M. was to be declared
14 the only legal parent of the children. SAC, ¶50.

15 On April 16, 2015, a month and a half before the surrogacy contract was
16 signed, C.M. sent Plaintiff an email acknowledging that there could be three children
17 born and he was committed to accept responsibility to raise all three. Dec. Cook, 12.
18 That August, when Plaintiff was pregnant, C.M. again wrote "We might get three
19 embryos successfully hook up [sic]." Dec. Cook, ¶13; SAC, ¶51.

20 On June 13, Melissa Cook started a drug regimen required by the surrogacy
21 contract to prepare her body to accept the embryo transfers. Dec. Cook, ¶¶15-19.
22 That drug regimen and the fertility techniques used in surrogacy arrangements, posed
23 significant risks to Plaintiff and the children. SAC, ¶¶54-62; Declaration of Anthony
24 Caruso, M.D, (hereafter "Caruso"), ¶¶7-27. At the request of C.M., the three embryos
25 transferred on August 17, 2015, were all male. Dec. Cook, ¶¶20-21; SAC, ¶¶64-66.
26 On August 31, it was determined that all three were viable. Cook, ¶21.

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

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

5 On September 18, the infertility clinic wrote to C.M. that because the
6 pregnancy was such a high risk, Melissa had to be seen each week, noting that the
7 risk came with C.M.'s decision to request that three embryos be transferred. SAC,¶69;
8 Dec. Cook,¶24.That same day, C.M. wrote to Walmsley, stating:

9 "I cannot afford to continue M.'s to visit weekly (sic) in the fertility
10 institute because of our contract that I never anticipated something such
11 worse (sic) like draining my finances so fast. ... I do not want to abort
12 twin babies, but I felt that is such possible (sic) to seek aborting all three
13 babies. I do not want to affect Melissa's health. I do not have any more
14 money in the bank, and my job does not pay great biweekly." (Emphasis
15 added). SAC,¶70; Cook,¶25.

16 Plaintiff became anxious as she began to realize that C.M. was not capable of
17 properly caring for the children. Dec. Cook, ¶¶26-29. In mid-September, C.M. began
18 to demand that Melissa have an abortion of one or all three babies because he was
19 incapable of raising them. SAC,¶72.

20 When she saw that C.M. could not raise the children, on September 21,
21 Plaintiff wrote to C.M. stating:

22 "You need to make a decision if you want any of these babies so that I
23 know what to expect.

24 I have been really upset and nervous and anxiety ridden." Dec. Cook,
25 ¶30; SAC,¶73.

26 In response, C.M. wrote, "I said I always would want twin babies." Plaintiff
27 wrote to C.M. stating that they had to make a plan for the third baby and that she
28 would, in order to assist him, raise all the children herself for a few months after birth.

In April, 2015, C.M. had told Plaintiff that he would want her to care for the children for a few weeks after birth. In September she first realized that he may not be able to care for them at all. SAC, ¶¶74-75; Dec. Cook, ¶31.

On September 22, 2015, in response to C.M.'s email earlier in the day, Plaintiff wrote to him:

> "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." SAC, ¶76; Dec. Cook, ¶32.

C.M. wrote to Plaintiff 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, soon as I need to tell my doctor and my lawyer before 14th to 17th weeks. ... I will tell them 3 weeks ahead before November 9 that I would look for twin babies." (Emphasis added). SAC, ¶77; Dec. Cook, ¶33.

On September 23, Plaintiff advised C.M. that she would not "abort any of them...I am not having an abortion. They are all doing just fine." SAC, ¶78; Dec. Cook, ¶34.

Thereafter, C.M. and Walmsley tried to convince Plaintiff that she was obliged to abort one of the babies. 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. Later C.M. stopped emphasizing his poverty and made a disingenuous argument that carrying all three children to term would risk the health of the children. Plaintiff continued to refuse to abort any of the babies. On October 28, C.M. mentions, in an email, that he may "start looking agencies for adoptive parents (sic)." On November 12, Plaintiff 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 to Plaintiff's offer to raise the third child, C.M. wrote that he "would encourage" her to "consider selection reduction (sic)." SAC, ¶¶79-82; Dec. Cook, ¶¶35-38.

On November 16, 2015, C.M. wrote to Plaintiff and advised her that "... I had decided, after looking at all issues, to pursue reduction." (Emphasis added). C.M. failed to acknowledge that Plaintiff offered to raise the third child. He added that "I know my decision is not welcomed to you (sic) but I hope you understand. ..." (Emphasis added). On November 24, C.M. wrote to Plaintiff and stated: "My decision made is, requires a selection reduction (sic). I am so sorry." On November 27, C.M. wrote to Melissa again stating "I made my decision which is best. ..." (Emphasis added). SAC, ¶¶83-84; Dec. Cook, ¶¶39-41.

On September 24, Walmsley wrote to Lesa Slaughter, an attorney who was supposed to review the contract with Plaintiff, stating: "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." Slaughter responded: "agreed." SAC, ¶¶85-86; Dec. Cook, ¶¶42-43, (Cook Exhibit 19).

On November 20, Walmsley, C.M.'s attorney, wrote to Plaintiff 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." Walmsley stated Plaintiff would be liable for C.M.'s mental distress "because of your decision not to honor his request for reduction." Dec. Cook, ¶45, (Cook Exhibit 21); SAC, ¶88. On November 13, Slaughter, being paid by C.M., wrote to Melissa and advised her, incorrectly, that C.M. had a right to demand an abortion and that Plaintiff was liable if she refused. Cook, ¶47; SAC, ¶89.

Late November, 2015, Plaintiff learned for the first time that S.I., and Walmsley admitted that they never did a home study of C.M.'s living arrangement. Cook, ¶49. Plaintiff 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

1 child to a stranger. SAC,¶ 91; Cook, ¶49; Declaration of Harold Cassidy ¶¶7-14.
2 Throughout the pregnancy, Plaintiff bonded with the children and the children
3 bonded with her. The relationship between mother and child during the pregnancy
4 was greatly beneficial to the children, and destruction of the bond and relationship
5 between them is harmful to the children. SAC, ¶¶106-121; Declaration of Alma
6 Golden, M.D. (hereafter "Golden") ¶¶11-51. A mother provides an essential benefit
7 throughout the early and late stages of childhood. SAC, ¶¶122-138; Declaration of
8 Miriam Grossman, M.D. (hereafter "Grossman") ¶¶9-45; Golden, *supra.* The
9 breaking of the bond between Melissa Cook and the three babies is detrimental to the
10 welfare of the children. *Id. See* also, Bystrova K, Ivanova V, Edborg M, Matthiesen
11 AS, Ransjo-Avidson AB, Mukhamedrakhimov R, Uvnas-Moberg K, Widstrom AM.
12 (2009), Early Contact Versus Separation: Effects on Mother-infant Interaction One
13 Year Later, Birth, 36(2), 97-109.; Hardy LT. (2007). Attachment Theory and Reactive
14 Attachment Disorder: Theoretical Perspectives and Treatment Implications. Journal
15 of Child and Adolescent Psychiatric Nursing, 20(1), 27-39; Shonkoff JP, Garner AS,
16 The Committee on Psychosocial Aspects of Child and Family Health, Committee on
17 Early Childhood, Adoption, and Dependent Care, and Section on Developmental and
18 Behavioral Pediatrics; Siegel BS, Dobbins MI, Earls MF, et al. (2012), the Lifelong
19 Effects of Early Childhood Adversity and Toxic Stress, Pediatrics. 129(1): e232-46.
20 The only criteria used to give sole custody of the children to C.M., is that C.M.
21 paid for the children, despite the fact he was not capable of raising them. The use of
22 a woman as a so-called gestational carrier is extremely exploitative of her, treating
23 her in an inhumane manner. The institution of surrogacy is intrinsically exploitive
24 and harmful to the woman as well as the child. See, Declaration of Barbara K.
25 Rothman, Ph.D., (hereafter "Rothman"), ¶¶9-36.
26 **B. The Cases Filed in California State Courts**
27 **1. Initial Pleadings and Proceedings**
28 Despite the fact that Melissa Cook has filed two separate Complaints and

multiple applications in the California State Courts, those courts have refused to consider her complaints and refused to give her a hearing. The proceeding resulting in a Judgment entered on February 9, 2016, terminating her rights and those of the children was treated as if it was uncontested.

On January 4, 2016, Melissa Cook filed a Civil Complaint in the Superior Court of California, on her own behalf and on behalf of the three children. Declaration of Michael Caspino, Esq. ("Caspino"), ¶3. That Complaint sought a Declaration that California's Gestational Surrogacy contract was unconstitutional as violative of the rights of Melissa Cook and the three children she carried in utero, and Plaintiff sought custody based on the best interests of the children. Complaint, *M.C. v. C.M.* (LC103726), 1RJN, Ex.1, P.10. It was served on C.M. at his home in Georgia on January 5, 2016. Caspino, ¶4. On January 7, 2016, Michael Caspino appeared *ex parte* seeking a temporary restraining order precluding C.M. from filing an uncontested Petition for termination of Melissa Cook's parental rights. Notice was given to C.M.'s attorney, Robert Walmsley, who appeared. 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 Plaintiff wanted her parental rights terminated. See,"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.") See, 1RJN, P.138. C.M. also submitted a "stipulation for entry of judgment" which stated: "The parties further agree that the Court make the following orders: The Court finds the non-existence of the parent-child relationship between respondent and the children to be born ..." (1RJN, P.140) and a "Declaration for Default or Uncontested Judgment" which stated "the parties have stipulated that the matter may proceed as an uncontested matter." 1RJN, P.148. The form of judgment submitted stated that the case was uncontested. 1RJN,

1 P.150-151; 1RJN, P.152-158. Those representations were made at a time when C.M.
2 and Walmsley knew that Plaintiff contested placement of the children with C.M.
3 Caspino, ¶5.
4 C.M.'s Petition states: "All parties have agreed that at all times relevant, the
5 intent of each and every party to the surrogacy agreement was that the Petitioner is
6 the natural, genetic, and sole legal parent of the children..." 1RJN, P.122. That
7 statement was false. C.M. also signed a sworn Declaration stating that he believed
8 that Plaintiff was willing to relinquish her parental rights. 1RJN, P.131, ¶10. C.M.
9 knew that was a false statement based upon communications with Plaintiff. The
10 Children's Court scheduled a proceeding for entry of an uncontested judgment
11 terminating the rights of M.C. and the children for February 9, 2016. Caspino ¶5.
12 See, Petition of C.M., 1RJN, P.116-127. On January 7th, the Honorable Russell
13 Kussman struck Plaintiff's Complaint, instructing Plaintiff to file her Complaint in the
14 Family Court. Caspino, ¶6.
15 On February 1, Plaintiff filed her Verified Answer to C.M.'s Petition, Separate
16 Defenses, and Verified Counterclaim. Caspino, ¶7; Answer and Counterclaim, at
17 1RJN, P.164-231. Plaintiff's Verified Answer denied the essential allegations of the
18 Petition, denying that Plaintiff wanted her rights terminated, and sought placement
19 of the children based upon their best interests.
20 Plaintiff's Verified Counterclaim contained twelve causes of action, seeking
21 among other things: (a) Declaratory Judgment that Melissa Cook is the legal mother
22 of Baby A, Baby B, and Baby C; (b) Declaratory Judgment that Fam. Code §7962
23 violates the Due Process and Equal Protection rights of Baby A, Baby B, and Baby
24 C guaranteed by the Fourteenth Amendment of the United States Constitution as it
25 is applied to them, and on its face; (c) Declaratory Judgment that Fam. Code §7962
26 violates the Due Process and Equal Protection rights of Plaintiff guaranteed by the
27 Fourteenth Amendment of the United States Constitution as it is applied to her, and
28 on its face; (d) Declaratory Judgment that the surrogacy contract cannot form the

basis to terminate Plaintiffs parental rights and the children's relationship with their mother; (e) Preliminary and Permanent Injunction ,for among other things, prohibiting C.M. from removing the children from the State of California; and (f) an Order awarding immediate legal and physical custody of Baby C to M.C. and scheduling a hearing to place Baby A and Baby B based on their best interests. Under these circumstances, C.M.'s Petition could not be processed as an uncontested involuntary termination of Plaintiffs' rights under §7962(e) and (f).

The Plaintiff filed her Complaint in the Federal District Court on February 2.

2. The Proceedings in Children's Court on February 8 and 9, 2016

After filing her Verified Answer, Separate Defenses and Verified Counterclaim in the Children's Court on February 1, Plaintiff filed an Ex Parte Application on February 4, seeking a continuance of the uncontested hearing scheduled for February 9th. Caspino, ¶8. See, Ex Parte Application, 1RJN, Ex. 6, P.232-259. That *Ex Parte* Application disclosed that Plaintiff 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." 1RJN, P.235-246.

The need for a continuance in order to properly litigate the facts and legal contentions of Melissa and the children was clearly set forth in Plaintiffs' Application. See, *Ex Parte* Application 1RJN, Ex. 6, P.242-245.

The Children's 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 Plaintiff's application for the continuance. Then, relying upon a misinterpretation of *Johnson v. Calvert*, 5 Cal. 4th 84 (1993) and *Buzzanca v. Buzzanca*, 61 Cal. App 4th 1410, (4th Dist., Div. 3, 1998), and a misconstruction of Fam. Code §7962 and §7960, summarily ruled that C.M. was entitled to a judgment terminating the relationship between the three children and Plaintiff. 2RJN, Ex. 11, P.378-382. Judge Pellman proceeded as if the Petition was uncontested, and

1 all C.M. had to show was that Plaintiff had legal counsel before the contract was
2 signed. 2RJN, Ex. 7, P.275-276.
3 The Court demonstrated that she was not familiar with the contents of the ex
4 parte application. The Court stated that she was unaware that a Verified Answer and
5 Counterclaim had been filed, despite the fact it was referenced in the application and
6 a copy had been hand delivered to her Court Clerk on February 1st. 2RJN, Ex. 11,
7 P.310, L. 26 to P. 311, L.2; 2RJN, Ex. 8, P.279, L. 9 to P. 281, L.2.
8 Because Judge Pellman had already decided the case, she barred Melissa Cook
9 from producing any evidence. 2RJN, Ex. 11, P.370. Counsel for Cook asked if the
10 Court would take any evidence on Cook's allegations that C.M. did not intend to, and
11 cannot, accept, legal responsibility to raise the children. The Court responded:
12 "There's no need for home study. There's no need for representation of
13 the children. There's no need for anyof that under the code," stating that
14 is "not relevant to my particular hearing." 2RJN, Ex. 11, P.336, L.26 to
15 P.337, L.3.
16 When counsel asked whether the well-being of the children was going to be
17 considered by the Court (2R.337, L.6-9), Judge Pellman stated:
18 "*...What is going to happen to these children once they are handed over*
19 *to C.M., that's none of my business. It's none of my business. And that's*
20 *not part of my job.*" (Emphasis added). 2RJN, Ex. 11, P.338, L. 3-6.
21 The Court observed a best interests determination is required in other actions, but
22 "surrogacy" is an exception. 2RJN, Ex. 11, P.338, L.6-8.
23 The summary disposition of the entire case, without discovery, evidence, the
24 opportunity to present Mrs. Cook's case, and without C.M. being required to answer
25 the allegations of the Answer and Counterclaim, was stunning. Mr. Caspino inquired:
26 "I ask how the court is going to dispose of our Counterclaim ..." 2RJN, Ex. 11, P.338,
27 L.9-10.
28 The Court then admitted that the entire case was disposed without the Court

1 even knowing that there was a Verified Answer and Counterclaim filed. 2RJN, Ex.
2 8, P.279, L.9 to 281, L.3. On February 9th, Mr. Caspino advised the Judge that on
3 February 8th, the Court Clerk advised him that the Verified Answer and Counterclaim
4 were indeed in the Court's file. 2RJN, Ex. 11, P.348, L.26 to 349, L.2. He again
5 asked the Court: "May I inquire as to how the Court is handling our Counterclaim."
6 2RJN, Ex. 11, P.72, L.3-5.

7 Mr. Caspino argued that the Court could not determine termination without
8 first addressing the factual and legal issues raised by Plaintiff. 2RJN, Ex. 11, P.349,
9 L.15-22. The Court refused to consider the Verified Answer and Counterclaim stating
10 that she was only dealing with a "petition to determine parentage. That's it." 2RJN,
11 Ex. 11, P.350, L.1. The Verified Answer and Counterclaim demonstrated why the
12 Court could not enter such an order based upon both state and Federal law, but Judge
13 Pellman refused to consider them. The Court insisted that the hearing on C.M.'s
14 uncontested petition conclude before she addressed the Counterclaim. 2RJN, Ex. 11,
15 P.369 to P.370, L.7. Judge Pellman then ruled that C.M. established the last missing
16 fact on his uncontested petition. 2RJN, Ex. 11, P.374, L.1-6. The Judge then stated:

17 "And so, therefore, the Court denies, if there are counterclaims
18 ...the Court denies them." 2RJN, Ex. 11, P.374, L.10-12.

19 It was clear from this and other comments that the Court never read or knew
20 the content of the Verified Answer and Counterclaim. The Court never explained the
21 basis for the "denial," whatever "denial" was intended to be or mean, and then entered
22 the Final Judgment terminating the rights of the three children and those of Plaintiff.
23 2RJN, Ex. 11, P.376, L.17 to P.382, L.27.

24 The Court signed the form of the Order for an uncontested proceeding
25 originally submitted by Mr. Walmsley with the uncontested Petition. That Order did
26 not recite that Plaintiff opposed the petition, or that she filed a Verified Answer and
27 Counterclaim. It did not even recite that Mr. Caspino appeared on behalf of Melissa
28 Cook. The order contained the same typographical errors and incorrect statements

1 of law as those in the original order submitted by C.M. The two orders are identical.
2 See and compare, 2RJN, 152-158 with 2RJN, 391-397. The Judgment states, contrary
3 to the actual facts, as admitted by C.M. and as attested to by Plaintiff, that:

4 "At all times relevant, the intention of each of the Parties was that the
5 Petitioner, C.M., Jr., would be the sole parent of the Children that
6 Respondent/Surrogate, M.C.is carrying and who are due to be born on
7 or about May 4, 2016. Each of the Parties also intended that the
8 Respondent, M.C. would not have any rights, parental, legal, financial
9 or otherwise, toward said children." 2RJN, P.393, L.3-7.

10 Following the proceedings of February 9, Plaintiff gave birth on February 22,
11 2016. That day, Defendant Kaiser took it upon itself to enforce the State Court's
12 Order, and refused to even allow Plaintiff to see any of the three babies as they were
13 being born. She was not permitted to know their condition, or even their weights.
14 The hospital posted two security guards to prevent Plaintiff from seeing the children.
15 The security guards kept track of everyone who visited Plaintiff and required that
16 visitors show identification. Dec. Cook, ¶¶53-56; Caspino, ¶¶12-14.

17 C.M. stayed in Georgia while the children were in the hospital for seven weeks.
18 Cook, ¶58. The entire experience was dehumanizing to Plaintiff, and after she left
19 the hospital, she refused to accept any of the $19,000 she was owed by C.M., under
20 the terms of the contract, because it felt like she was taking money in exchange for
21 the children she had come to love. Cook, ¶57; ¶59. Shortly after February 9, the
22 Plaintiff filed a Notice of Appeal in the California Court of Appeal, and on March 30,
23 Melissa Cook filed a Petition for a Writ of Supersedeas. Within a couple of hours,
24 that Court stayed the Judgment. Despite that stay, Defendant Kaiser continued to
25 refuse Plaintiff's requests to visit the children. Caspino, ¶¶ 16-29. On April 6, the
26 Children's Court refused to entertain an *Ex Parte* Application to allow her to visit the
27 children. Caspino, ¶ 20. On April 14, the Court of Appeal denied the Petition for the
28 Writ and vacated the Stay Order. Caspino, ¶ 22. Upon information and belief, C.M.

1 took the three children to Georgia on April 20.

2 **LEGAL ARGUMENT**

3 **I. Melissa Cook is the Mother of Baby A, Baby B, and Baby C, as a Matter of Fact, and She is Recognized as their Legal Mother as a**
4 **Matter of Law**

5 As a matter of biological fact, Plaintiff is the mother of the three children, who
6 bonded both physiologically and psychologically with them and they with her. She
7 has had an existing relationship with the children. Dec. Golden, ¶¶11-51; Dec.
8 Grossman, ¶¶ 9-45; SAC, ¶¶106-138.

9 Plaintiff is also the legal mother of the children. Cal. Fam. Code §7610(a)
10 recognizes that the mother who carries and gives birth to children is, in fact, the
11 mother, and her legal status is established by proof of that fact. §7610(a) states: "The
12 parent and child relationship may be established as follows: (a) between a child and
13 the natural parent, it may be established by proof of having given birth to the child..."
14 §7601(a) defines "natural parent," as "a non-adoptive parent established under this
15 part (part 3) whether biologically related to the child or not."

16 This recognition that Melissa Cook is the natural mother is not the result of a
17 legal fiction in the form of a presumption. Fam. Code §7962 does operate to rebut
18 certain enumerated statutory presumptions, but §7610(a) is not so enumerated. Nor
19 can it be, because it is not a rebuttal presumption, but recognition of a natural fact.

20 Thus, §7962 can only be understood to recognize a properly executed
21 gestational surrogacy contract as a legal basis to terminate the rights of the children
22 and their mother even against the mother's wishes and even if such termination is not
23 in the best interests of the children.

24 Some of the Defendants incorrectly assert that *Johnson v. Calvert,* 5 Cal.4th
25 84 (1993), held that a surrogate mother who was not genetically related to the child
26 she carried was not the child's legal mother. That contention is incorrect.

27 In *Johnson*, the gestational surrogate claimed a superior legal parentage over
28 the claim of motherhood advanced by Mrs. Calvert, who was the genetic mother of

the child with whom she had a relationship as the child's custodial mother. She was married to the genetic father . The California Supreme Court found that both Ms. Johnson and Mrs. Calvert had produced evidence that they were the natural mother of the child and both had valid claims to the legal status as mother. (*Id.* at 90, 92.) The Court concluded it could award legal status as mother to only one of the women at the expense of the other. (*Id.* at 92.) In that extraordinary circumstance, *Johnson* held that the original intent of the two women, coupled with the fact that the two genetic parents were a married couple, compelled placing legal status as mother in Mrs. Calvert. The only reason that Ms. Johnson was denied legal status was because a second woman had a superior claim to that status. (*Id.* at 93.)

In fact, *Johnson* actually supports Plaintiff's claim that she is the legal mother of the children. *Johnson* overruled the Court of Appeal's conclusion in that case, that because Ms. Johnson was not genetically related to the child she bore, she could not be the "natural" mother and, therefore, her giving birth could not form a basis as "legal" mother. The *Johnson* court held that the lack of a genetic relationship did not preclude a woman who gives birth from being the legal mother. (*Johnson, supra*, 5 Cal.4th at 92, fn. 9.) That holding has since been codified by Cal. Fam. Code §7601, subdivision (a).

The issue of "intent" was relevant in *Johnson* only to resolve the competing claims to "legal" status as mother between two women who were in fact, the natural mothers of the child. Here, there is no other person who asserts any competing claim as legal mother, and C.M.'s claim as legal father is irrelevant to Plaintiffs' standing as legal mother.

Some of the Defendants have used their misunderstanding and misconstruction of California law to argue that Melissa Cook has no standing to attack the constitutionality of the California Statute. As the argument goes, if the California Statutes do not recognize Melissa Cook as the legal mother, the state's depriving her of that title by itself, bans her from challenging the Statute. Other Defendants argue

that the State Court terminated Melissa Cook's rights and, therefore, she is no longer the mother, and has no standing.

First, of course, Mrs. Cook, while she carried the children and gave birth, clearly was the babies' mother, as a matter of fact. As noted above, she was also the mother recognized as the legal mother under the law. The surrogacy contract was used in court to form the basis to terminate her parental rights, and that is the only possible construction of the Statute. The illogic of the argument that the fact that the court used the unconstitutional Statute to use the contract as a basis to terminate her rights, precludes the mother whose rights were terminated from attacking the Statute is all too palpable. She is the one person with standing, as she suffered from a direct injury as do the children whose rights she seeks to protect.

Other Defendants argue that Plaintiffs have no standing because *Johnson v. Calvert* says a surrogate cannot be a legal mother. That, of course, as noted is incorrect. Even if that were a correct interpretation of California law – which it is not – Melissa Cook, as the only mother of the children, in fact, has the standing to challenge the law that includes deprivation of her legal standing.

Finally, one Defendant asserts that the contract itself, acts as a document that terminates the future rights of Melissa Cook and the children. But, only a court order can terminate their rights. A document signed by a birth mother which expresses her intention to give up her parental rights, even if signed after the birth of the child, does not by itself operate to terminate her rights. Only a court order can do so. Thus, Melissa Cook as the mother of the children, in fact, is recognized as the legal mother under California law, and has standing to challenge the constitutionality of §7962.

It is most illogical to suggest that a mother whose rights are terminated as a result of the enforcement of an unconstitutional statute is barred from challenging the denial of her rights because the unconstitutional order obtained in the process declares that she has no rights – the very harm from which she seeks relief. If enforcement of the contract by the state is unconstitutional, the terms placed in the

contract by the surrogacy broker are unenforceable and without effect. They are irrelevant to the issue of standing.

II. This Case Presents a Number of Federal Constitutional Issues of First Impressions, which This Court is Uniquely Qualified to Determine

A. California's Gestational Surrogacy Statute, Fam. Code §7962, Violates the Constitutional Rights of Baby A, Baby B, and Baby C

1. Plaintiff Melissa Cook has the Standing to Litigate the Constitutional Rights of the Three Children

Melissa Cook possesses the legal standing to vindicate the constitutional rights of Baby A, Baby B, and Baby C. The United States Supreme Court may have best explained the criteria to establish one person's standing to litigate the rights of another in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989):

> "When a person ... seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations ... point to permitting the litigant to advance the claim? ...To answer [the second] question, our cases have looked at three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Singleton v. Wulff, supra* 428 U.S. at 113-118,...; *Eisenstadt v. Baird*, 405 U.S. 438, 443-446,...(1972)." 491 U.S. at 624, FN3.

Plainly, there is an Article III case and controversy. Melissa Cook has suffered an injury-in-fact by having her rights terminated. As for the prudential question, there could be no more intimate relationship, or one more beneficial to the two participants, than that between a mother and her children. Their interests are so interwoven that the termination of the rights of one operates to terminate the rights of the other.

Likewise, the children have no ability to assert their own rights, and they are

uniquely dependent upon their mother to assert their rights for them. In fact, Plaintiff Cook is the only person who can assert their rights because their other legal parent, C.M., is the party who seeks to terminate the children's rights, and asserts interests in direct conflict with those of the children.

Finally, the outcome of this litigation necessarily impacts the rights of the children. If Plaintiff fails in her effort to establish and maintain her rights, the children's right to their relationship with their mother, as well as their other substantive and procedural Due Process and Equal Protection Rights, will all be adversely affected. Melissa Cook has standing to litigate their rights.

2. §7962 VIOLATES THE CHILDREN'S SUBSTANTIVE DUE PROCESS RIGHTS

INTRODUCTION

The Due Process Clause of the Fourteenth Amendment guarantees more than fair process, and some of the liberties it protects are substantive in nature. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). "The clause protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

The Due Process Clause protects those fundamental rights and liberties which are "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The Supreme Court has stated that these rights deemed fundamental liberties are those "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). They are those "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); See also, *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

Baby A, Baby B, and Baby C have two fundamental liberties that were violated by §7962 and the court's order enforcing the surrogacy agreement: (1) their liberty interest in their relationship with their mother; and (2) their liberty interest to be free

1 from commodification and the purchase of exclusive control and custody over them.

2 **(a) The Statute Violates the Fundamental**
3 **Liberty Interests of Baby A, Baby B, and Baby C in their Relationship with Their Mother**

4 The California Court terminated the children's relationship with their mother
5 despite the fact that the mother was perfectly fit, desired to raise the children, did not
6 want the child-mother relationship to be terminated, and the genetic father does not
7 want, and refuses to accept, the responsibility to raise one or more of the children.
8 California has no legitimate interest to deprive the children of their constitutionally
9 protected relationship with their mother.

10 It is well settled that a child has his own Fundamental Liberty interest in
11 establishing and maintaining his relationship with his mother. The parent and child
12 have reciprocal rights, and both have a protected interest in maintaining their
13 relationship. *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987) (Rev'd
14 on other grounds). *Smith* held that the Supreme Court decisions which recognized
15 a substantive Due Process Liberty Interest in the parent-child relationship

16 "...logically extend to protect children from unwarranted state
17 interference with their relationships with their parents. The
18 companionship and nurturing interests of parent and child in
19 maintaining a tight familial bond are reciprocal, and we see no reason
20 to accord less constitutional value to the child-parent relationship than
21 we accord to the parent-child relationship." *Id.* at 1418.

22 The Ninth Circuit Court of Appeals has stated that "parents and children have
23 a well-elaborated constitutional right to live together without government
24 interference." *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 1999). *Lowry v. City*
25 *of Riley*, 522 F.3d 1086, 1092 (10th Cir., 2008), stated: "[a] child has a
26 constitutionally protected interest in a relationship with her parent."

27 The right to maintain the relationship between a parent and a child is one which
28

is an intrinsic natural right – not derived from government, but arising by virtue of the dignity of the person. *Smith v. Organization of Foster Families*, 431 U.S. 816-845 (1977). The Supreme Court has stated that the constitution protects the "sanctity" of these familial relationships. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

In this case, there is no justification, or any legitimate governmental interest, in taking the children out of the arms of their perfectly fit mother who wants to care for them. That is especially true, as here, when the court terminates the children's relationship with their mother and enters a Judgment making the genetic father the sole parent despite his stated intention to give one or more of the children up for adoption.

The complete lack of any legitimate governmental interest in California terminating the children's substantive Due Process Rights is illustrated by the court declaring it was "none of the court's business" what happened to the children and determining what was in the children's best interest was "not my job." The Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). (Emphasis in original). It is an unconstitutional deprivation of the children's Due Process Rights to treat the contract, signed on May 31, 2015, as an irrevocable waiver of the future rights of the children; a "waiver" of their rights made by someone else, before they even existed, and one which was revoked when their mother realized that "waiver" was harmful to them.

(b) The Statute Violates the Children's Rights to be Free From Commodification and the State Sanctioned and State Enforced Purchase of Their Familial Rights and Interests

The Act authorizes not only the termination of the children's constitutionally protected relationship with their mother, it requires the court – as Judge Pellman

construed it – to do so without regard for the children's best interests. The court held that it does not matter what befalls the children after the court turns the children over to C.M., even if he then turns them over to a stranger – or worse.

That total control of the children given to C.M. to do with them whatever he desires, was accomplished only because of the payment of money by C.M. to all involved. Complaint, ¶¶141-144; ¶¶168-173.

Throughout the history of our Nation, the relationship between mother and child has been revered as one having intrinsic worth and beauty as the touchstone and core of all civilized society. The Supreme Court has held that the courts had a duty to preserve the "sanctity" of such relationships. *Moore, supra*, at 503. Thus, there has been, in this nation, a long and strong prohibition against the purchase and sale of the rights of children and their mothers to their familial relationships.

For instance, California Penal Code §181 states in pertinent part:

> "Every person...who buys or attempts to buy...or pays money...to another, in consideration of having any person placed in his or her custody, or under his or her control...is punishable by imprisonment...for two, three or four years."

That prohibition has been part of the fabric of the tradition of our national values.

C.M. pleads that the controlling factor in the placement of the children is "intent," that the parties "intended" that he have sole custody and parentage. That begs the question. C.M.'s "intent" is hard evidence that he is paying, not for children whose lives have intrinsic value to come into the world, but for the possession and control of the children. It was a plan intended to give him total control over the children.

He bargained not for fertilization and birth of children, but rather for total possession which takes on indicia of ownership: the children can never get to know their mother, and he will do with them exactly what he wants, in the manner he alone

1 decides, free from court scrutiny and the scrutiny of their mother. It can be said of
2 any illegal sale of a child that the purchaser "intended" to have custody.

3 The Fourteenth Amendment's guarantee of liberty is surely offended because
4 control having ownership qualities derived solely in exchange for money
5 commodifies the children, and the children's relationship, which offends all civilized
6 notions of freedom and liberty. Under the contract, used as a basis to terminate the
7 children's rights, C.M. paid only for healthy children, children who lived for at least
8 six months, and payment increased based upon the number of children delivered. *See*,
9 Complaint ¶¶174-177.

10 In the history and tradition of this Nation, the central focus of all child rearing
11 has been the welfare of the children, and in the placement of children the interests of
12 the children are paramount; those of the parent are subordinate. *See*, *Goodarzirad v.*
13 *Goodarzirad* (1986), 185 Cal. App. 2d 1020, 1026; *In re Marriage of Russo* (1971),
14 21 Cal. App. 3d 72, 85; *Smith v. Smith* (1948), 85 Cal. App. 2d 428, 434. In that
15 history and tradition, contracts between parents to give primary custody to one parent
16 over the other have never been enforceable without the court holding a trial to
17 determine what is in the child's best interest. *In re Marriage of Jackson* (2006), 136
18 Cal. App. 4th 980, 990; *Goodarzirad, supra* at 1027.

19 So ingrained in our tradition is the concern for the best interests of children,
20 that in *Ford v. Ford*, 371 U.S. 187, 193 (1962), the United States Supreme Court held
21 that a state is not bound by the full faith and credit clause under Art. IV of the Federal
22 Constitution when the judgment entered by one state awarding child custody was
23 based on a contract between two parents without regard to the children's best
24 interests. "Virginia Law, like that of probably every state in the union, requires the
25 court to put the child's interests first." *Id.* at 193.

26 C.M. may attempt to justify the payments as a payment for services, but that
27 assertion is contradicted by the fact that he has demanded custody, and total control
28 of the children, and anything short of complete sole parentage is less than what he

bargained for. This fact is amply demonstrated by C.M.'s acknowledgment that he cannot raise at least one of the children, yet insists upon complete ownership of that child to dispose of as he sees fit – in an adoption or otherwise.

§7962 violates the children's liberty guaranteed by the Fourteenth Amendment of the United States Constitution.[2]

3. §7962 Violates the Children's Right to the Equal Protection of the Law

Once a state acts to protect some individuals, it must act even-handedly and provide protection to all unless there is a legitimate state interest promoted by the denial to the excluded class. *Harper v. Virginia*, 383 U.S. 663, 665 (1966); *N.J. Welfare Rights Organ. v. Cahill*, 411 U.S. 619 (1973); *Weber v. Aetna*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73; *Griffin v. Illinois*, 351 U.S. 12 (1956).

"Those who are similarly situated must be similarly treated." *Plyer v. Doe*, 457 U.S.202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 344 (1949).

In *Harper*, the Court held that where a benefit is protected by the state, a classification which excludes some individuals from protection of a fundamental interest must be strictly scrutinized. 383 U.S. at 670. See also, *Carrington v. Rash*, 380 U.S. 89 (1965); *Weber*, 406 U.S. at 172. "Classifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Even where a statute merely provides greater protection of a fundamental

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[2] *Johnson v. Calvert*, 5 Cal. 4th 84 (1993), did not address the question of whether payment for custody was a violation of the 14th Amendment. The only issue before the *Johnson* Court concerning the payment of money was whether it violated the public policy of California. But even on that issue, the Court addressed the question in the narrow context of that case in which it was found that Ms. Johnson had no parental rights to be sold, and the children maintained their relationship with their legal mother.

right for some relative to others, only a compelling interest can justify the classification. *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). See also, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Graham v. Richardson*, 403 U.S. 365 (1971); *Mem. Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Carey v. Brown*, 447 U.S. 455 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Police Dept. of City of Rockford*, 408 U.S. 104 (1972); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Thus, the classification which defines the excluded individuals must, where fundamental personal rights are involved, be justified by a compelling state interest. *Weber v. Aetna*, 406 U.S. 164, 175 (1972); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); Tussman, at 364, 366, 344-348.

In order for a classification to withstand strict scrutiny, the classification had to be necessary to achieve a "legitimate overriding purpose." *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192, 194 (1964).

Here California has created a class of children who are denied protection of their fundamental liberty interest in their relationship with their mother, denied protection of their interest in not being treated as a commodity, and denied protection of their interest in being placed based upon their best interests. The classification created by §7962 are those children who are the subject of a contract which denies them of their fundamental rights and interests only because some adult (who may not be genetically related to the children) paid money to obtain exclusive parental rights and control over them.

As noted, Cal. Penal Code §181 states that "every person...who buys, or attempts to buy, any person or pay money...to another, in consideration of having any person placed in his or her custody, or under his or her power or control...is punishable by imprisonment...for two, three or four years."

Cal. Penal Code §273 states that it is a misdemeanor for "any person to pay,

offer to pay...money or anything of value for the placement for adoption or for consent to an adoption of a child."

In every instance, California has held that regardless of the intent or plan of the adults, a child can be placed by court order only based upon what the court determines is in the child's best interests. Children subject to a surrogacy contract under §7962 are the sole exception. Ironically, even Judge Pellman made that very observation. 2RJN, P.279, L.6-8.

California requires that placement of adopted children must be in the child's best interest, and has established significant procedural safeguards. See, Cal. Fam Code §8600, et seq. Before a court can enter an order of adoption, the court must determine that the "interest of the child will be promoted by the adoption." *Id.* at §8612.

"It is the cardinal rule of adoption proceedings that the court consider what is for the best interests of the child." *In re Laws' Adoption*, 201 Cal. App. 2d 494, 498 (Ct. App. 1962) (citing *Adoption of Barnett*, 54 Cal.2d 370, 377 (1960)). "'The welfare of the child can never be excluded from the issues, no matter what preliminary action its parent or parents may have taken.'" *Id.* at 501 (quoting, *Ex Parte Barents*, 222 P.2d 488, 492 (1950)).

Indeed, so important is the court's independent evaluation of the best interests of the children when considering the termination of one parent's rights, that "a court cannot enter a judgment terminating parental rights based solely upon the parties' stipulation that the child's mother or father relinquishes those rights." *In re Marriage of Jackson* (2006), 136 Cal. 980, 990.

A judgment based upon a contract or stipulation between parents of minor children is void when the court has not made an independent determination of what is in the child's best interest. See, *Goodarzirad v. Goodarzirad* (1986), 185 Cal. App. 2d 1020, 1026 (citing *In re Arkle* (1925) 93 Cal. App. 404, 409, and *Anderson v. Anderson* (1922) 93 Cal. App. 87, 89).

Thus, under California Law, a contract between two adults agreeing to place custody in one or the other is not enforceable, and the child can be placed only based upon a court determination of what is in the child's best interests.

> The legislature finds and declares that it is the public policy of this state to assure that the health, safety and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. Cal. Fam. Code §3020(a).

The only exception to these prohibitions is found in §7962, which authorizes the termination of the children's rights. There is no requirement that there be any determination that the child's best interests be served.[3]

California has no legitimate state interest of any kind, let alone a compelling one, to create a class of children who are deprived of their mothers. The mother-child relationship is intrinsically beneficial to the child and the state has no interest in promoting its destruction and enforcing a plan made before the children were conceived to deprive the children of the benefits of that relationship.

The state has no interest of any kind to enforce, by court order, the placement of a child with an unfit care giver, when the child's mother is ready, willing and able to care for the child.

Most importantly, it is not a legitimate interest of the state to terminate the rights and interests of the children in order to accommodate the desire of a fifty year old Georgia man at the children's expense. The focus of all child rearing, including in California, is on the welfare of the children, not the desire of an adult at the children's expense. This one departure from that commitment violates the children's

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[3]The dangers of a state authorizing a surrogacy agreement which places a child with a single man without any regard for the children's best interests is illustrated by *Huddleston v. Infertility Center of America, Inc.*, 700 A.2d 453 (Sup.Ct. Pa. 1997) where a single man unable to cope with the rigors of child rearing, killed the child a month after his birth. While that is an extreme case, it illustrates the importance of placing the child based upon his or her best interests.

Equal Protection Rights.

The Statute and the Judgment it produced violates the Equal Protection Rights of the children and the judgment is void. *Fuentes v. Shevin*, 407 U.S. 72 (1972); Goodarzirad at 1026.

B. §7962 Violates the Substantive Due Process and Equal Protection Rights of Melissa Cook and All Other "Gestational" Surrogate Mothers

1. The Statute Violated the Substantive Due Process Fundamental Liberty Interests of Melissa Cook and Those of Other "Gestational" Surrogate Mothers

(a)

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

Since the interest protected is the interest in the relationship itself, the mother's interest in her relationship with her child is always protected as fundamental, even during pregnancy. The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. 380,398-99, and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr* at 259-60; 260, n.16.

Defendants interpret the California Supreme Court's holding in *Johnson v. Calvert*, 5 Cal.4th 84 (1993), to mean that a mother who is a "gestational" surrogate

has no constitutional rights under the Fourteenth Amendment. That is not the holding in *Johnson*.

It should first be noted that this is the only one of the six constitutional issues raised in this case, which *Johnson* purportedly addressed. *Johnson,* however, did not address the issue present here where the children are deprived of their only mother. Even if it had, it is not binding on this count. *Watson v. Estelle*, 866 F.2d 1093, 1095 (9th Cir. 1993); *Woods v. Holy Cross Hospital*, 591 F.2d 1164 (5th Cir. 1979). There is nothing about the *Johnson* analysis that would be remotely persuasive for this Court, because that Court's analysis in inapplicable here.

Again the factual differences in *Johnson* are critical. Mrs. Calvert was not only genetically related to the child, married to the child's genetic father, and a legal mother who asserted her rights, she also had an existing relationship with the child having raised the child following birth. Mrs. Calvert possessed constitutional rights under the Fourteenth Amendment. She asserted those rights and Ms. Johnson sought to have them terminated. The *Johnson* Court faced the same dilemma on the issue of constitutional rights as it did on the issue of the statutory basis for status as legal mother: both women had legitimate claims which were mutually exclusive.

The *Johnson* Court did not hold that no gestational carrier has a constitutionally protected interest in her relationship with her child, but rather that in that unusual context where there were two mothers competing for mutually exclusive status, Ms. Johnson did not enjoy protection. *Johnson* explained its resolution by stating that:

> "Anna's argument depends on a prior determination that she is indeed the child's mother. Since Crispina is the child's mother under California law it follows that any constitutional interests Anna possesses in this situation are something less than those of a mother." *Johnson*, 5 Cal. 4th at 976.

As the *Buzzanca* Court would state it, again the "tie" would be "broken in favor

1 of the intended parent." *Buzzanca v. Buzzanca*, 61 Cal. App. 4th at 1422. Here, there
2 is no tie to be broken. Plaintiff is the children's only mother, and she has the right to
3 litigate her Fourteenth Amendment rights she has asserted.

4 It is a *per se* violation of Mrs. Cook's and the children's substantive Due
5 Process liberty interests for California to terminate their rights based upon a
6 document signed before the rights and before the children even existed. As such, the
7 contract would constitute a prospective irrevocable waiver of a future right before
8 Plaintiff knew the facts which demonstrated that surrender of the children to C.M.
9 was harmful to them, before she knew he would not accept legal responsibility for the
10 children, before he demanded abortion of one or more of the children, before she
11 knew he would give them away, and before she had a full understanding and
12 knowledge of the depths of her bond with, and love for, the children. She revoked
13 that waiver when she understood the actual facts.

14 In other contexts, the United States Supreme Court has held that a waiver of
15 a constitutional right must be voluntary, knowing, and intelligently made. *Miranda
16 v. Arizona*, 384 U.S. 436, 444 (1966); *Brady v. United States*, 397 U.S. 742, 748
17 (1970). To be effective, the waiver must be "an intentional relinquishment or
18 abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464
19 (1938).

20 Here we are dealing with the greatest right a mother may have in all of life
21 other than her own right to life itself. The surrogacy contract does not advise the
22 mother that she has rights which she is forever giving up. In fact, all of the language
23 in the contract tells her that she has no rights at all. However, even if the contract
24 made explicit disclosures of all of the rights being waived, the contract could not
25 form the basis to terminate either the rights of the children or their mother.
26 Fundamental rights of a child cannot be waived before the child exists, or be waived
27 by an adult if such waiver, later revoked, was a promise to consent to the termination
28 of their rights to their substantial detriment.

1 As for Melissa Cook, a waiver of her rights, if that is what the contract is
2 purported to be, was not informed, knowing or intelligent. It was waived before she
3 had rights to waive. She could not anticipate the facts which subsequently developed.
4 More importantly, she could not waive her right to challenge the constitutionality of
5 the basis of the termination of her rights. In the strictest sense, her "waiver" was not
6 voluntary because her rights were terminated against her will, and by compulsion of
7 a contract applied to events that were unforeseen.

8 **(b)**

9 Melissa Cook has a fundamental liberty interest in not being exploited.
10 Surrogacy embodies deviant societal pressures, the object of which is to destroy her
11 interests as a mother to satisfy the interests of third parties who have personal
12 interests that conflict with those of the mother and her children. Surrogacy exploits
13 women by treating the mother as if she is not a whole woman. It assumes she can be
14 used much like a breeding animal and act as though she is not, in fact, a mother. It
15 demands that she detach herself from her experiences and her bond, love, and sense
16 of duty to herself and her child. It expects a mother to prevent the bonding process
17 despite the fact that this natural process is both physiological as well as
18 psychological. It uses the mother as an object without regard for the harm it can
19 cause her or the children. It allocates all of the risk, guilt, physiological and
20 psychological pain to her and isolates her in her distress by placing the responsibility
21 of termination of the children's rights entirely upon her. Dec. Rothman, ¶¶9-36.

22 It was for these reasons that all of Europe bans surrogacy and the European
23 Parliament has recently reaffirmed its condemnation of surrogacy as a human rights
24 violation. European Parliament's Annual Report on Human Rights, Nov. 30, 2015.
25 ([European Parliment]"Condemns the practice of surrogacy, which undermines the
26 human dignity of the woman since her body and its reproductive functions are used
27 as a commodity; considers that practice of gestational surrogacy which involves
28 reproductive exploitation and use of the human body for financial gain...[as a human

rights violation]"). at P. 16.

Such denigration cannot be enforced consistent with Plaintiff's substantive Due Process rights and there is no compelling interest of the state which is advanced by such exploitation and denigration.

2. The Statute Violates the Equal Protection Rights of Melissa Cook and All Other "Gestational" Surrogate Mothers

Plaintiff is a member of a class of pregnant mothers who is denied the same substantive and procedural protections provided by California to women similarly situated.

As a general matter, women who promise, before birth, to surrender their parental rights, enjoy strictly enforced protections. A pregnant mother voluntarily surrendering her rights in an adoption is not bound by an agreement she signs before the birth of the child. Only an agreement signed after she leaves the hospital following the child's birth can be used as a basis to terminate her relationship with the child. Cal. Fam. Code §8801.3(b)(2). Even if the mother signs such a post-birth consent, the mother has thirty days to revoke the consent. Fam. Code §8814.5(a). The mother can request immediate return of the child. Fam. Code §8815(b).

That is the law in all voluntary terminations except for a mother who signed a "gestational" surrogacy agreement before the child is conceived. Because the statute terminates a fundamental liberty, California must demonstrate a compelling state interest to justify the classification. See, II C above. The state has no such interest to involuntarily terminate Melissa's rights in order to allow a single man in Georgia to give away one or more of the children, or to otherwise exercise control over them.

The purpose of California's refusal to enforce pre-birth agreements is precisely because facts change, the pregnant mother's experience changes, and the mother's understanding of what is best for the children can change. All of those considerations present in voluntary surrender of rights in other contexts, are present for a

"gestational" surrogate and in this case.[4]

If, in fact, C.M. paid Melissa Cook for "gestational" services, those "services" were performed at birth. Selling her rights is not a service and the prohibition against money in exchange for parental rights is just as applicable in this case (where the children need their mother), as it is in other contexts. See, e.g. Cal. Penal Code §181; Cal. Penal Code §273. California's denial of the protection of these laws violate Melissa Cook's Equal Protection Rights.

III. The California Family Court Violated the Procedural Due Process Rights of Baby A, Baby B, and Baby C, and those of Melissa Cook by Entering a Judgment Without a Pre-Judgment Hearing

The complete denial of procedural Due Process is pertinent to questions of whether abstention by a Federal Court is appropriate, an issue discussed in Point IV below.

Judge Pellman terminated the rights of the three babies and those of their mother against Melissa Cook's will. It was an involuntary termination. The Children's Court refused to give Plaintiff a hearing, refused to consider her Verified Answer and Counterclaim, and denied her a right to produce evidence or witnesses to demonstrate why she was entitled to relief.

In *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) the United States Supreme Court stated:

> *Lassiter* declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children' " is an interest far more precious than any property right. 452 U.S., at 27,quoting *Stanley v. Illinois*, 405 U.S., at 651.

The termination of Plaintiff's rights does not merely "infringe" her rights, it

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[4]The constitutional issue concerning the Equal Protection violation was not raised in *Johnson v. Calvert*. The public policy considerations raised in *Johnson* (at 96) are not applicable to a constitutional challenge.

ends them. The fact that a private citizen, C.M., sought termination of Mrs. Cook's rights and not the state, is irrelevant. It was the state, through its court, which entered the order of termination and it was incumbent upon the court to adhere to the same standards of Due Process as those required if the state were initiating the termination. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

These substantive rights were terminated without any procedural Due Process. "Due Process...calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The magnitude of the rights being infringed dictates the need for the greatest of protections, especially, as here, the state's interest is essentially non-existent. See, e.g. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Regardless of the standard to be employed, Judge Pellman, enforcing §7962 gave Plaintiff and the children no Due Process of any kind.

> "...[T]here can be no doubt that at a minimum [the Due Process Claim] requires that deprivation of life, liberty or property by adjudication is [an] opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Judge Pellman construed §7962 to mean that C.M. was entitled to proceed as if his petition was uncontested and Plaintiff had no right to be heard regardless of the facts or the unconstitutional deprivation of her rights and those of the children.

The Judge denied Melissa Cook any pre-judgment hearing on her Verified Answer and Counterclaim. This is the plainest and gravest form of a denial of Due Process and the Judgment is void. *Fuentes v. Shevin*, 407 U.S. 67 (1972). It was a separate violation for the court to enter a Judgment of Termination without requiring C.M. to prove the basis for termination by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982); M.L.B. v. S.L.J., 519 U.S. 102 (1996).

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IV. This Court has Jurisdiction in this Case, and Abstention is Inappropriate Under Established Controlling Principles

This case involves a constitutional challenge brought under 42 U.S.C. §1983 to California's "Gestational Surrogacy" Enabling Statute, Cal. Fam. Code §7962, used to terminate the fundamental rights of Melissa Cook and the three children. The US District Court has original jurisdiction pursuant to 28 U.S.C. §1331 and §1343.

A.

Certain Defendants assert that the so-called *Rooker-Feldman* Doctrine, enunciated in *Rooker v. Fid. Trust Co.*, 263 U.S. 413(1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983) renders this Court without jurisdiction. That assertion is incorrect.

The import of the *Rooker-Feldman* Doctrine was explained in *Exxon Mobil Corp. v. Saudi Pasic Indus. Corp.*, 544 U.S. 280 (2005). The *Rooker-Feldman* Doctrine only applies to very narrow circumstances. The mere fact that there was a case pending between M.C. and C.M. in the State Court (Melissa Cook's Counterclaim was filed on February 1, 2016) when the Federal Complaint was filed the next day on February 2, is completely irrelevant to whether *Rooker-Feldman* deprives the Federal Court of jurisdiction. *Exxon Mobil Corp.* held that the *Rooker-Feldman* Doctrine applies only to "cases brought by State-Court losers complaining of injuries caused by State Court Judgments *rendered before the District Court proceedings commenced and inviting District Court review and rejection of those judgments*." *Exxon Mobil Corp.*, 544 U.S. at 284 (emphasis added). *Rooker-Feldman*, simply put, precludes a litigant to use a Federal Court as an Appellate Court after a State Judgment is entered. *Exxon* explained "neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a State Court reaches judgment on the same or related question while the case remains *sub judice* in a Federal Court." *Id.* At 292. This Court has proper jurisdiction.

1 **B.**

2 Defendants urge, that even if this Court possesses jurisdiction, it should abstain
3 from exercising it, citing *Younger v. Harris*, 401 U.S. 37 (1971). However, the
4 principles enunciated in *Younger* apply only to three exceptional categories of cases.

5 In *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S.
6 350 (1989)(NOPSI), the U.S. Supreme Court evaluated its prior *Younger* jurisdiction,
7 and itemized three categories of cases that constitute "exceptional circumstances
8 justify[ing] a federal court's refusal to decide a case in deference to the States: (1)
9 ongoing "state criminal prosecutions;" (2) "civil enforcement proceedings;" and (3)
10 "civil proceedings involving certain orders that are uniquely in furtherance of the
11 state courts' ability to perform their judicial functions." NOPSI, 491 U.S. at 368
12 (citations omitted). The Supreme Court recently reaffirmed its ruling in NOPSI,
13 noting that "a federal court's 'obligation' to hear and decide a case is 'virtually
14 unflagging[,]' [and] [p]arallel state court proceedings do not detract from that
15 obligation." *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)
16 (quoting, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800,
17 817 (1976).) *The Sprint Communications, Inc.* Court emphatically held "that Younger
18 extends to the three 'exceptional circumstances' identified in NOPSI, but no further."
19 *Sprint Communications, Inc.*, 134 S. Ct. at 594 (emphasis added).

20 Plainly, there is no underlying state criminal prosecution or civil enforcement
21 proceeding. See, e.g. *Younger*, 401 U.S. 37 (ongoing criminal prosecution) and
22 *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (civil nuisance proceeding). This case
23 is also dissimilar from the third exceptional category - civil proceedings which
24 involve orders critical to a state's ability to perform its judicial functions. As the 9th
25 Circuit Court of Appeals explained, such court orders "involve the administration of
26 the state judicial process-for example, an appeal bond requirement, a civil contempt
27 order, or an appointment of a receiver." *ReadyLink Healthcare, Inc. v. State Comp.
28 Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) (citations omitted).

In *ReadyLink Healthcare, Inc.*, the 9th Circuit held that *Younger* abstention did not apply, because that case, in contrast to cases which involved the administration of a state judicial process, involved "a 'single state court judgment' interpreting an insurance agreement and state law, not the process by which a state 'compel[s] compliance with the judgments of its courts.'" *Id.* at 759 (quoting, *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F. 3d 876, 886 (9th Cir. 2011)). Like *ReadyLink Healthcare, Inc. and Potrero Hills Landfill, Inc.*, the sole order at issue here resulted from a complete lack of Due Process and the Children's Court order has nothing to do with how California State courts compel adherence to their judgments. Accordingly, this case does not involve an order in furtherance of the state's ability to perform its judicial functions, so it does not fall within any of the three exceptional categories of cases which would support the application of *Younger*.

C.

The fact that the California Children's Court entered a Judgment on February 9, does not bring this case within *Younger*. In fact, that Judgment was the result of a complete denial of Procedural Due Process that renders the Order, under the circumstances, unconstitutional and void.

The Children's Court did not consider the federal constitutional claims at all, and those issues and the contested claims relating to the issuance of the birth certificates were not actually litigated. As such, there is no preclusive effect to the Children's Court's order, and all the issues raised in the federal court complaint can be litigated in this case. The denial of Due Process is amply set forth above.

Pursuant to 28 U.S.C. §1738, Federal Courts are required to give full faith and credit to state court judgments, and to render "the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 466 (1982). Importantly, however, "the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full

1 and fair opportunity" to litigate the claim or issue." *Id.* at 480-81 (quoting, *Allen v.*
2 *McCurry*, 449 U.S. 90, 95 (1980)). "Redetermination of issues is warranted if there
3 is reason to doubt the quality, extensiveness, or fairness of procedures followed in
4 prior litigation." *Id.* at 481 (quoting, *Montana v. United States*, 440 U.S. 147, 164,
5 n.11 (1979)). A State must "satisfy the applicable requirements of the Due Process
6 Clause. *A State may not grant preclusive effect in its own courts to a constitutionally*
7 *infirm judgment, and other state and federal courts are not required to accord full*
8 *faith and credit to such a judgment.*" *Id.* At 482 (emphasis added).

9 Under California law, if five requirements are met, "relitigation of an issue of
10 law or fact" is barred. *ReadyLink Healthcare, Inc.*, 754 F.3d at 760. One of those five
11 requirements is that the issue sought to be precluded "must have been actually
12 litigated in the former proceeding." *Id.* at 760-61 (emphasis added) (quoting, *Lucido*
13 *v. Superior Court*, 795 P.2d 1223, 1225 (1990) (en banc). To be "actually litigated,"
14 the parties must have been given "the opportunity to present full cases." *Id.* at 761
15 (quoting, *Lucido*, 795 P.2d at 1225).

16 In this case, although the constitutional claims and issues relating to the
17 constitutionality of the Surrogacy Statute and issuance of birth certificates were raised
18 in Melissa Cook's Verified Answer, Separate Defenses, and Counterclaim, the
19 Children's Court refused to consider those pleadings before entering the final order,
20 treating C.M.'s Petition as if it were uncontested and as if Melissa Cook wanted her
21 rights terminated. Melissa Cook was not permitted to introduce witnesses, and the
22 court flatly refused to consider the best interests of the children, stating that such
23 considerations were "irrelevant" and "none of the Court's business." Therefore, none
24 of the issues surrounding the Children's Court's order was "actually litigated," so the
25 order has no preclusive effect, and the District Court's ability to consider the issues
26 before it is not constrained by the Children's Court's constitutionally infirm order.

27 **D.**

28 The County State Defendants, Harding, Gunzenhauser and Logan, argue that

this Court has broad discretion to abstain from entertaining this case because Plaintiff seeks, among other things, a Declaratory Judgment. However, the Court's discretion is not nearly as broad as Defendants suggest, and applicable authority suggests the Court must exercise its jurisdiction.

The Defendants rely upon diversity cases where there is no Federal issues. *See*, e.g., *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998)(insurance coverage state court issue); *Snodgrass v. Provident Life and Acc. Ins. Co.*, 147 F.3d 1163 (9th Cir. 1998)(state court action involving insurance issues removed on basis of diversity, when 9th Cir. Held that District Court abused its discretion by remanding the case to State Court); *Polido v. State Farm Insurance*, 110 F.3d 1418 (9th Cir. 1997)(diversity case involving insurance coverage question remanded back to State Court). Defendants also rely upon *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-290 (1995) which addresses the District Court's discretion when jurisdiction is based on diversity, rather than a Federal question.

Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942) is the first case to distinguish the difference in discretion when jurisdiction is predicated on a Federal issue. *Brillhart*, 316 U.S. at 495.

More recently, in *Wilton v. Seven*, the Supreme Court made that point more strongly while explaining the discretionary standard in diversity cases, stating it was not attempting "to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of Federal law or cases in which there are no parallel state proceedings." *Wilton*, 515 U.S. at 290.

Federal Courts which have addressed the Court's discretion in declaratory Judgment cases involving Federal issues, invariably ruled that the Court should exercise its jurisdiction. In *Verizon Communications Inc. v. Inverizon International, Inc.*, 295 F.3d 870 (8th Cir. 2002) the Eighth Circuit observed that *Wilton* and *Brillhart* were based upon diversity jurisdiction, and that neither *Wilton* nor *Brillhart* delineate the scope of the District Court's discretion in cases in which the Court's

jurisdiction is based upon a Federal question. The Eighth Circuit went on to say that the fact that: (1) there is a pending State Court case; (2) that the state case can resolve all of the issues; (3) it may be inefficient to require litigation in two separate actions; and (4) Verizon "wrongfully" deprived Inverizon of its choice of forum was not at all dispositive of the question of whether the District Court abused its discretion by abstaining. The Court stated that the presence of a Federal question was extremely important and should be given "significant weight," distinguishing *Wilton* and *Brillhart.*

In *Youell v. Exam Corporation*, 74 F.3d 373(2nd Cir. 1996) the second circuit went even further stating that "to resolve novel questions of Federal law, however, is quintessentially our (Federal Courts) obligation." *Id.* At 376. *Youell* stated that the State Court is not better equipped to decide a Federal question, quoting *Youell v. Exxon Corp.*, 48 F.3d 105 (2nd Cir. 1995):

> "Federal adjudication of this issue will not constitute 'gratuitous interference with orderly and comprehensive disposition of [the] State Court litigation.' *Brillhart*, 316 U.S. at 495...[A] Federal question of first impression must all but demand that the Federal Court hear the case...while we loathe wasting judicial resources, it would be worse to cede Federal review of an issue of Federal Law merely because Exxon won the race to judgment in State Court.' *Youell,* 48 F.3d at 111-12, 114."

In reversing a District Court dismissal of a Declaratory Judgment case, the Fifth Circuit stated that "'the presence of Federal law issues must always be a major consideration weighing against surrender' of federal jurisdiction." Citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983).

But there are even more important considerations here. First, we suggest that when a State Court Statute is under Federal constitutional scrutiny, it is always better that the Federal Court objectively scrutinize the Statute. Second, only C.M. is a party

1 to the State Court action, and the State Court has no jurisdiction over the state actors
2 responsible for executing the orders resulting from an unconstitutional statute.
3 Likewise, they have no real ability to defend the statute, because they cannot now
4 obtain discovery in that case given its current posture.

5 Third, and most importantly, the Plaintiffs have been denied any hearing of any
6 kind in the State Court. The State Court has refused to exercise its jurisdiction and
7 refused to consider the Federal Constitutional issues at all. Thus, Defendants ask this
8 Court to surrender its jurisdiction over important Federal Constitutional issues, to a
9 State Court which twice refused to entertain them. It would be a clear abuse of
10 discretion for a Federal Court to abstain under such circumstances.

11 The Plaintiff actually filed her Complaint, on January 4, in the California Civil
12 Court precisely because the Family Court was ill equipped to decide the constitutional
13 issues. When the Civil Court kicked it over to the Family Court, Plaintiff virtually
14 simultaneously filed her Verified Answer and Counterclaim in the Children's Court,
15 and a Complaint in the Federal Court.

16 Defendants observe that Plaintiff filed an Appeal in the State Court of Appeal,
17 which is irrelevant. All the Court of Appeal can do is remand the case and direct the
18 Family Court to decide the issues it refused to hear. Even if Plaintiff won in the
19 Court of Appeal and then obtained a trial in the Family Court, it would be another
20 eighteen to twenty-four months and the Plaintiffs' rights would be lost. It is also quite
21 possible – perhaps likely – that after remand the hostile family trial court would rule
22 against Plaintiffs, and the appeal of such an Order could not be completed for another
23 three years.

24 The Court must exercise its jurisdiction.

25 **V. Karen Smth, M.D., M.P.H., as the Director and State Public Health**
26 **Officer for the California Department of Public Health is a Proper**
Party Defendant; as is Kaiser Foundation Hospital, and Payman
27 **Roshan. Prospective Injunctive Relief is Appropriate as to All of Them**

28 Defendants Governor Edmund Brown and Dr. Karen Smith argue that they are

not proper parties because they are not responsible for issuance and maintaining Birth Certificate records. Defendants Kaiser Foundation Hospital, Panorama City Medical Center, and Payman Roshan, the hospital administrator, assert that they have no involvement with the issuance of the Birth Certificates, and because of the entry of the State Judgment, the question is "moot."

All are incorrect in their arguments, except for Governor Brown. Plaintiffs agree that the Complaint should be dismissed against the Governor, but the other Motions to Dismiss must be denied.

A. The Roles of Defendants Smith, Kaiser Hospital and Roshan

Pursuant to California Health and Safety Code §102145, a hospital and its administrator is required to collect information from the birth mother, who gives birth at its institution, to ensure that the statutorily required information can be input into the birth certificate.[5] The "attending physician and surgeon, certified nurse midwife, or principal attendant" must sign the certificate. *Id.* at §102405. If those persons are not available, however, the hospital administrator is permitted "to sign the birth certificate certifying the fact of birth." *Id.*[6] The individual completing the birth certificate must input all statutorily required information. *Id.* at §§102125, 102135(a). The hospital administrator is responsible for registering the birth certificate with the local registrar within 10 days of birth. *Id.* at §§102400.

The health officer of the local health department serves as the local registrar

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[5] "Every person in charge of a hospital or other institution to which persons are admitted for treatment or confinement shall make a record of the personal, medical and other information for each patient sufficient and adequate for the completion of a birth or death certificate." Cal. Health & Safety Code § 102145 (West).

[6] For live births that occur in a hospital, or a state-licensed alternative birth center, as defined in paragraph (4) of subdivision (b) of Section 1204, the administrator of the hospital or center or a representative designated by the administrator in writing may sign the birth certificate certifying the fact of birth instead of the attending physician and surgeon, certified nurse midwife, or principal attendant if the physician and surgeon, certified nurse midwife, or principal attendant is not available to sign the certificate; and shall be responsible for registering the certificate with the local registrar within the time specified in Section 102400." Cal. Health & Safety Code § 102405 (West).

of births, and is required to "carefully examine each certificate before acceptance and registration" to ensure that it has been completed in accordance with "the policies established by the State Registrar (Defendant Smith)." *Id.* at §102305,[7] §102275. The local registrar is also responsible for enforcement of the vital statistic statute within his registration district. *Id.* at §102295. Upon acceptance for registration, the local registrar signs the birth certificate, and originals are transmitted to the State Registrar on a weekly basis. *Id.* at §§102315 102345(a).[8]

Defendant Karen Smith, M.D., as the Director of the Department of Public Health, acts as the State Registrar of Vital Statistics. *Id.* at §102175.[9] Upon receipt of the certificates from the local registrar, the State Registrar "shall carefully examine the certificates" to ensure that they have been satisfactorily completed. *Id.* at §102220.[10] Defendant Smith as the State Registrar, is responsible for adopting regulations which specify the procedures for access to birth certificates, and for issuing detailed instructions to ensure adherence to the vital statistics statute and "the

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[7] "The local registrar of births and deaths shall carefully examine each certificate before acceptance for registration and, if any are not completed in a manner consistent with the policies established by the State Registrar, he or she shall require further information to be furnished as may be necessary to make the record consistent with those policies before acceptance for registration." Cal. Health & Safety Code § 102305 (West).

[8] "The local registrar of births and deaths shall transmit each week to the State Registrar all original certificates accepted for registration by him or her during the preceding week." Cal. Health & Safety Code § 102345 (West).

[9] "The director shall be the State Registrar of Vital Statistics." Cal. Health & Safety Code § 102175 (West).

[10] "The State Registrar shall carefully examine the certificates received from the local registrars of births, deaths, and fetal deaths, and if they are incomplete or unsatisfactory shall require any further information that may be necessary to make the record complete and satisfactory." Cal. Health & Safety Code § 102220 (West).

maintenance of a satisfactory system of registration." *Id.* at §102205[11] and §102110.[12] The Director of the Department of Public Health, as State Registrar, has "supervisory power" over the local registrars to ensure compliance, and the Department "is charged with the uniform and thorough enforcement" of the statute. *Id.* at §102180[13] and §102105.[14] The State Registrar can investigate cases of irregularity and report violations to the District Attorney who must assist in the enforcement if requested by the State Registrar. *Id.* at §§102185, 102190, and 102195. Importantly, when a parent-child relationship has been judicially determined, Defendant Dr. Smith, as the State Registrar, is required to "establish a new birth certificate for the child." *Id.* at 102725.[15]

There is no question that Defendant Smith is the state official most responsible

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[11] "The State Registrar shall prepare and issue detailed instructions as may be required to procure the uniform observance of this part and the maintenance of a satisfactory system of registration." Cal. Health & Safety Code § 102205 (West).

[12] "The State Registrar shall adopt regulations specifying both of the following:
(a) Procedures to assure the confidentiality of the confidential portion of the certificate of live birth, specified in subdivision (b) of Section 102425, and the medical and health report, specified in Section 102445.
(b) Procedures regarding access to records required by this part." Cal. Health & Safety Code § 102110 (West).

[13] "The State Registrar is charged with the execution of this part in this state, and has supervisory power over local registrars, so that there shall be uniform compliance with all of the requirements of this part." Cal. Health & Safety Code § 102180 (West).

[14] "The department is charged with the uniform and thorough enforcement of this part throughout the state, and may adopt additional regulations for its enforcement." Cal. Health & Safety Code § 102105 (West).

[15] Whenever the existence or nonexistence of the parent and child relationship has been determined by a court of this state or a court of another state, and upon receipt of a certified copy of the court order, application, and payment of the required fee, the State Registrar shall establish a new birth certificate for the child in the manner prescribed in Article 1 (commencing with Section 102625), if the original record of birth is on file in the office of the State Registrar." Cal. Health & Safety Code § 102725 (West).

for creating the regulations and providing the supervision of California's entire Statutory and Administrative scheme for issuance, maintenance and changing of Birth Certificates in California. The fact – if true – that Dr. Smith has delegated some of her functions to someone she supervises, Dr. Greene, is irrelevant. Dr. Smith is the party legally responsible by statute for all of the supervision, and the state official given the responsibility to create mandatory regulations. Dr. Smith claims to have delegated some functions to Dr. Greene. Whether that is true or not – we are not at a discovery phase in the case as yet – does not exonerate her from being the official responsible for her statutory functions.[16] She remains responsible.

It is Defendant Smith who is responsible for issuing a new Birth Certificate when a Court Order directs that parentage is established after the other Birth Certificate had been issued and registered. §102725.

In this case, once the issues presented are resolved, Defendant Smith is the state official responsible for issuing a new Birth Certificate naming Melissa Cook as mother of Baby A, Baby B and Baby C. No state official has the power to exonerate herself unilaterally, by writing a letter. That power is entrusted exclusively to her by the legislature. It is noteworthy that Defendant Smith does not provide any legal authority that suggests that a statutory official can excuse herself from the statutory responsibilities imposed upon her. Thus, there is no need on a Motion to Dismiss for Plaintiffs to brief that issue, especially since it depends on facts not properly in the records, and facts subject to discovery.

Smith argues that Plaintiffs have no standing because they suffered no injury, in fact, and because there is no "causal connection" between the harm and the conduct of the state actor. First, it has been well laid out above that Melissa Cook and the three children suffered some of the worse injury a mother and her children can

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[16]Defendant Smith Provides a copy of a hearsay letter. It is not a proper subject for judicial notice. While her delegating is irrelevant to the fact she is the proper statutory Defendant in this case, the letter should not be considered without Plaintiffs being able to obtain discovery.

1 endure: the termination of their relationship. It was accomplished
2 by Defendant Smith, the County State Defendants, and the Hospital Defendants
3 enforcing an unconstitutional order. Further, the prospective injunctive relief sought
4 involves all of them because they all will, including Defendant Smith, have a role in
5 issuing the new Birth Certificates, which is an integral aspect of reestablishing and
6 prospectively protecting Plaintiffs' rights which have been violated.

7 Dr. Smith is an essential party to providing that prospective relief. Melissa
8 Cook and the three children have attacked the Statute on its face, and seek an
9 injunction enjoining future state conduct denying surrogate mothers and the children
10 their rights. That relief includes enjoining Dr. Smith and the other Defendants from
11 issuing Birth Certificates without them properly reflecting the proper parental-child
12 relationship.

13 **B. The Hospital Defendants**

14 It is quite obvious that California's entire statutory scheme relies upon the
15 substantial involvement of the Hospital Defendants. In fact, the entire process begins
16 with them and cannot function without their cooperation. They are necessary parties
17 to any challenge to the Surrogacy Statute with respect to prospective relief. They
18 took it upon themselves to enforce the Court Orders resulting from the enforcement
19 of the Statute. In fact, in this case, as Mr. Caspino and Melissa Cook certified, the
20 hospital took on police functions to enforce the unconstitutional order of February 9
21 to the point of inhuman, and – it can be argued – cruel treatment of the Plaintiff and
22 the children. The Hospital Defendants are a proper and necessary party to enjoin their
23 future acts of enforcement of the orders and involvement in issuance of Birth
24 Certificates. They have the control over hospital records that prove Melissa Cook
25 gave birth, and they have a role in issuing new Birth Certificates.

26 Nothing is moot. There is prospective relief which needs to be obtained and
27 the Hospital Defendants are necessary parties to obtain that relief.

28 Beyond that, the Hospital Defendants are actually State Actors under applicable

constitutional law.

"'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the Statute (§1983). To act 'under color' of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agents.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 943 citing *Adiches U.S.A. Kress & Co.*, 398 U.S. 144, 152 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966).

The California Statutory Scheme so intertwines the state officials and the Hospital Defendants in the issuance of Birth Certificates, and the state is so dependent upon the Hospital Defendants in that process, there is no question but that they are State Actors. Not only are the Hospital Defendant state actors as to the Birth Certificates, they are intimately involved in the enforcement of the state's orders enforcing its unconstitutional statute. The hospital prevented Melissa Cook and all past and future surrogate mothers from seeing their children; from having access to their medical records; from having visitation with the children to the point that they are the very person who enforce the unconstitutional orders now, and in the future, and take the action necessary to insure that the unconstitutional termination of the rights of the children and their mothers is reflected in the state records. *See*, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Fuentes v. Shevin*, 407 U.S. 67 (1972). The Order of the Children's Court itself involved the Hospital Defendants. There is no question that they are State Actors and proper party defendants with respect to prospective relief sought. The Hospital Defendants performed and will contiue to perform overt, official involvement in the deprivation of Plaintiffs' rights and those similarly situated. *Lugar*, at 927. The hospital profits from this involvement in a manner that it receives financial remuneration many scores times what they receive in normal childbirth. Nicolau, Y, et al, *Outcomes of Surrogate Pregnancies in California and Hospital Economics of Surrogate Maternity*

1 *and Newborn Care;* Baishideng Publishing Group, Inc., CA., published online
2 November 10, 2015.

3 **CONCLUSION**

4 The Motions to Dismiss filed by the County State Defendants, Dr. Karen
5 Smith, and the Hospital Defendants must be denied. The Motion to Dismiss filed on
6 behalf of Governor Brown, should be granted as unopposed.

7

8 Dated: April 28, 2016

9 Respectfully Submitted,
THE CASSIDY LAW FIRM
10 Harold J. Cassidy* (NJ SBN: 011831975)

11 By: /s/ *Harold J. Cassidy*
Harold J. Cassidy
12 *Admitted Pro Hac Vice

13 BUCHALTER NEMER, P.C.
Michael W. Caspino (SBN: 171906)
14

By: /s/ *Michael W. Caspino*
15 Michael W. Caspino

16 *Attorneys for Plaintiffs*

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