

In The
Supreme Court of the United States

—◆—
M.C.,

Petitioner,

v.

C.M.,

Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The Court Of Appeal
Of The State Of California**

—◆—

**MOTION AND BRIEF OF CONCERNED
UNITED BIRTHPARENTS, INC. AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

—◆—

August 25, 2017

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**MOTION FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF***

Although Petitioner, M.C., has consented to the filing of this *Amicus Curiae* Brief by Concerned United Birthparents, Inc. (“CUB”), Respondent, C.M., has withheld his consent. Therefore, pursuant to Supreme Court Rule 37.2(b), CUB moves for leave to file this *Amicus Curiae* Brief in Support of Petitioner in the above-captioned matter for the following reasons:

Amicus Curiae, CUB, is the only nationally recognized organization that is primarily focused on birthparents – their experiences, healing, and wisdom. CUB serves all those affected by adoption or surrogacy and all who are concerned about adoption and surrogacy-related issues, including gestational mothers, intended contractual parents, adoptees, adoptive parents, and adoption and surrogacy professionals. CUB’s membership and the people it serves include citizens throughout the United States, including California where this case originates, and Canada.

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

* Much of CUB’s motion is derived from CUB’s position paper on surrogacy, which was drafted by the late Carole J. Anderson, M.S.W., J.D., in 1987.

and practices. As part of its mission, CUB assists birthparents and gestational mothers in litigation that involves significant adoption or surrogacy-related issues and the parents' constitutional rights and liberty interests in parenting their biological children, including those to whom they gave birth, but with whom they share no genetic link.

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

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

This case presents significant issues as to the constitutional rights and liberty interests implicated in surrogacy and the minimum due process and equal protection requirements that should be applied to lawful surrogacy contracts in the United States. As the only organization that focuses on the impacts upon birthparents, including gestational carriers, in adoption or surrogacy situations, CUB has a direct interest in the outcome of this case. As CUB knows, mothers

who surrender children for adoption suffer life-long, detrimental consequences. Gestational mothers, who tend to be younger, less well-educated, and financially disadvantaged, who are separated from the children they gave birth to because of a surrogacy contract, have been known to suffer many of the same ill effects. They also face increased risks during pregnancy that are often not properly considered by the agreement or the courts.

CUB provides information and assistance to expectant and birthparents looking for help and resources to prevent unnecessary family separations caused by adoption or surrogacy. In addition, CUB conducts adoption support groups both in physical locations within the United States and online. Those support groups include women who have acted as gestational mothers under state-sanctioned surrogacy contracts. CUB's membership and assisted population has experienced firsthand the devastating and life-altering impacts caused by adoptions not only to birthparents, including gestational mothers, but also to adoptees and, in some cases, adoptive parents or intended, contractual parents who acquire children through surrogacy arrangements. Thus, CUB has an interest in ensuring that all adoption and surrogacy procedures comply with public policy and the Due Process and Equal Protection Clauses of the United States Constitution.

Indeed, it is part of CUB's mission to advocate for adoption and surrogacy-related reforms that protect

the constitutional rights and liberty interests of expectant and birthparents, including gestational or surrogate mothers, as well as the children involved be they naturally-conceived adoptees or babies created pursuant to assisted reproductive technologies and surrogacy contracts.

Indeed, infertility is a physical limitation not unlike blindness or cystic fibrosis. Currently, our society refuses to enforce contracts that require any person to sell her eyes or lungs. Those types of contracts are deemed void as a matter of public policy. The societal concern is that the sellers would be poor, powerless, or easily exploited, while the buyers would be the rich and powerful. Society, however, does not care whether the buyer of an eye is a well-known artist while the seller cannot read. Who might make better use of an organ is irrelevant and does not justify those types of body-part sales. Also, the wealthy, well-educated, and powerful are unlikely to subject themselves to the practice of selling their spare organs to poor couples or individuals needing them. The purchase of children has long been illegal in the United States because it treats the child as a commodity and exploits vulnerable women. The same considerations that make contracts for the sale of body organs void apply equally to contracts for the sale of children created through assisted reproductive technologies. The surrogacy industry is just a poorly rationalized form of child trafficking and female exploitation.

Thus, public policy, law, ethics, and society should be concerned for the adults in these new child-bearing

arrangements, but more importantly, for the children who are created with the expressed intention of separating them from their biological mothers, including the gestational surrogates who carried them to term. The separation of any child from a parent is a tragedy with far-reaching consequences, not only for the individual child and the parent but also for the children of the gestational mothers who helplessly watch a baby brother or sister disappear.

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

Consequently, CUB does not support any reproduction where a child is created with the express intention of separating him from his birthparent, which includes a mother who lacks any genetic link to the child. The woman who carries the child makes an essential biological contribution to the child's procreation, and the relationship between that mother and child is the most intimate and the one most worthy of protection in all human experience. Adoption of any child created through surrogacy should be handled in the exact same way as all other adoptions, which require considerations of actual voluntariness, revocation, waiting periods, expense reporting, home studies to approve the placement, and court approval. No surrogacy agreement should result in an involuntary

termination of parental rights. Should any surrogate change her mind before her rights are terminated, she should have the same rights and obligations as any other parent under the applicable state law. No custody decisions should be based solely upon the language of a surrogacy contract, which is often drafted and executed before the child is even conceived or the embryo transferred to the gestational mother. Any parent who is not awarded custody should be entitled to visitation and obligated to pay support. And, that initial custody decision should be subject to review upon a change of circumstances. To do otherwise is to sanction baby selling, which is a violation of the gestational mother's and the child's constitutional rights and liberty interests.

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

resources, information, and support group counseling related to surrogacy matters, CUB's membership and assisted population have a direct stake in the outcome of this case.

THEREFORE, *Amicus Curiae*, CUB, respectfully requests that this Court accept the attached *Amicus Curiae* Brief in support of the Petitioner.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*¹

Concerned United Birthparents, Inc. (“CUB”)² is a nationally recognized organization whose mission is to: 1) provide support for all family members separated through adoption or surrogacy agreements; 2) offer resources to help prevent unnecessary family separations; 3) educate society about the life-long impact on all who are affected by adoption and surrogacy contracts; and 4) advocate for fair, ethical, and constitutional adoption and surrogacy laws, policies, and practices. In furtherance of this mission, CUB serves all those who are affected by adoption or surrogacy arrangements and who are concerned about adoption and surrogacy-related issues. Although CUB’s focus is primarily on expectant and birthparents, CUB’s membership and assisted population also includes gestational carriers, traditional surrogate mothers (*i.e.*, women genetically linked to the child), children

¹ The Petitioner, by and through her counsel of record, Harold J. Cassidy, has consented to the filing of this brief. A letter reflecting that consent has been filed with the Clerk of this Court as required by Supreme Court Rule 37.2. The Respondent, C.M. has withheld his consent. Further, as required by Supreme Court Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *Amicus Curiae*, its members, or its counsel. The parties were notified ten days prior to the due date of this brief of the intention to file.

² General information concerning CUB as well as specific information related to its membership and activities can be found at www.cubirthparents.org, last accessed on August 12, 2017.

created through surrogacy contracts, intended contractual parents, adoptees, adoptive parents, and adoption and surrogacy professionals throughout the United States, including California, and Canada.

As part of its mission, CUB assists birthparents, including gestational mothers like M.C., who are genetically unrelated to the children they delivered, in litigation that involves significant issues related to the parents' constitutional rights and liberty interests in parenting their children and avoiding unnecessary family separations caused by adoption or surrogacy contracts. CUB also provides support for the rights of children created through surrogacy.

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

have experienced these impacts firsthand. Therefore, they have a direct interest in the outcome of this case.

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

Consequently, CUB believes that to protect the gestational mothers' and children's liberty interests and constitutional rights, surrogacy contracts and procedures should be subject to the same restrictions and regulations as adoptions.

Specifically, CUB argues, as it does in adoption cases, that no consent to a relinquishment of parental rights should be permitted until at least one week after birth. And, by no means should such a consent be permitted before a child is even conceived or an embryo transferred.

CUB also recommends that the minimum revocation period in which a parent or gestational carrier can reclaim the child without penalty, should be at least

thirty days after birth. This revocation period should be strictly enforced by the courts and, during this time, birthparents, including gestational surrogates, should not have to prove “superior fitness” to parent as compared to the hopeful intended, contractual parents. Moreover, no consent should provide a basis for termination of parental rights or adoption until after the child has been born and there has been a judicial finding, in a court of law with the consentor present, that the consent was knowingly and voluntarily given. The courts must take care to ensure that birthparents, including gestational surrogates, are not being exploited financially or actively or subtly coerced into forfeiting their constitutional rights and liberty interests in parenting their children simply to provide a supply of healthy babies to infertile people.

Also, no child should be delivered to the intended, contractual parent or parents until they have undergone and passed a thorough home study to ensure their parental fitness. The fact that they were wealthy enough to procure a child through surrogacy does not mean they will be suitable parents. Thus, care must be taken to ensure the child will be cared for properly.

If a conflict develops between the gestational surrogate and the intended parent or parents after the free-revocation period, the courts should resolve the issue with the child’s best interests in mind.

Finally, the children created and born through surrogacy should have the right upon adulthood, like

other adoptees, to discover their creation story and medical, genealogical, and parental history.

Because this case and so many other sad tales like it seriously impact the constitutional rights and liberty interests of birthparents, including gestational surrogates, adoptees, and children created and born through surrogacy contracts, and because of CUB's singular role in assisting birthparents, including gestational mothers, faced with the difficult decision of whether to parent or to knowingly, voluntarily, and meaningfully consent to adoption or relinquishment, CUB, its members, and its assisted population have a direct stake in the outcome of this case. Consequently, the resolution of the issues in this case are critical to the constitutional rights and liberty interests of expectant and birthparents, including gestational surrogates, their children (whether genetically linked or not), the stability of placements through adoption or surrogacy contracts, and the protection of hopeful adoptive or intended, contractual parents, children, and professionals involved in surrogacy and adoption arrangements throughout the United States.



INTRODUCTION AND SUMMARY OF THE ARGUMENT

In this case, this Court has a unique opportunity to address the substantial, constitutional concerns raised by surrogacy contracts and procedures. Given the long-standing constitutional prohibitions against

slavery and indentured servitude and the existing federal and state public policies against baby selling and human trafficking, CUB believes that all surrogacy contracts should be deemed illegal, void, and unenforceable.

The same facts and reasoning underlying CUB's own policy against surrogacy also informs and fully supports the conclusion that the California surrogacy statutes violate the due process and equal protection rights of the birthmothers and children involved. The imposition of appropriate minimum constitutional guidelines is the only way to fully safeguard the serious liberty and constitutional interests involved. To do otherwise would be to allow the profit incentive involved in the surrogacy industry to prevail and to reduce children to consumer products and women to breeding machines in violation of the United States Constitution.

At their core, surrogacy contracts are state-sanctioned child procurement and sales agreements. See Smolin, David M., *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, Samford University (2015).³ Children are conceived in a petri dish with the intention of removing the child from the birthmother's custody and transferring the child to intended parent or parents for

³ http://works.bepress.com/david_smolin/19/, last accessed on August 20, 2017.

a price. These arrangements are focused upon providing a product – a genetically-linked (or not) infant – to infertile people for money. This has necessarily generated an entire industry bent on profiting from what is essentially baby selling and the exploitation of vulnerable, disadvantaged women.

In our rush to satisfy a perceived human desire to create a child of our own genetic stock, we overlook the negative impacts to the gestational surrogate and do not even consider the potential harm to the child procured through surrogacy. Indeed, “the legal legitimation of commercial surrogacy in some jurisdictions,” including California, which is a leading proponent of the practice, “is a profound step backwards in the legal progress against the interrelated practices of human trafficking and the sale of children.” Smolin, at 341.

CUB believes that, as in the case of many countries in the world, surrogacy contracts should be deemed illegal, void, and unenforceable as a matter of public policy. See *Surrogate Parenting: A Worldwide Industry, Lacking Global Rules*, Morning Edition, National Public Radio (June 11, 2015) (“In Europe, for example, it’s illegal in half a dozen countries, including France, Germany, Italy and Spain. It is permitted in a handful of other European nations – though there are major restrictions.”).⁴ Surrogacy contracts necessarily exploit vulnerable, financially disadvantaged women

⁴ <http://www.npr.org/sections/parallels/2015/06/11/413406325/surrogate-parenting-a-worldwide-industry-lacking-global-rules>, last accessed on August 20, 2017.

and reduce children to a product to be manufactured and sold with little regard for their best interests. Therefore, CUB opposes surrogacy.

The reasons CUB opposes surrogacy relate directly to the reasons why surrogacy in general, and the California statute in particular, violate the constitutional rights of the birthmothers and the children involved. This case provides a reasonable basis for the implementation of minimum due process and equal protection standards to be imposed on all state-sanctioned surrogacy agreements and procedures in the United States. Outlining such minimum guidelines would prevent the wholesale violation of the constitutional liberty interests of the gestational mother and the children involved in and affected by surrogacy contracts. Indeed, CUB believes that, at a minimum, surrogacy contracts and procedures should be subject to the same legal, ethical, and constitutional requirements as adoptions generally. To do otherwise is to unconstitutionally commodify women and children.

CUB asserts that where surrogacy contracts are permitted by state law, no consent to the relinquishment of the gestational mother's parental rights should be obtained until at least one week after the birth of the child. CUB also recommends an unconditional revocation period of at least thirty (30) days after birth. Moreover, no child created through surrogacy should ever be given to the intended parent or parents until they have passed a thorough home study. This should be the case even if the intended parents are genetically related to the child. If a conflict develops

between the various parents after the free-revocation period, the court should decide custody and visitation using the same best interest analysis applied in custody cases. And, finally, upon adulthood, the children should be entitled to information regarding their genetic, medical, ancestral, and gestational history. To do otherwise is to engage in state-sanctioned baby selling. *See id.* Therefore, because the California statute provides no adoption-like protections for the birthmothers and children involved, this Court should conclude that California's surrogacy statute does not pass constitutional muster.

◆

ARGUMENT

Unrestricted surrogacy arrangements like the one involved in this case are nothing more than poorly rationalized baby selling. As a result, CUB believes they should be declared illegal, void, and unenforceable as a matter of public policy. For the same reasons CUB opposes surrogacy in general, this Court should conclude that California's surrogacy statute violates minimum standards of due process and equal protection for the birthmothers and children involved. To allow unrestrained surrogacy as California does not only violates the constitutional prohibition against slavery and indentured servitude, but it also runs afoul of long-standing public policies against human trafficking and baby selling. Therefore, this Court should grant the Petition and review this case on the merits.

Surrogacy Generally

Two types of surrogacy arrangements generally exist in the United States – traditional surrogacy and gestational surrogacy. *See Surrogacy Statistics, Modern Family Surrogacy.*⁵ In traditional surrogacy, the birthmother who carries the child to term provides the egg, which is fertilized either by the intended father or a sperm donor. *Id.* In gestational surrogacy, however, the birthmother whose womb carries the child to term has no genetic link to the child she delivers. *Id.* Rather, the child is either genetically related to both intended parents, one intended parent, or neither intended parent. As many as six adults may be involved in a child's conception and birth – the gestational/birthmother, her spouse or partner, the egg donor, the sperm donor, the intended, contractual father, and the intended, contractual mother. In this case, three people were essential to the children's creation, C.M., the intended, sperm-donating father, an anonymous egg donor, and M.C., the birthmother. Thus, the parties here engaged in gestational surrogacy. Gestational surrogacy is understandably complex and implicates many medical, moral, religious, social, and constitutional concerns. Therefore, they should not be considered without deep thought and sensitivity.

As infertility rates rise in the United States, the use of assisted reproductive technologies ("ART") and surrogacy arrangements increases too. *See Cohen,*

⁵ http://www.modernfamilysurrogacy.com/page/surrogacy_statistics, last accessed on August 20, 2017.

Deborah L., *Surrogate Pregnancies On The Rise Despite Cost Hurdles*, Reuters (March 18, 2013).⁶ In 2011, the Society of Assisted Reproductive Technology (“SART”) tracked 1,593 babies born in the United States to gestational surrogates. *Id.* This number was up from 1,353 in 2009, and just 738 in 2004. *Id.* The numbers of total babies born to gestational surrogates could be slightly higher because some of the clinics handling these procedures do not report to SART. *Id.* Currently, the estimate is that nine babies are born through surrogacy in each state, each year. But, given SART’s 2011 numbers, that estimate seems too low.

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

In 2013, surrogates typically charged \$30,000 to \$35,000, excluding legal and medical fees, which amounts to approximately \$5.48 per hour for each hour she is pregnant, based upon a pregnancy of 266 days or 6,384 hours. *See Surrogacy: A 21st Century Human*

⁶ www.reuters.com/article/us-parent-surrogate-idUSBRE92H11Q20130318, last accessed on August 20, 2017.

Rights Challenge, The Center for Bioethics and Culture Network.⁷ This equals less than the minimum wage of \$7.25 per hour.⁸ But, as discussed below, despite the low wage, the money is nevertheless a major factor for many surrogates.

In addition, the surrogacy agency charges a fee of \$15,000 or more. *See* Cohen, at 3. The average journey of intended parents can be anywhere from \$68,000 at the low end to \$166,000 or more at the high end.⁹ One intended parent reported incurring expenses exceeding \$300,000. *See* Cohen, at 2. Thus, it tends to be only the wealthy who can utilize surrogacy arrangements. Indeed, in 2005, most intended parents were married, white, and had incomes of over \$80,000 per year. *See* Ciccarelli, Janice C., et al., *Navigating Rough Waters: An Overview Of Psychological Aspects Of Surrogacy*, *Journal of Social Issues* (Plenum Publishing Corp. March 22, 2005), at 7.¹⁰ Given inflation, that income would be just under \$102,000 today.¹¹

Most couples who resort to surrogacy have already spent a considerable amount of money on other ART,

⁷ www.cbc-network.org/issues/making-life/surrogacy/, last accessed on August 20, 2017.

⁸ <https://www.dol.gov/whd/minimumwage.htm>, last accessed on August 20, 2017.

⁹ <http://www.surrogacyadvisor.com/directory/agencyratings/>, last accessed on August 20, 2017.

¹⁰ <http://claradoc.gpa.free.fr/doc/33.pdf>, last accessed on August 20, 2017.

¹¹ <http://www.saving.org/inflation/inflation.php?amount=80,000>, last accessed on August 20, 2017.

like IVF. *Surrogate Motherhood: A Violation of Human Rights*, European Center for Law and Justice, Report at the Council of Europe, Strasbourg (April 26, 2016), at 6 (footnote omitted).¹² IVF can cost as much as \$8,500 per round of treatment, plus the cost of medication. *Id.* at 7.

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

In contrast, it is not the very wealthy who are agreeing to act as gestational birthmothers or even traditional surrogates. As the Supreme Court of New Jersey observed in *In re: Baby M*: “. . . it is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in

¹² <http://icolf.org/surrogate-motherhood-a-violation-of-human-rights/>, last accessed on August 20, 2017.

the bottom twenty percent. Put differently, we doubt that infertile couples in the low[-]income bracket will find upper income surrogates.” 537 A.2d 1227, 1249 (N.J. 1988). The court’s observations have proved true. Generally, surrogate mothers’ family incomes are modest and they come from working class backgrounds. *See* Ciccarelli, J., at 5. Surrogates tend to be younger, less well-educated, and to have a lower socio-economic status than intended parents. *Surrogate Motherhood*, at 7.

Recently, legal scholars have begun to reevaluate traditional concepts of contractual duress and the impact of certain stressors on a person’s ability to make meaningful and informed decisions about whether to enter into certain contracts. *See* Gan, Orit, *Contractual Duress and Relations of Power*, 36 *Harvard J. of Law & Gender*, 171 (2013); Keren, Hila, *Consenting Under Stress*, 64 *Hastings L. J.* 679 (2012). These works use psychological, sociological, and other studies from other disciplines to conclude that stressors like financial concerns, gender inequality, pregnancy, and the societal expectation for women to satisfy others’ needs over their own negatively impacts their ability to give “meaningful consent” in a variety of contractual settings. *See id.* The analyses help to explain the inherently exploitative nature of surrogacy both emotionally and financially.

Indeed, surrogates generally explain their willingness to participate in surrogacy by referring to “giving the gift of life” or empathy for childless couples. *See* Offerman-Suckerberg (ed.), *Gender in Transition: A*

New Frontier, Chapter 9, Einwhoner, J., *Who Becomes a Surrogate Personality Characteristics*, (Springer Science+Business Media New York 1989), pp. 131-40, at 133. Nevertheless, for many surrogates, the money is a motivating factor, even if it is not the only one. *Id.* In one study, forty percent of surrogates reported that the money was their main motivator. *Id.* at 138. Some experts believe, however, that those surrogates who claim money was not a factor in their decision are simply parroting what they think is the socially acceptable answer rather than revealing their true, underlying motivation. *See* Ciccarelli, at 4. Thus, surrogacy presents a prime opportunity to exploit young, vulnerable, financially disadvantaged women.

The purely commercial nature of surrogacy transactions also tends to force the parties into viewing pregnancy as a commercial transaction. *Surrogate Motherhood*, at 8. Most surrogate mothers say they try to detach themselves psychologically from the child during pregnancy to make it easier to relinquish the child after birth. *Id.* They think of their pregnancies as a job wherein they must keep emotions at bay. *Id.* Because there is very little research on the long-term psychological effects of surrogacy, it is unknown how this detachment and relinquishment may affect the surrogate mother or the child long term. *Id.* at 8. Some assume that given what we know about the long-term difficulties women have experienced post-adoption, it is reasonable to expect similar regrets will manifest in surrogate mothers over time. *Id.* at 9. In CUB's anecdotal experience, this assumption has proven true.

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

Additionally, the exploitative effects of surrogacy on the surrogate mother often do not appear until after the baby is relinquished. *Surrogate Motherhood*, at 10. The surrogate mother is often cherished, cared-for, and supported by the intended parents or the surrogacy agency during her pregnancy and labor. *Id.* But then, after the baby is relinquished, many intended parents withdraw their support. *Id.* at 10-11. Once the contractual parent or parents get the baby they paid for, their interest in the surrogate mother's wellbeing disappears. *Id.* at 11. Thus, some surmise that the likelihood

¹³ <http://www.livestrong.com/article/233454-emotional-issues-for-surrogate-mothers-families/>, last accessed on August 20, 2017.

of a surrogate becoming dissatisfied with the surrogacy arrangement increases as time passes and contact with the contracting couple diminishes. *Id.*

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

Further, as more medical and psychological studies highlight the importance of the links created during pregnancy between the mother and the child, and their importance for the child’s development, even more questions arise regarding the practice of surrogacy. Although the data is scarce, it seems inevitable that the mother’s detachment during pregnancy will impact the child. *Id.* at 9. Substantial evidence exists that babies are highly attuned to their mothers’ bodies while *in utero*. See Covington, Coline, *The Psychological Trauma Behind Surrogate Pregnancies*, *The Week*

(May 6, 2009), at 2.¹⁴ Still, we do not yet know the full impact on the baby of the loss of its mother at birth except that it could likely exacerbate an experience that is already traumatic. *Id.* Society's failure to recognize the importance of pre-natal attachment indicates a purposeful willingness to rationalize and minimize the importance of attachment, separation, and loss for the baby just so babies can be created and transferred to those unable to conceive for a price. *Id.* at 4; *see also* Tehran, Hoda Ahmari, et al., *Emotional Experiences In Surrogate Mothers: A Qualitative Study*, 12 Iran J. Reprod. Med. 7, at 471-80.

Indeed, one study suggests that children born through surrogacy are more likely to suffer depression than those carried by the mother who raises them. Innes, Emma, *Surrogate-Born Children Are More Likely To Suffer Depression Than Those Carried By Their Real Mother*, Daily Mail.com, at 1.¹⁵ They are more likely to display behavioral and emotional problems as their understanding of their creation increases. *Id.* They appear to have more difficulty coping with the idea that they were carried by another woman than with the fact that they are not genetically related to the parents raising them. *Id.* at 2.

¹⁴ <http://www.theweek.co.uk/politics/23389/psychological-trauma-behind-surrogate-pregnancies>, last accessed on August 20, 2017.

¹⁵ <http://www.dailymail.co.uk/health/article-2344362/Surrogate-born-children-likely-suffer-depression-carried-real-mother.html>, last accessed on August 20, 2017.

And, in surrogacy, the rights of the child are almost never considered. *Surrogacy: Human Rights Challenge*, at 1.¹⁶ By transferring the duties of parenting from the birthmother to a contracting couple or individual the child is denied any claim to its “gestational carrier” and to its biological parents if the egg or sperm do not belong to the intended parent or parents. *Id.* In addition, the child loses all right to information about any siblings he may have, whether genetically linked or not. *Id.* Thus, given these potential psychological and long-term impacts, more consideration needs to be given to the rights of children born through surrogacy.

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

¹⁶ www.cbc-network.org/issues/making-life/surrogacy/, last accessed on August 20, 2017.

Womb To Carry It, The New York Times (July 5, 2014).¹⁷

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

**Cub's Opposition To Surrogacy Is
Supported By The Constitutional And
Public Policies Against Slavery, Human
Trafficking, And Baby Selling**

CUB's own policy against surrogacy is supported by the Constitution and long-standing federal and state public policy. Pursuant to the Thirteenth Amendment to the United States Constitution, "[n]either slavery nor involuntary servitude . . . shall exist in the United States. . . ." U.S. Const. amend. XIII. Likewise, federal law makes it illegal to engage in or to attempt

¹⁷ <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>, last accessed on August 20, 2017.

to engage in human trafficking. *See* 18 U.S.C.A. §§ 1583, 1590, 1594. It is also unlawful to profit from human trafficking. *See* 18 U.S.C.A. § 1593A. In fact, in California, the federal government prosecuted several prominent lawyers for being a part of a baby-selling ring. Smolin, at 328. In that case, the government concluded that because the lawyers had impregnated surrogates and then offered the babies for purchase by intended parents, they were selling babies in violation of federal law and public policy. *Id.* at 328-29. Therefore, baby selling or human trafficking violates federal public policy.

Baby selling and paying money for adoptions or agreements to terminate parental rights is also illegal in California because those acts violate California's public policy as well as the federal ones. *See* Cal. Penal Code § 273 (making it a crime to pay or receive anything of value for the placement for adoption or for the consent to the adoption of a child); Cal. Penal Code § 181 (2011) (making it a crime to sell ownership of a human being). Thus, public policy abhors human trafficking and baby selling, which is, indeed, what surrogacy is fundamentally about. Consequently, CUB opposes all forms of surrogacy because it undermines and, indeed, violates the liberty interests and constitutional rights of gestational/birthmothers to parent their babies and not to be exploited and the children's rights not to be commodified and to have their best interests considered and protected.

California's Surrogacy Statute Is Unconstitutional

California's surrogacy statute does nothing to protect the birthmothers' and the children's constitutional rights from being violated through surrogacy. California is currently the leading pro-surrogacy jurisdiction in the United States and it also provides a significant market for international commercial surrogacy. *See* Smolin, at 325 (footnote omitted). Ironically, California enacted its surrogacy statute in 2012, in part as a reaction to the baby-selling prosecution described previously. *See id.* at 334-35 (footnotes omitted). But, that statute, on its face, seems to legitimize the very baby selling California was seeking to avoid. As a result, it is unconstitutional.

Under California's surrogacy statute, a "gestational carrier" is defined as a woman "who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement." Cal. Fam. Code § 7960(f)(2). But, a gestational carrier, like M.C., is expressly defined as a biological or birthparent under California's law. Cal. Fam. Code §§ 7601(a), 7610(a), "Intended parent" is defined as "an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction." Cal. Fam. Code § 7960(c). Thus, the intended parent need not be genetically related to the child to gain parental rights by contract. *Id.*

The statute also requires that the gestational carrier must fully execute the surrogacy contract before pregnancy or embryo transfer. Cal. Fam. Code § 7962(d). As explained above, in California, a contract executed after pregnancy or embryo transfer is considered illegal baby selling.

An action to establish parentage of the child may be initiated pre-birth. Cal. Fam. Code § 7962(e). If the party initiating that action files the notarized agreement signed by all parties and the required declarations of independent legal representation, the statute provides that those filings are sufficient to terminate the gestational carrier's and her spouse's or partner's parental rights. Cal. Fam. Code § 7962(f). The judgment terminating the gestational carrier's and her spouse or partner's parental rights can be entered before or after the birth of the child. *See* Cal. Fam. Code § 7962(e).

Thus, California's statute provides no constitutional safeguards to ensure that: 1) the consents involved are knowing, voluntary, and meaningful; 2) the child's best interests will be served; 3) women will not be exploited; and 4) children will not be commodified or manufactured to certain specifications and sold to the highest bidder. Therefore, the statute at issue here necessarily violates the liberty interests, due process, and equal protection rights of the gestational mother and the children involved.

Consequently, to protect against these constitutional violations, some minimum, constitutional requirements must be imposed on surrogacy contracts and procedures to protect the rights of women and children.

Specifically, CUB contends that no consent to the relinquishment of the birthmother's parental rights should be permitted until at least one week after the child's birth. Under no circumstances should this consent be given prior to the child's conception or the embryo transfer. Prior to the pregnancy, the gestational carrier who is a biological birthmother because she and her body protected and nurtured the fetus for nine months, has no full and fair understanding of the bond she may form with, and the emotions she may develop toward, the child or children she is carrying. Thus, any preconception consent is necessarily not fully knowing, willful, voluntary or meaningful. *See Keren*, at 689.

Likewise, if the birthmother does agree to relinquish her parental rights post-birth, she should be given at least thirty days in which to revoke that consent without penalty. This revocation period should be strictly enforced by the courts and, during this time, the birthmother should not have to prove "superior fitness" to parent as compared to the contractual parent or parents. Moreover, no consent should provide a basis for the termination of the parental rights of the birthmother until there has been a judicial finding – with her present in court – that her consent to terminate her parental rights was willful, knowing, voluntary, and meaningful. The courts must take care to ensure

that birthparents, including gestational mothers, are not being exploited or actively or subtly coerced into forfeiting their constitutional rights and liberty interests in having a relationship with their children just to provide healthy infants to infertile individuals or couples.

In addition, the intended parent or parents should not be permitted to adopt or take custody of the child until they have submitted to a thorough home study to ensure their fitness as parents for the child. Just because the intended parent or parents were wealthy enough to procure a child through surrogacy does not necessarily prove they will make suitable, loving parents. Indeed, C.M. indicated his desire to abort one or all three children before birth or to give away at least one child through adoption to a stranger, thereby callously separating that one child from his brothers and his birthmother who would gladly nurture and love him.

Moreover, in the event of a conflict between the birthmother and the intended parent or parents after the free-revocation period but before termination of her parental rights, the court should be required to consider the child's best interests as it would in any custody dispute. Those best interests may be served by joint custody, primary custody and visitation, or sole custody. But, at the very least, all options should be considered with the child's best interest in mind.

Finally, surrogate-born children should have the right upon adulthood to know their creation story and

to obtain information regarding their genetic and medical history, their ancestry, and the identity of their gestational mother. These minimum standards, derived mostly from the adoption context, are the only way to ensure that money and market power does not supersede the significant constitutional and liberty interests of the gestational mothers and, more importantly, the voiceless children created through ART and surrogacy agreements.

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CONCLUSION

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

Respectfully submitted,

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