CASE NO. 17-129

IN THE SUPREME COURT OF THE UNITED STATES

M.C.

Petitioner

v.

C.M.

Respondent

On Petition for Writ of Certiorari to the California Court of Appeal

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MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS, FAMILY RESEARCH COUNCIL, CONCERNED WOMEN FOR AMERICA AND CENTER FOR FAMILY AND HUMAN RIGHTS IN SUPPORT OF PETITIONER

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Proposed Amici Curiae, the American College of Pediatricians, Family Research Council, Concerned Women for America and Center for Family and Human Rights, by and through their counsel of record, do hereby respectfully request, pursuant to Supreme Court Rule 37.3(b), for leave to file the annexed Amicus Curiae Brief in Support of Petitioner.

Proposed Amici make this request pursuant to the following:

1. Proposed Amici's counsel sought consent from both parties to file an amicus curiae brief in support of Petitioner. Counsel for Petitioner provided written consent, which is being filed and served with this Court simultaneously with this Motion and Brief. Counsel for Respondent stated in writing that no consent would be granted. A true and correct copy of the email transmission in which counsel for Respondent stated he would not consent is attached to this Motion as Exhibit A.

2. Proposed Amici are a group of medical practitioners and pro-family organizations which have researched the medical, psychological and social aspects of the mother-child bond and its foundational importance to the health and well-being of children at all stages of life.

3. The research that Proposed Amici has collected includes neuroscientific studies of the brain as well as the biological processes during pregnancy, birth and childhood. That

research establishes the unique and interdependent nature of the mother-child bond, and the criticality of fostering and maintaining that bond in order to provide the optimal environment for development of the child. Research shows, *inter alia,* that the "maternal cascade of hormones" during pregnancy determines much of what the child will be *throughout his life*.

4. Proposed Amici are gravely concerned about California Family Code §7962's legalistic approach to parentage determinations, and in particular, its complete disavowal of any consideration of the best interests of the child or the suitability of the "intended" parent.

5. Proposed Amici believe that the research it has collected, which is detailed in the attached Amicus Brief, is critically important to this Court's consideration of the Petition.

6. Based upon the above, Proposed Amici respectfully request that this Court grant leave to file the annexed Amicus Brief.

Respectfully Submitted,

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Exhibit A

8/8/2017 Mail - mary@LC.org

Re: M.C. v. C.M., Supreme Court Docket No. 17-129-- Request for Amicus Consent

John L Dodd, Esq. <JDodd@appellate-law.com>

We are not consenting to any of these requests

JLD

From: Mary McAlister [mailto:mary@LC.org]
Sent: Tuesday, August 08, 2017 1:31 PM
To: jdodd@appellate-law.com
Subject: M.C. v. C.M., Supreme Court Docket No. 17-129-- Request for Amicus Consent

Dear Mr. Dodd:

I am writing on behalf of the American College of Pediatricians, Americans United for Life, Family Research Council and Center for Family and Human Rights (C-FAM) to request your client's consent to file an Amicus Curiae Brief in Support of the Petitioner, M.C., seeking granting of the Petition.

Please let me know via return email if your client consents.

Thank you for your consideration.

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INTEREST OF AMICI[1]

Amici are not addressing the issue of whether M.C. should have custody of the children nor arguing against a mother voluntarily giving her children up for adoption. Instead, Amici are focusing on medical discoveries about the mother-child bond that, particularly in the context of the facts of this case, demonstrate why gestational surrogacy laws such as the California law challenged here should be invalidated. Amici are concerned about the precedent that this case would set for parental relationships and the best interest of the child and therefore present the Court with medical research showing the innate mother-child bond that begins in utero and continues

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioner has consented to the filing of this brief, and its written consent is being filed simultaneously with the Brief. Respondent did not consent, and Amici are seeking this Court's permission by motion pursuant to Supreme Court Rule 37.3.

throughout life to urge the Court to grant the Petition. Amici are:

The American College of Pediatricians ("ACPeds"), a national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. ACPeds member physicians have conducted extensive research on the mother-child bond and are gravely concerned about the precedent that the California court's decision could have on the health and welfare of children.

Family Research Council (FRC), which was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in public policy by all branches of government. Through publications, media appearances, public events, debates and testimony, FRC's team of policy experts reviews data and analyzes legislative and executive branch proposals that affect marriage, family, and human life. FRC seeks to ensure, whenever possible, that the unique and natural bond between mother and child is recognized and protected by the courts.

Concerned Women for America ("CWA") is the nation's largest public policy women's organization with a rich history of over three decades of helping members across the country bring Biblical principles into all levels of public

policy. Among the seven core values underlying CWA's mission are the protection of all innocent human life from conception until natural death and defense of the family. Both of those issues are implicated in this case, and CWA believes the information contained in this Brief will be vital in assisting the Court in its deliberations.

Center for Family and Human Rights ("C-Fam") was founded in 1997 with a mission to defend life and family at international institutions and to publicize the debate. C-Fam is a non-partisan, non-profit research institute dedicated to reestablishing a proper understanding of international law, protecting national sovereignty and the dignity of the human person. It is the dignity of the most vulnerable humans, unborn children, that is at stake in this case, and C-Fam is asking this Court to seriously consider the issues raised in this Brief in its deliberations.

PRELIMINARY STATEMENT

To say, as the state court did here, that the best interest of the child is none of its business, reflects a callous and legalistic approach to the well-being of children that violates the principles upon which our constitutional republic has been built. The commodification of children is not only repulsive to law and public policy, but also

disregards medical research establishing the inseparable bond that forms between mother and unborn infant in utero and cannot be tossed aside as irrelevant. As California Supreme Court Justice Kennard said, a pregnant woman makes indispensable and unique contributions to the developing child as an agent of creation. *Johnson v. Calvert*, 5 Cal. 4th 84, 116 (1993) (Kennard, J. dissenting).

Medical research substantiates Justice Kennard's conclusion. Researchers have demonstrated that pregnancy plays a vital role in the bonding process between mother and child and is foundational to the healthy development of the child. It forms the basis of a lifelong loving relationship between a mother and the child. Researchers and practitioners agree that it is difficult to overstate the essential and lifelong importance of the mother-child bond. It is a unique relationship, irreplaceable, and the prototype upon which all later attachments are based. Since mother and child are biologically intertwined, their relationship is qualitatively distinct from any other relationship.

The lower court's utter disregard for the welfare of the children, which is reflective of the California Legislature's adoption of an intentionality standard for parentage determinations in surrogacy arrangements,

destroys that unit without any consideration for the long-term effects on the child's well-being.

The lower court's devaluation of the neurobiological bond between pregnant women and their unborn infants will have profound effects on parental rights and children's well-being. These effects point to the need for this Court's review.

REASONS FOR GRANTING THE PETITION

I. CALIFORNIA FAMILY CODE §7962 DISREGARDS ADVANCES IN MEDICAL RESEARCH WHICH DOCUMENT THE UNIQUE, INTIMATE, INTERDEPENDENT AND IRREPLACEABLE BOND BETWEEN MOTHER AND CHILD THAT DEVELOPS IN UTERO AND CONTINUES THROUGHOUT LIFE.

California's abandonment of best interest of the child in favor of "intentionality" in Family Code §7962 runs afoul of medical advances that have documented the powerful physiological and psychic processes of pregnancy that create a neurobiological bond between mother and infant that cannot be contracted away. Medical research has confirmed what the California Supreme Court acknowledged in *Burgess v.*

Superior Court, 2 Cal. 4th 1064, 1076 (1992), *i.e.,* that the mother and unborn infant are biologically intertwined, creating a relationship that is qualitatively distinct from any other relationship, a unique physical unit.

The unborn infant is not in a "surrogate" relationship but in a direct, real, live and deeply intimate relationship with the mother who provides nutrients, blood and nurturing prior to birth.[2] A mother and her pre-born child have unique interdependencies that are essential for the optimal health of each. After birth, these interactions continue as mother and child each benefit from the other's contribution to the relationship.

A. Medical Research Demonstrates That A Pregnant Woman Is Not "Standing In" For Someone Else, But Is Actively Involved In Creating The Child.

By disregarding the welfare of unborn children and adopting a pure contract approach to gestational surrogacy arrangements, the

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[2] Barbara Katz Rothman, *Reproductive Technologies and Surrogacy: A Feminist Perspective*, 25 CREIGHTON L. REV. 1599, 1607 (1992).

California courts have relegated the birth mother to little more than an incubator. *See Johnson,* 5 Cal. 4th at 116 (Kennard J., dissenting).

> A pregnant woman intending to bring a child into the world is more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued.

Id. at 115-16. Indeed, the "maternal environment during gestation is not like a building site where workmen put materials in place according to blueprints."[3]

> The construction of a building is the same no matter where the building site is located, whereas the gestation of a child is totally different depending on the womb supplying the endocrine cascade differentiating the cells that comprise the child. Not only do the available materials for the child's growth differ depending on the

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[3] R. Brian Oxman, *Maternal-Fetal Relationships And Nongenetic Surrogates*, 33 JURIMETRICS JOURNAL 387, 395 (1993).

womb supplying the materials, but also the hormonal impact on the child differs from womb to womb or mother to mother so that one portion of the blueprints (genes) is followed in one womb where it is not followed in another. No matter what the genetic blueprints might be, a gestational mother contributes her actual living tissue to the child, which no worker contributes to a building, and a gestational mother contributes an endocrine cascade that determines how the child will grow, when its cells will divide and differentiate in the womb, and how the child will appear and function for the rest of its life. Nor is a woman's womb like a garden where a seed is planted, watered, and fertilized until it grows. A woman's endocrine system determines the timing, amount, and components of the hormones that affect the fetus and the absence of any component at its appropriate time will irreversibly alter the life, mental capacity, appearance, susceptibility to disease, and structure of the fetus forever. A tree without water can await the next rain, whereas a

> male fetus without human chorionic gonadotropin will not develop as a male and a female fetus with too much estrogen will develop as a male.[4]

Far from being a purely functional incubation period, pregnancy is a time when a child develops her earliest emotional attachments that indelibly influence her personality and later life experiences, including subsequent relationships and ability to navigate stress and adversity. Neuroscientific research has confirmed what child development experts have long understood, *i.e.,* that there is a primordial attachment that starts during pregnancy and lasts throughout life.[5] The infant recognizes, and is emotionally attached to, his mother, from before birth.[6] Attachment to the primary caregiver drives the infant's healthy brain development.[7] The attachment

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[4] *Id.*

[5] Allen Schore & Jennifer McIntosh *Family Law and the Neuroscience of Attachment, Part 1* 49 FAMILY COURT REVIEW 501, 512 (2011).

[6] James Leckman & John S. March, *Editorial: Developmental neuroscience comes of age,* 52 CHILD PSYCHOLOGY AND PSYCHIATRY, 333-38 (2011).

[7] Schore at 501-12.

between mother and child is both biological and psychological.[8] It exists regardless of genetic connection or of the "intent" of the parties to a contract and cannot be dismissed away as the California law attempts to do. Also, research has shown that the bonding between mother and child continues through childhood and adolescence.[9]

Consequently, California Family Code §7962, relying as it does upon "intent," is contrary to scientific determinations that show that contractual relationships cannot supplant the psychological, biological and emotional connections between mother and child which must very much be the business of the court.

B. The Mother's Endocrine System Dramatically Affects The Mother's Brain And Unborn Infant's Development.

The mother-unborn infant connection is intricate, complex and bidirectional, with long term consequences for both mother and child. The mother's entire body has an interrelated impact on the growth and development of the unborn infant, and there is no organ system of the unborn infant that is not anatomically,

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8 *Id.*

9 *Id.*

physiologically, and genetically affected by the maternal endocrine system to the extent that the infant is a unique product of the gestational mother that gives rise to a lifelong maternal-child relationship.[10] "Each child is dependent throughout its entire life on the formation of its body created by its gestational mother's endocrine system."[11] Thus the bond is not only during infancy, but also throughout childhood and adolescence.

Pregnancy causes vast changes in the female brain that prime the mother to care and nurture her child in a responsive and sensitive manner.[12] Hormones interface with cellular receptors in the medial preoptic area (mPOA) of the hypothalamus to stimulate maternal behaviors.[13] As early as 1940, researchers showed that the hormones estrogen and progesterone influenced maternal sexuality and

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10 *Id.* at 412, 424.

11 *Id.* at 424.

12 Gareth Leng, Simone L. Meddle, *et. al., Oxytocin and the maternal brain,* 8 CURRENT OPINION IN PHARMACOLOGY 731, 734 (2008).

13 Robert S. Bridges, *Neuroendocrine Regulation of Maternal Behavior*, 36 FRONTIERS IN NEUROENDOCRINOLOGY, 178-96 (2015).

behavior.[14] Later, in 1980, researchers found that endorphins, produced by the pituitary gland and hypothalamus, increased late in pregnancy.[15]

As well as influencing maternal behavior, the hormonal changes in the mother's body affect the development of the unborn infant. In fact, the "maternal cascade of hormones" during pregnancy determines much of what the child will be *throughout his life*.[16]

> The child's appearance, growth, and physiological capabilities all are dependent on the unique mix of maternal hormones from the gestational mother. The child is a unique product of the maternal endocrine cascade during gestation, and the impact of that cascade on the child creates a relationship with the gestational mother throughout the child's life, whether or not the child is genetically related to its gestational mother.[17]

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14 Craig H. Kinsley & Kelly G. Lambert, *The Maternal Brain,* SCIENTIFIC AMERICAN, 72-79 (January 2006).

15 *Id.*

16 Oxman at 412 (emphasis added).

17 *Id.*

Estrogen in particular affects the development of the unborn infant during pregnancy and the rate of cell reproduction in the early stages of embryonic development.[18] The size and structure of the unborn infant, the quality of his development and maturation of his lungs are dependent on the presence of maternal estrogens.[19] Without adequate production of estrogens by the mother, the unborn infant's growth and development is arrested or the unborn infant dies.[20] Estrogen production is unique to each mother and to each pregnancy.[21]

> The structure, immunological capacity, neurological development, size, shape, and sexual characteristics of a child are dependent on the estrogen environment during fetal development, and the resulting child's susceptibility to cancer or genetic predisposition to cancer are equally dependent on the endocrine fetal environment.[22]

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18 *Id.* at 401.

19 *Id.*

20 *Id.*

21 *Id.* at 403.

22 *Id.*

Researchers believe that cortisol may also be involved in maternal behavior. In one study, first-time new mothers with higher cortisol levels were studied as they responded to their own baby's odor versus that of another infant. Those mothers with higher cortisol levels in their saliva responded more to their baby's odor than those mothers with lower levels.[23] Towards the end of pregnancy, women have a dampened cortisol response to stress, which leads to lower changes in blood pressure, heart rate, and lower catecholamine responses. Researchers believe that this "down-regulation" of stress occurs to protect both mother and child as delivery approaches.[24]

Cortisol also has a major role in the development of the unborn infant's lungs.[25] It determines not only the structure, but also the maturity of the infant's lungs at birth.[26] The amount of cortisol present during gestation, or a malfunction in its production, has a significant lifelong effect on the unborn

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[23] Bridges at 178-96.

[24] Laura M. Glynn & Curtis A. Sandman, *Prenatal Origins of Neurological Development: A Critical Period for Fetus and Mother,* 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE, 384, 386 (2011).

[25] Oxman at 407.

[26] *Id.* at 408.

infant.[27] It is the uniqueness of the levels of cortisol and the other maternal steroids and hormones that determines the growth and development of the unborn infant, and his development through childhood and adolescence.[28]

Hormonal changes in the mother, particularly increases in oxytocin, are also closely related to psychological aspects of mother-infant bonding. In fact, oxytocin, known as the "love and bonding hormone," is regarded as one of the primary means for insuring maternal responses.[29] The first empirical report on the topic assessed oxytocin levels in 60 pregnant women during the first and third trimesters and during the early post-partum period.[30] Researchers found clear evidence of the biological basis for maternal psychological responses to the unborn infant.[31] First trimester levels of oxytocin predicted bonding-

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27 *Id.*

28 *Id.*

29 Ruth Feldman, Aron Weller, *et. al., Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother Infant Bonding,* 18 PSYCHOLOGICAL SCIENCE, 965, 970 (2007).

30 *Id.*

31 *Id.*

related thoughts and bonding behavior directed to the newborn.[32] Women whose bodies were secreting more oxytocin early in the pregnancy were more psychologically attached to their infants. Stronger attachment involved positive energy directed towards the child and maintenance of constant affectionate and stimulating bodily contact with the child.[33] Mothers who had high oxytocin levels were also more preoccupied by thoughts of the infant, focusing on safety and the child's future.[34]

Using functional magnetic resonance imaging (fMRI), researchers examined patterns of maternal brain activation to determine what changes occur in the brain that affect the mother-child bond.[35] They discovered that particular circuits in the brain, involving several regions in the cerebral cortex and

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[32] *Id.*

[33] *Id.*

[34] *Id., See also,* Ari Levine, Orna Zagoory-Sharon, *et. al.*, *Oxytocin During Pregnancy and Early Postpartum: Individual Patterns and Maternal Fetal Attachment*, 28 PEPTIDES, 1162-69 (2007).

[35] Madoka Noriuchi, Yoshiaki Kikuchi & Atsushi Senoo, *The Functional Neuroanatomy of Maternal Love: Mother's Response to Infant's Attachment Behaviors*, 63 BIOLOGICAL PSYCHIATRY, 415-23 (2008).

limbic system, are distinctively activated when mothers distinguish the smiles and cries of their own infants from those of other infants.[36] The researchers also found that a mother responds more strongly to the crying than the smiling of her own infant, which seems "to be biologically meaningful in terms of adaptation to specific demands associated with successful infant care."[37]

Researchers have found that the changes to the maternal brain last long after delivery of the baby. Brain scans were performed on 25 women before and after pregnancy and delivery.[38] The scans revealed a decrease in grey matter that researchers believe reflect pruning to make the brain function more efficiently and effectively in social attachment.[39] There were noticeable differences in scans on women who had given birth and those who had not, and the observed changes persisted at follow up two years later, again demonstrating the long-term effects of the mother-child bond.[40]

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36 *Id.*

37 *Id.*

38 Elseline Hoekzema, Erika Barba-Muller *et. al., Pregnancy leads to long-lasting changes in human brain structure,* 20 NATURE NEUROSCIENCE 287-96 (2017).

39 *Id.*

40 *Id.*

The hormonal and neurological changes in pregnancy have significant lifelong effects on both mother and child, affecting not only the infant's physical development, but also the mother's brain and psychological responses to her child. They affect the baby's development in infancy, childhood and adolescence, particularly when the birth mother continues to be the primary caregiver of the child. These biological realities should not be cast aside as irrelevant as is the case with California Family Code §7962.

C. The Mother Influences The Sensory Development Of The Unborn Infant.

Medical research has shown that the mother-child bond extends to all aspects of the mother's and infants' physical and psychological development. The unborn infant's senses begin developing early in the pregnancy in response to in utero stimulation from the mother, and that early development has profound effects on the infant-mother relationship.[41] Infants base their sensory responses on maternal sounds (*e.g.* heart,

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[41] Melissa B. Clark-Gambelunghe & David Clark, *Sensory Development*, 62 PEDIATR CLIN. N. AM. 367–84 (2015)

voice), maternal actions (activities, patterns of movement, and sleep), smell and tastes (food and spices preferred).[42] During the second and third trimester of pregnancy, sensory regions of the cerebral cortex begin to function and hearing, touch, vision, taste and smell develop.[43]

1. Unborn Infants Recognize and React To Their Mothers' Voices In Utero.

Studies have demonstrated that unborn infants recognize and are excited by hearing their mother's voice. In one study 60 unborn infants heard a recording of a passage of a book being read by either the mother or a stranger. The infants' heart rates increased in response to mother's voice, but decreased when exposed to the stranger's voice.[44] In another study, 40 unborn infants at 36 weeks gestation who

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42 *Id.*

43 *Id.*

44 Barbara S. Kisilevsky, Sylvia M.J. Hains *et. al.*, *Effects of Experience on Fetal Voice Recognition,* 14 PSYCHOLOGICAL SCIENCE, 220-24 (May 2003).

heard mothers reading aloud demonstrated in utero learning of the maternal voice.[45]

In another study, infants born prematurely were exposed either to routine hospital noise or to the addition of recordings of maternal sounds (voice and heartbeat). Those infants exposed to maternal sounds showed significantly larger auditory cortices bilaterally on brain MRI scans later in life as compared to the control infants.[46]

A recent study from Sweden showed that infant hearing is adversely affected by excessive occupational noise their mothers are exposed to while they are pregnant.[47] The

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[45] Kristin M. Voegtline, Kathleen A. Costigan, *et. al. Near-term fetal response to maternal spoken voice,* 36 INFANT BEHAVIOR & DEVELOPMENT, 526-33 (2013).

[46] Alexandra R. Webb, Howard T. Heller, *et. al.*, *Mother's voice and heartbeat sounds elicit auditory plasticity in the human brain before full gestation* 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE USA, 3152-57 (2015).

[47] Jenny Selander, *et.al., Maternal Occupational Exposure to Noise during Pregnancy and Hearing Dysfunction in Children: A Nationwide Prospective Cohort Study in Sweden*, 124 ENVIRONMENTAL HEALTH PERSPECTIVES, 855-60 (2016)

researchers noted that the auditory system anatomically appears by the 20th week of gestation and the unborn infant responds to sounds at that time.[48] The infant receives input from the mother's body as well as from external sources which travel through the abdominal wall and amniotic fluid.[49] In the case of excessive noise, the result can be hearing problems after birth.[50] As discussed below, in the case of regular speech and language, the results can be mirroring of the mother's words and native language.

2. Unborn Infants Recognize Their Mothers' Language In Utero.

As well as recognizing the mother's voice vis-à-vis other voices and even noises, the unborn infant recognizes the native language of her mother versus other languages. In one study, 16 two-day old infants were evaluated while listening to either English or Spanish audiotapes. The infants demonstrated preference for their mothers' native

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48 *Id.* at 858

49 *Id.* at 858-59.

50 *Id.* at 859.

languages.[51] Newborns turn their heads toward a tape playing speech in the language of the woman who bore them rather than a tape of someone speaking in a foreign language. Also, researchers now understand that infant cries and murmurs reflect learned language: babies born in German-speaking families tend to cry with a falling melody, while those exposed to French in utero tend to have a rising melody in their cry.[52]

Researchers have found that babies also remember words heard while in utero. Infants exposed to new "pseudo-words" in utero demonstrated memory of those words when exposed to them after delivery as evaluated by EEGs.[53] Finnish researchers, using newer technologies to study neural activity, demonstrated specific word-learning during pregnancy. They had the pregnant women

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[51] Christine Moon, Robin P. Cooper *et. al., Two-day-olds prefer their native language,* 16 Infant Behav. Dev. 495–500 (1993).

[52] Mampe Birgit et al. *Newborns' Cry Melody Is Shaped by Their Native Language*, CURRENT BIOLOGY, November 5, 2009

[53] Eino Partanen, Teija Kujala, *et al., Learning-induced neural plasticity of speech processing before birth*, 110 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, 15145-50 (2013).

repeatedly play four minute musical tracks punctuated with a made-up word, "Tatata" and some variants on this fake word.[54]

After birth, the researchers found that the babies demonstrated through neural activity their familiarity with this word and an awareness of pitch changes in the word. Babies not exposed to this fake word showed no comparable neural activity in response.[55]

3. The Unborn Infant's Sense of Taste Is Affected By Maternal Diet In Utero.

By 13 to 15 weeks gestation the unborn infant's taste buds have developed and are in contact with the amniotic fluid, so the infant is potentially affected by tastes in the maternal diet.[56] The unborn infant is bathed in the amniotic fluid, and swallows many ounces of this liquid each day, experiencing various odors and tastes based on maternal diet and environment. "Components of the maternal diet reach the amniotic fluid, are swallowed, and become familiar" to the unborn infant.[57] "They

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54 *Id.*

55 *Id.*

56 Clark-Gambelunghe at 376.

57 *Id.* at 376-77.

may contribute to the scent of the mother, including her breast milk."[58]

The unborn infant is also nourished by the placenta which allocates nutrition between the mother and child.[59] Research has shown that the placenta is not merely a conduit of nutrition.[60] Instead, it is responsible for determining how nutrition is allocated.[61] The placenta actively mediates metabolic signals from both mother and unborn infant to ensure the infant's growth while maintaining maternal health.[62]

Researchers have found that children remember tastes that they experienced in utero. [63] Fifty-six pregnant women were divided into three groups, those who drank carrot juice during pregnancy only, those who only drank carrot juice after the baby was born and those

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58 *Id.* at 377.

59 Paula Diaz, Theresa L. Powell & Thomas Jansson, *The Role of Placental Nutrient Sensing in Maternal-Fetal Resource Allocation,* 91 BIOLOGY OF REPRODUCTION, 1-10 (2014).

60 *Id.*

61 *Id.*

62 *Id.*

63 Julie A. Mennella *et.al.*, *Prenatal and Postnatal Flavor Learning by Human Infants.* 107 PEDIATRICS, E88 (2001).

who never drank carrot juice.[64] Infants at five months of age were presented with two kinds of baby cereal – with and without carrot flavoring. The babies who had been exposed to carrots in utero were more accepting of the carrot flavored cereal.[65] In another study, mothers ingested garlic or a placebo prior to amniocentesis, and garlic odor was identified in four of the five women who had ingested garlic.[66] Therefore, the unborn infants of women in garlic-eating cultures are learning that garlic is a familiar food.[67]

Similarly, women who were given anise-flavored food and drink in pregnancy had babies who showed a preference for anise at birth. Babies not exposed to the food and drink were tested at four days and were neutral or showed an aversion to the smell.[68]

In some cases physicians and other care providers who do not have cross-cultural food awareness have misdiagnosed healthy

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64 *Id.*

65 *Id.*

66 Julie A. Mennella *et. al., Garlic ingestion by pregnant women alters the odor of amniotic fluid*. 20 CHEM SENSES, 207-09 (April 1995).

67 *Id.*

68 Benoist Schaal *et al.*, *Human Foetuses Learn Odours from Their Pregnant Mother's Diet,* 25 CHEMICAL SENSES, 729-37 (2000).

newborns as ill or suffering from inflammation.[69] This was reported by European physicians who were unfamiliar with the normal scents of cumin and fenugreek and misdiagnosed newborns.[70]

The research shows that pregnant women introduce their unborn infants to particular foods, and thus acclimate them to a certain food culture long before birth, creating another bond between the birth mother and the infant that carries through into childhood and adolescence.

4. The Unborn Infants' Sense of Smell Is Highly Developed and Affected by Maternal Diet and Body Chemistry.

The unborn infant's sense of smell is also developed early in pregnancy and "becomes an important component of the early infant-mother interaction."[71] Components of the maternal diet reach the amniotic fluid, are

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69 G.H. Hauser, *et.al., Peculiar Odours In Newborns And Maternal Prenatal Ingestion Of Spicy Food* 144 EUROPEAN JOURNAL OF PEDIATRICS, 403 (November 1985).

70 *Id.*

71 Clark-Gambelunghe at 376.

swallowed, and become familiar to the unborn infant.[72] Researchers believe that the infant's intake of the components of the mother's diet through the amniotic fluid may contribute to the infant's perception of his mother's scent, the scent of her breast milk.[73] Newborns five to six days old preferentially choose the breast pad of their mother rather than that from another mother or an unused pad,[74] showing the continuing importance of the nurture of the birth mother, contrary to California's statute.

In fact, smell is the most developmentally advanced of all the senses at birth.[75] A newborn recognizes his mother's–and only his mother's–scent and is soothed by it. During pregnancy, women develop a distinctive pattern of five volatile compounds that are released in the nipple and underarm areas. [76] These chemicals pass into the amniotic fluid and the unborn infant is exposed to them from early in

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72 *Id.* at 376-77.

73 *Id.* at 377.

74 *Id.*

75 Regina M. Sullivan, *Review: Olfaction in the Human Infant*, (2000) available at www.researchgate.net/publication/242084746

76 Stefano Vaglio, *et. al.*, *Volatile Signals During Pregnancy: A Possible Chemical Basis for Mother Infant Recognition,* 35 JOURNAL OF CHEMICAL ECOLOGY, 131-39 (2009).

pregnancy, when the sense of taste begins to develop.[77] After birth, the infant is attracted to, and soothed by, his mother's unique scent.[78] It is partially because of this scent that he can locate her nipple and be nourished.[79] Disregarding that attraction, as California's statute does, adversely affects the child's growth and development.

It is this biological interdependence, not contractual provisions, that creates the life-long mother-child bond. It is this bonding that affects all aspects of the child throughout his life that should be at the forefront when making child welfare determinations. California Family Code §7962's *per se* disregard for that bonding in the gestational surrogacy context is antithetical to the best interest of the child and should be reviewed by this Court.

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77 *Id.*

78 *Id.*

79 *Id.*

II. CALIFORNIA FAMILY CODE §7962 VIOLATES THE PRINCIPLE THAT THE CHILD IS NOT THE MERE CREATURE OF THE STATE AND IS UTTERLY IRRECONCILABLE WITH THE CARDINAL RULE OF CHILD WELFARE THAT THE BEST INTEREST OF THE CHILD SHOULD BE THE PARAMOUNT CONSIDERATION.

A. California Family Code §7962 Has Transformed Children Into Creatures Of The State And Should Be Invalidated By This Court.

This Court has long recognized the innate bond between parents and children and protected it from state attempts to undermine it in pursuit of some purported greater social good. *See e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (rejecting state's claim that prohibition against German language instruction was necessary to protect the health of children); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (rejecting attempt to require that all children attend public schools); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (rejecting claim that all children had to receive 12 years of formal education); *Santosky v. Kramer* 455 U.S. 745, 755 (1982) (rejecting state claim that parents

who temporarily lost custody have diminished due process rights); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (rejecting usurpation of parental rights inherent in visitation statute).

As the *Troxel* Court said, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 66. That fundamental right has arisen from the understanding that natural bonds of affection lead parents to act in the best interests of their children. *Parham v. J. R.*, 442 U.S. 584, 602–03, (1979) (citing 1 W. Blackstone, COMMENTARIES, 447 (William Lewis, ed. 1922); 2 J. Kent, COMMENTARIES ON AMERICAN LAW, 190 (1826)).

> Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."

Id. at 602 (quoting *Pierce*, 268 U.S. at 535). This Court has consistently upheld the primacy of the parent-child relationship in child welfare determinations, specifically through recognition of the over-arching concern for the best interests of the child. *Lehr v. Robertson,* 463 U.S. 248, 257 (1983).

California courts have also recognized that the best interests of the child must be their primary concern when the custody and care of children is at issue. *Adoption of Matthew B.*, 232 Cal. App. 3d 1239, 1257 (1991). "It is the cardinal rule of adoption proceedings that the court consider what is for the best interests of the child." *Id.* "We can never ignore the child's best interests, 'no matter what preliminary action its parent or parents may have taken.'" *Id.* (quoting *In re Barents,* 99 Cal.App.2d 748, 753 (1950)). Indeed, the child's welfare is "the controlling force in directing its custody, and the courts will always look to this rather than to the whims and caprices of the parties." *Id.* (quoting *Crater v. Crater* 135 Cal. 633, 634 (1902)). "Accordingly, even if we assume that the parties' conduct was illegal, the state's paramount interest in Matthew's welfare overrides its interest in 'deterring illegal conduct.'" *Id.* (quoting *Lewis & Queen v. N.M. Ball Sons,* 48 Cal.2d 141, 150 (1957)). "To hold otherwise would, in violation of the above

principles, allow the 'preliminary action' of Matthew's parents to determine his fate without due regard for his best interests." *Id.* (citation omitted).

That heretofore paramount concern about the best interests of the child is eliminated as a factor in the gestational surrogacy context, and, according to the lower court, is none of the court's business. (Petition for Writ of Certiorari, p. 7). In other words, contrary to this Court's longstanding precedent, under California Family Code §7962, the children **are** the mere creatures of the state whose futures are determined in the sterile and legalistic framework of contract law with no regard for their best interest. As the facts of this case attest, the consequences of that disregard for the well-being of the children can be devastating.

B. California's Adoption Of "Intentionality" Instead of The Best Interest Of The Child In Surrogacy Cases Further Demonstrates The Need To Grant The Petition and Invalidate Family Code §7962.

Despite having acknowledged that the mother and unborn infant are unique and inseparable in *Burgess,* 2 Cal. 4th at 1076, the

California Supreme Court only one year later concluded that in the gestational surrogacy context genetics will trump gestation when the genetic mother and gestational mother are not the same woman. *Johnson,* 5 Cal. 4th at 93.

In *Johnson,* the court broke the tie between the gestational and genetic mother by citing "intentionality" as the determining factor. *Id.* "[S]he who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law." *Id.* What *Johnson* used as a tie-breaker the California Legislature established as a *per se* rule in Family Code §7962. The Legislature wholly ignored the best interests of the children as a factor in determining parentage in gestational surrogacy situations. In fact, under the statute, the mother who gave birth to the children must terminate her rights in favor of the "intended" parent, regardless of that "intended" parent's fitness or any other factors related to the health and safety of the children. In other words, under the statute, as the lower court said, the children's welfare is none of the court's business.

The Legislature eschewed the best interest of the child despite the Supreme Court's acknowledgement that the birth mother's emotional well-being and the health of the child

are "inextricably intertwined." *Burgess,* 2 Cal. 4th at 1076. "During pregnancy, the mother and child are a unique physical unit. The welfare of each is 'intertwined and inseparable.'" *Id.* at 1080 (quoting J.J. Nocon, *Physicians and Maternal–Fetal Conflicts: Duties, Rights and Responsibilities* 5 J. OF LAW AND HEALTH 1, 15 (1990)). In fact, "the specialty of obstetrics has always held that the welfare of the mother and fetus are so intertwined and inseparable that it is impractical to attempt to distinguish between them."[80]

It is that inextricable unity of mother and child that lies at the heart of this Court's long-standing recognition of the primacy of best interests of the child when examining child welfare issues. *Lehr,* 463 U.S. at 257. It is that inextricable unity that has been tossed aside in favor of principles of contract law in California's gestational surrogacy statute, pointing to the need for this Court to grant the petition and restore the long-standing protection of the best interests of children.

CONCLUSION

California's Family Code §7962 ignores the cardinal concern of child well-being, the

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[80] Nocon, *Physicians and Maternal-Fetal Conflicts*, at 15.

best interest of the children. The state has supplanted that child-centric consideration with legalistic contract principles that protect the intentions of adults with no regard for the children. California's statute commodifies children in a way that is antithetical to *Lehr,* 463 U.S. at 257, and other precedents holding the best interest of the child as of paramount importance. More importantly, the statute is antithetical to the optimal growth and development of the child.

For these reasons, this Court should grant the Petition.

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