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**STATE OF MICHIGAN**
**IN THE SUPREME COURT**
**FROM THE COURT OF APPEALS**

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IN RE BARBER/ESPINOZA MINORS

_____/

Supreme Court Case No. 167745

Court of Appeals Case No. 369359

Lenawee County Circuit Court, Juvenile Division, Case No. 23-00033-NA

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# APPELLEE-MOTHER'S SUPPLEMENTAL BRIEF

**ORAL ARGUMENT REQUESTED**

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## Introduction

The cornerstone of Michigan's child protective system is its clear statutory mandate that the Department of Health and Human Services (DHHS) must make reasonable efforts to reunify families in all cases unless explicitly excused by law. In this case, the Court of Appeals unanimously recognized that the trial court committed plain error by disregarding this legislative directive and prematurely terminating Ms. Espinoza's parental rights without providing her the opportunity to receive necessary reunification services. The Court of Appeals emphasized that the statutory language in MCL 712A.19a(2) is unequivocal – reasonable efforts are compulsory unless specific aggravated circumstances, explicitly defined by the Legislature, exist. Here, none of those circumstances applied.

The Legislature intentionally structured the law to safeguard family integrity and ensure parents have a meaningful opportunity to address shortcomings before permanently losing their fundamental rights. By erroneously deferring to DHHS's unsupported assertion that reunification services were unnecessary simply because termination was sought at the outset, the trial court bypassed the law and undermined the Juvenile Code's protective framework.

Courts cannot do this. This Court has consistently recognized that adherence to statutory mandates is critical; courts must honor – not rewrite – the policy judgments already made by lawmakers. Permitting DHHS or trial courts to circumvent statutory requirements absent explicit legislative authorization would impermissibly alter the delicate balance created to protect both parental rights and child safety.

As such, the Appellee asks this Court to either deny the Application for Leave to Appeal or affirm the decision by the Court of Appeals.

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## Statement of the Basis of Jurisdiction

Appellant correctly states the basis for this Court's jurisdiction.

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## Statement of Questions Presented

1. Did the Court of Appeals correctly hold that reasonable efforts must be made when the severe abuse was not committed by a "parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home" as required by MCL 722.638(1)(a)?

   Court of Appeals says yes.
   Appellee says yes.
   Appellant says no.

2. Did the Court of Appeals correctly hold that MCL 722.368(3) did not excuse DHHS from making reasonable efforts to reunify the family?

   Court of Appeals says yes.
   Appellee says yes.
   Appellant says no.

3. Did the Court of Appeals correctly hold that the trial court's failure to require DHHS to make reasonable efforts to reunify was plain error because it affected the very framework within which the case progressed?

   Court of Appeals says yes.
   Appellee says yes.
   Appellant says no.

4. Did the Court of Appeals correctly hold that the trial court's failure to advise the Appellee of her right to appeal the removal order – as required by MCR 3.965(B)(15) – was plain error because the Appellee lost the opportunity to immediately challenge the trial court's erroneous ruling that reasonable efforts were not required in this matter?

   Court of Appeals says yes.
   Appellee says yes.
   Appellant says no.

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## Statement of Facts

At the termination of parental rights hearing, CB – one of the two children involved in this matter and the victim of abuse – spoke about her desire for her mother, Crystal Espinoza, to get services and for her to be able to maintain a relationship with her mother, despite the trauma she had experienced. 31b. CB stated:

> "I wanted to tell her that I do love her and miss her and I know that she can do this and I really believe in you. And I just want you to get the help and I don't want this to be the end of it. I do, really, want to see you and I do really love you and I just want you to succeed. . . I know it's so, so hard but I know you can do this. And I really believe in you." 31b.

CB's emotional request captures the important legal concept at the heart of this appeal – the opportunity for parents to receive services to address their shortcomings. Ms. Espinoza acknowledged that she had fallen short as a parent, battling mental health issues and an addiction to drugs; she just wanted a chance to get better. 38b, 39b, 40b. But despite CB's request, the trial court – in December 2023 – immediately terminated Ms. Espinoza's parental rights without giving her the chance to participate in services and demonstrate her ability to become a fit parent. 57b-59b.

Prior to the filing of the petition that led to the termination of her parental rights, Ms. Espinoza certainly struggled to parent CB and her younger brother, ME. Ms. Espinoza had been granted sole physical custody of CB in 2012 after she divorced the children's father. 3b-5b. In 2014 after ME was born, Ms. Espinoza and the children began living with Teresa Pate, the maternal grandmother. 44b, 47b. Ms. Pate ultimately got a guardianship over CB and ME – even while Ms. Espinoza was living in the house – which lasted until 2021. 46b. Ms. Pate stated she obtained a guardianship because both children's parents struggled with substance abuse. 46b.

Between 2021 and the filing of the petition in this case, the children's lives were marked with instability, contentious custody proceedings and CPS

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involvement. They lived with their mother, father and grandmother at various times. Additionally, in October 2021, CB was admitted into a residential treatment facility – Havenwyck – because she was having thoughts of self-harm. 36b; 29a. While there, CB reported to staff that she had been molested at a young age by an uncle; CB, however, did not mention anything about being abused by any of her mother's acquaintances. 24b.

In fact, while CB and ME were in Ms. Espinoza's care, Ms. Espinoza had taken the children to the emergency room due to concerns that they had been sexually abused by their father, but the nurse practitioner – who had been certified to conduct adolescent and adult sexual assault exams – did not see any signs of abuse. 49b, 50b. Afterwards, that nurse practitioner went on to see the children in her regular practice and didn't see or hear anything to believe that the children had ever been sexually abused. 51b, 52b.

Ms. Espinoza acknowledged that in the years prior to the filing of the petition, she used drugs while caring for CB and ME and admitted she tried to commit suicide in November 2021 while CB was in the next room. 38b, 41b. She also admitted she had a lengthy criminal history and significant mental health challenges. 40b, 39b.

As a result of these challenges, in February 2022, the trial court ordered that Ms. Espinoza and Mr. Barber share legal custody of the children, but that Mr. Barber have primary physical custody of them, with Ms. Espinoza having parenting time. 28a-29a. At the time the court issued that order, CB was residing in an inpatient mental health facility. 28a-29a.

In October 2022, the court modified the order and granted Ms. Espinoza unsupervised parenting time with ME and therapeutic parenting time with CB. 344a-345a. That order was again modified in December 2022 to allow Ms. Espinoza to have physical custody of ME during weekends. 347a. At the time DHHS filed the petition in this matter, Ms. Espinoza was caring for ME three weekends a month in her home and saw CB during therapeutic parenting time. 12b.

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In February 2023, DHHS filed a petition seeking jurisdiction over CB and ME and the immediate termination of Ms. Espinoza's parental rights. 152a-164a. Although CB was 14 at the time the petition was filed, the petition was based on alleged sexual abuse that had happened to CB when she was between the ages of 2 and 9. 9b, 10b. The petition did not contain any allegations that ME had been abused, nor did it contain any facts alleging that the children had been abused or neglected by Ms. Espinoza over the last five years.

On February 17, 2023, the court held a preliminary hearing on the petition, at which DHHS requested that the children be placed with their father and visitation be suspended. The judge handling the matter did not typically handle child protective matters and candidly acknowledged that "[i]t always takes me a couple of minutes to look up my scripts to figure out what I'm supposed to do on this one." 6b.

At the hearing, two Child Protective Services workers testified. Brittany Kelly stated that allegations made by CB related to sex abuse, sex trafficking and improper supervision led to the filing of the petition. 7b. Ms. Kelly stated that in a forensic interview, CB disclosed that many years earlier she had been sexually abused by two different men who were friends with Ms. Espinoza, that Ms. Espinoza walked in on the abuse and that Ms. Espinoza walked out without intervening. 8b. Ms. Kelly also stated that CB stated she had seen her mother use drugs and that CB believed her mother allowed one of these acts to happen so that the man would give her mother drugs. 8b. Ms. Kelly also admitted that the allegations were from when CB was between the ages of 2 and 9. 10b. Chelsee Pelham, the second investigator, confirmed that DHHS was seeking termination because of the allegations of sexual abuse. 11b.

After both investigators testified, the court asked the lawyers, if "the petition is requesting movement directly to termination, does a case service plan get put in place?" 13b. Immediately, the lawyer for DHHS remarked, "With termination petitions, we do not offer service plans." 13b. Based on this assertion, the court stated, "I would ask the Department as well, because the request is to move towards

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termination, there would be no service plan." 15b. The court reiterated, "I'm not going to order a case services plan at this time." 15b.

At no point in the hearing did the court make a finding that DHHS had satisfied the requirements in MCL 712A.19a(2) that excused the agency from making reasonable efforts to reunify. Rather, the court excused reasonable efforts because DHHS stated it was seeking termination at the initial dispositional hearing. 15b.

At the conclusion of the hearing, the court authorized the petition, suspended parenting time, and placed the children with their father. 14b. The court did not advise Ms. Espinoza she had a right to appeal the order removing the children from her custody.

After numerous hearings focused on trial-related issues, the court began the trial on jurisdiction and termination of parental rights on December 8, 2023. CB – who was fourteen years old and in the ninth grade at the time – testified that her mother had neglected her, used drugs in front of her and overdosed in her presence. 21b, 22b. She alleged that approximately six to ten years prior to the hearing, her mother – high on drugs – had allowed her to get sexually assaulted by one of her mother's friends, Patrick. 23b, 27b. CB stated that although she did not tell her mother about the abuse, she was "pretty sure" her mother knew about it because "when she came in, she had like a soft voice and she did sound like she felt bad". 28b.

When asked why she believed her mother allowed the abuse to happen in exchange for drugs, CB could not answer the question directly. 29b. Rather, she described that her mother and Patrick had been doing drugs together and then her mother left the room. 29b. Based on that observation, CB presumed that her mother had made an arrangement with Patrick. 30b ("So that's why I believe, that's what."). Neither CB, nor any other witness, offered any direct testimony that Ms. Espinoza had made a plan with Patrick to allow the abuse to happen. And again, according to CB, the abuse had happened anywhere between six to ten years prior to the TPR hearing. 23b, 27b.

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CB did acknowledge that she spent time at a residential facility - Havenwyck in 2022 – but never told the doctors there about the abuse by her mother's acquaintance. 24b. CB also admitted that she only began making the allegations against her mother after her mother turned her into the police for violating probation, something that made CB very angry. 25b, 26b. CB conceded that her anger did influence her "maybe a little bit," in making the allegations, and that after the allegations were made, the proceedings for the probation violations came to a halt. 25b.

After she finished testifying, CB asked the court for permission to speak again. When she did, CB shared that she loved and missed her mother, believed in her, and requested that her mother get help because she "didn't want this to be the end of it." 31b.

In addition to CB, two CPS workers – Chelsee Pelham and Brittany Kelly – testified, neither of whom had any direct knowledge proving that Ms. Espinoza had traded her daughter for drugs. Both shared that Ms. Espinoza had prior criminal and CPS history. 32b, 33b.

The court held the last day of trial on December 28, 2023. Ms. Espinoza testified and admitted that she had tried to commit suicide in the past, had used drugs, and had a criminal history. 38b, 39b, 40b. She also confirmed what CB had reported – that the allegations regarding the sexual abuse only arose after Ms. Espinoza had reported CB's drug use. 34b. Prior to that, Ms. Espinoza had not heard of the allegations, nor did CB report anything about the abuse when she had spent time at Havenwyck. 34b, 35b. Ms. Espinoza also shared that after the filing of this case, she had taken substance abuse classes, was enrolled in counseling, had a job, and was working on getting a second job. 37b. She also reported that she had been taking suboxone for four years to treat her addiction. 42b.

CB and ME's grandmother, Teresa Pate, testified that the two children had lived in her home, that she had had a guardianship over the children until 2021, and that nothing had happened to CB in her home. 43b, 44b, 45b, 46b.

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Finally, Rachelle Vanakan, CB and ME's primary care provider testified. She was certified in adult and adolescent sexual assault exams and stated that she had seen no signs of abuse in CB or ME, either when she first examined them in the emergency room in 2017 or 2018 or when she began seeing them as patients in her primary care practice in 2020. 48b, 49b, 50b, 52b. Ms. Vanakan stated that the children did not behave in a way or say anything that would have led her to believe that they had been sexually abused. 51b.

In closing arguments, DHHS conceded that the facts of the case did not meet the criteria of MCL 722.638(1) to dispense with reasonable efforts to reunify. 54b. But it still believed it could seek termination at the initial dispositional hearing because the L-GAL agreed with termination. 54b. DHHS further argued, "Although, the governing statute does not specifically outlay sex trafficking and substance abuse in front of children as an aggravating circumstance. We ask the Court to consider that there are aggravating circumstances in this case and the Department is not required to make reasonable efforts to reunify the matter." 53b-54b.

The L-GAL did not present any argument as to why reasonable efforts to reunify were not required but just acknowledged that "[t]he Agency did not offer services to [Ms. Espinoza], did not require her to do services." 55b.

After hearing argument, the court granted DHHS's petition and ordered the termination of Ms. Espinoza's parental rights. 57b-60b. The court noted that it believed that DHHS could seek termination at the initial disposition without making reasonable efforts to reunify because DHHS arranged for a conference with the L-GAL and because "the parent being a suspected perpetrator or suspectful (sic) placing the child at an unreasonable risk and harm due to failure to take reasonable steps to intervene to eliminate that risk." 57b. The court later stated that "reasonable efforts were not made to preserve and reunify the family because, the Court, in previous Order determined that it would be detrimental to the children's health and safety." 60b.

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After determining that reasonable efforts were not required, the court found statutory grounds to terminate under MCL 712A.19b(3)(b)(i), (b)(ii) and (j) and that termination was in the children's best interest. 56b-59b. In making the best interest determination, however, the court failed to weigh the fact that the children were living with their father as a factor that weighed against termination. 58b-59b.

Ms. Espinoza appealed the termination of her parental rights, arguing both that the trial court erred in finding that reasonable efforts to reunify were not required and by not informing her of her right to appeal the removal order, which would have given her the opportunity to immediately challenge the court's denial of efforts. COA Br. at 5. Appellate counsel challenged the finding that CB was traded for drugs by her mother and argued that there was "no factual basis" for an aggravated circumstances finding, thereby entitling Ms. Espinoza to services. COA Br. at 13.

A unanimous panel of the Michigan Court of Appeals agreed and reversed the TPR order, holding that the trial court plainly erred by excusing reasonable efforts without legal justification. *In re Barber/Espinoza*, unpublished opinion per curiam of the Court of Appeals, issued on September 19, 2024 (Docket No 369359). The Court of Appeals noted that "[a]bsent aggravating circumstances, the DHHS has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *Id*. at 7. The Court explicitly rejected the trial court's reasoning that reasonable efforts were unnecessary simply because DHHS sought termination at initial disposition. It found that the "trial court erred by failing to determine whether reasonable efforts were required under MCL 712A.19a and instead deferring to DHHS's assertion that such efforts were unnecessary." *Id.* at 9. The Court further found that the trial court misapplied the aggravated circumstances exception under MCL 722.638, as the alleged perpetrators of abuse were not parents, guardians, or custodians who resided in the home. *Id*. at 8. It held, "Where, as here, the perpetrators were neither a parent, guardian, or custodian of CB, and never resided with the children, the conduct at issue is not an 'aggravated circumstance' for purposes of MCL 722.638(1)." *Id.*

Additionally, the Court of Appeals noted that the trial court had failed to advise Ms. Espinoza of her appellate rights following the preliminary hearing, in violation of MCR 3.965(B)(15). *Id.* at 11.

Concluding that these errors undermined the fairness of the proceedings and affected Ms. Espinoza's substantial rights, the Court of Appeals unanimously reversed the termination order and remanded for further proceedings, including the provision of reunification services. *Id.* at 13. In reversing the termination order, it noted that "[there is simply no way to know how termination may have proceeded differently when respondent was improperly denied any opportunity to rectify her situation and demonstrate a willingness and ability to parent." *Id.* at 10.

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## Argument

### I. The Court of Appeals correctly held that reasonable efforts to reunify were required because the severe abuse specified in MCL 722.638(1)(a) was not committed by a "parent, guardian, or custodian, or a person who is 18 years of age or older and who resided for any length of time in the child's home."

The Court of Appeals correctly interpreted the Juvenile Code and the Child Protection Law in finding that the trial court erred when determining that reasonable efforts to reunify the family were not required. The objective of statutory interpretation "is to give effect to the Legislature's intent." *In re AJR*, 496 Mich 346, 352; 852 NW2d 760 (2014). "To ascertain that intent, this Court begins with the statute's language." *Id.* When statutory language is unambiguous, "no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed." *Id.* at 352-353. Moreover, "[w]hen interpreting a statute, courts must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute," which "requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Id.* at 353. In contrast, a court may not presume that the Legislature meant to say something different than what is reflected in the statute. *People v Williams*, 491 Mich 164, 174-180; 814 NW2d 270 (2012); *Robinson v City of Detroit*, 462 Mich 439, 459-462; 613 NW2d 307 (2000). It must respect the policy judgments made by the Legislature. *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 432-433; 987 NW2d 501 (2022) ("This Court, however, is bound by the language that the Legislature has enacted, not what the parties or amici believe the Legislature should have enacted or what any individual representative believed was enacted.").

The Juvenile Code plainly states that "reasonable efforts to reunify a child and family must be made in all cases" unless a court finds that the case meets a specific exception set forth in MCL 712A.19a(2). Unless an exception applies, within thirty days of a court's decision to order a child's placement outside the

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custody of a parent, DHHS must prepare an initial service plan that identifies the services to rectify the conditions that led to removal. MCL 712A.13a(10); *see also* MCL 712A.18f(1) (requiring the agency when it "advises the court against placing a child in the custody of the child's parent" to report "the efforts to rectify the conditions that caused the child's removal from his or her home."). These efforts must be made with respect to both custodial and non-custodial parents. See *In re Rood*, 483 Mich 73, 121-122; 763 NW2d 587 (2009) (noting that "MCL 712A.19a(2) is not fulfilled merely through efforts to reunify the child and the custodial parent" and that unless "statutorily disqualified," the noncustodial parent is entitled to "receive services.").

These efforts are foundational to the goals of the child protective system "in maintaining the integrity of the family unit whenever possible." *In re Sanders*, 495 Mich 394, 416; 852 NW2d 524 (2014). As this Court has stated, "[i]t is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about parents' ability to protect and care for their children." *In re Rood*, 483 Mich at 98. When DHHS fails to make such efforts, this Court has repeatedly held that a court may not terminate parental rights. *In re Smith-Taylor,* 509 Mich 935; 971 NW2d 657 (2022); *In re Simonetta*, 507 Mich 943; 959 NW2d 170 (2021)*; In re Hicks/Brown*, 500 Mich 79; 893 NW2d 637 (2017); *In re Mason,* 486 Mich 142; 782 NW2d 747 (2010); *In re Rood*, 483 Mich 73.

MCL 712A.19a(2) lays out the specific circumstances in which a court can excuse DHHS from making reasonable efforts to reunify the family.[1] Under this provision, reasonable efforts are not required if there is a judicial determination that the parent has subjected the child to "aggravated circumstances" as defined under MCL 722.638(1) and (2), or if the parent has been convicted of an enumerated criminal offense, had rights to a child previously terminated and failed to rectify the conditions that led to the termination, or is a registered sex offender. MCL

[1] When a court makes an initial decision that reasonable efforts to reunify a family are not required, the court must convene a permanency planning hearing within 30 days of that decision. MCL 712A.19a(2); MCR 3.976(B)(1).

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712A.19a(2). Unless one of these exceptions apply, "[r]easonable efforts to reunify the child and family must be made in all cases." *In re Simonetta*, 507 Mich at 943.

Under MCL 722.638(1)(a), a court may find "aggravated circumstances" only if two requirements are met. First, "a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child." Second, "the abuse" must have included one of the following forms of extreme maltreatment: (a) abandonment, (b) criminal sexual conduct, (c) battering, torturing, or other serious physical harm, (d) loss or serious impairment of an organ or limb, (e) a life-threatening injury, or (f) murder or attempted murder.[2] MCL 722.638(1)(a).

By its plain terms, the statute first names the actor – "a parent … has abused the child" – and then specifies that this "abuse" included one or more enumerated acts. Grammatically, "included" modifies "the abuse" directly attributed to that parent. It follows that if someone else commits the enumerated act, one cannot say "the [parent's] abuse included" that conduct. MCL 722.638(1)(a).

Had the Legislature intended to capture scenarios in which a third party inflicted these forms of extreme harm, it could have easily added words such as "caused," "facilitated," or "allowed," or used a broader phrase like "the child was subjected to." Instead, the Legislature specifically stated "a parent … has abused the child … and the abuse included" a particular act, indicating that the parent's own wrongdoing must encompass an enumerated harm.

Reading the statute otherwise would render superfluous the language "a parent … has abused the child." In other contexts, the Legislature indeed uses broader phrases and terms – such as "placing a child at an unreasonable risk" or "exposure" – to hold parents responsible for third-party conduct. See, e.g. MCL 722.622(k) ("placing a child at unreasonable risk of harm to the child's health or welfare . . . or by failure . . . to intervene to eliminate that risk"); MCL 722.622(o) ("a

[2] MCL 722.638(2) only applies if a petition is "required by subsection (1)." Thus, as is the case here, if the requirements of subsection (1) have not been met, subsection (2) cannot apply.

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child's exposure or contact with methamphetamine production."); MCL 722.623(9) ("if the department suspects that a child has been exposed to . . . methamphetamine production."). By contrast, MCL 722.638(1) imposes a heightened showing: it demands that the parent's abuse "include" a severe, enumerated act. Interpreting the statute to cover third-party conduct would effectively rewrite it to say "the child suffered abuse that included," which is not what the Legislature enacted.

This choice reflects a deliberate policy judgment: the Legislature required a parent, guardian, or resident adult to have personally committed one of the specified acts to trigger an "aggravated circumstances" finding. It could have made a different choice – for instance, by adding "sexual exploitation" to the list of severe harms in MCL 722.638(1)(a), or by saying parents who "facilitate, encourage, or allow" third-party abuse are subject to immediate termination without reunification efforts. It did none of those things. The Court should not override this clear legislative policy by expanding the statute beyond what its text requires.

Here, the Court of Appeals properly chose not to disturb the policy judgments made by the Legislature in determining that "aggravating circumstances" were not present. Although CB was sexually abused by a third party, that third party did not reside in the home. Thus, the first prong of MCL 722.638(1) was not satisfied, precluding a finding of "aggravating circumstances." A finding of "aggravating circumstances" requires finding both that a child experienced a specific form of severe abuse, and that the abuse was committed by a parent, guardian or adult residing in the home.

The L-GAL and DHHS attempt to obfuscate the plain reading of the statute by arguing that Ms. Espinoza abused CB by sexually exploiting or trafficking her. Appellants' Supp. Br. at 5-10. This argument fails for two reasons. First, clear and convincing evidence did not support a finding that Ms. Espinoza had arranged for CB to be sexually abused for some benefit to her. When asked why she believed her mother allowed the abuse to happen in exchange for drugs, CB could not answer the question directly. 29b. That is not surprising given that the abuse, according to

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CB, had occurred anywhere between six to ten years prior to the TPR hearing, when CB was anywhere between 4 and 8 years old. 23b, 27b.

Rather than providing any direct information, CB testified that she presumed her mother had done so based on circumstantial observations. She only stated that her mother and the acquaintance had been doing drugs together and then her mother left the room prior to the abuse. 29b, 30b. Based on that observation, CB presumed that her mother had made some sort of arrangement with the acquaintance. 30b. Neither CB, nor any other witness, offered any direct testimony that Ms. Espinoza had made an arrangement with the acquaintance to allow the abuse to happen.

But even if clear and convincing evidence proved that Ms. Espinoza had sexually exploited CB, that finding would not have been enough to make a finding of aggravating circumstances since the Legislature chose not to include "sexual exploitation" as a form of severe abuse listed in MCL 722.638(1)(a). Thus, the abuse committed by Ms. Espinoza was not a severe form of abuse listed in the provision. The Legislature certainly could have included "sexual exploitation" on the list of severe abuse. But it chose not to. It is not the job of this Court to overrule the policy choices made by the Legislature.

Because CB was not abused by a parent or an adult residing in her home, the Court of Appeals correctly determined that "aggravating circumstances" were not present. Thus, the trial court erred in dispensing with the requirement to make reasonable efforts to reunify.

## II. The Court of Appeals correctly held that MCL 722.638(3) did not excuse DHHS from making reasonable efforts to reunify.

The Court of Appeals also correctly interpreted the statutory scheme to determine that MCL 722.638(3) did not excuse DHHS from making reasonable efforts to reunify.

Even when a parent's conduct does not meet the requirements of MCL 722.638(1) requiring the filing of the petition, MCL 722.638(3) suggests that DHHS may still consider petitioning for termination of parental rights at the initial

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dispositional hearing. The provision contemplates that when DHHS is considering filing such a request in a non-mandatory case, the Department must hold a conference and consult with the attorney representing the child[3] before making this decision.

But the provision does not eliminate the requirement that DHHS must offer reasonable efforts to reunify the family. MCL 712A.19a(2) unequivocally states that these efforts be provided in "all" child protective cases unless the court finds that the exceptions in that provision exist. The mere fact that DHHS may decide to file a termination petition from the outset under MCL 722.638(3) does not, by itself, constitute one of those aggravated circumstances. In fact, MCL 712A.19a(2) does not even mention MCL 722.638(3). MCL 722.638(3) simply permits DHHS to file a request to pursue termination in a non-mandatory case. It does not grant DHHS or the court the power to dispense with reasonable efforts unless another exception exists.

Reading MCL 722.638(3) to bypass the reasonable-efforts requirement would undermine the Legislature's deliberate framework, which expressly conditions bypass on severe abuse falling under MCL 722.638 (1), or other exceptions spelled out in MCL 712A.19a(2). Such an expansive reading of (3) would eviscerate the statutory scheme, allowing DHHS to circumvent reasonable services purely at its discretion whenever it is "considering" an early termination petition. In contrast, giving effect to MCL 722.638(3) as a departmental procedure – while preserving

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[3] Notably, this provision requires the Department to hold a conference with "the attorney representing the child" and not the child's lawyer-guardian ad litem, which are two distinct roles under Michigan law. See MCL 712A.13a(1)(c) & (g) (noting the distinction between an attorney representing a child who serves as the "child's legal advocate in a traditional attorney-client relationship with the child" and a lawyer-guardian ad litem); MCL 712A.17c(8) (distinguishing between an attorney and lawyer-guardian ad litem); MCL 712A.17d(2) (noting that a lawyer-guardian ad litem can request the court to appoint an attorney for the child). So even if this Court finds that MCL 722.638(3) somehow allows DHHS and the court to circumvent the plain language of MCL 712A.19a(2), the provision could not apply here because the children did not have attorneys representing them.

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MCL 712A.19a(2)'s general requirement for reasonable efforts – harmonizes both provisions, ensures that families receive services in all but the most egregious cases, and upholds the plain text of the law. Under MCL 712A.19a(2), the courts retain the ultimate authority to determine whether the facts justify bypassing services based on specific aggravated circumstances. So a discretionary TPR petition under MCL 722.638(3) does not automatically relieve the Department of offering or providing assistance to the parent.

Therefore, under MCL 722.638(3), DHHS may consider pursuing termination from the outset in any case but must still comply with MCL 712A.19a(2), which requires reasonable reunification efforts unless a valid statutory bypass applies. This interpretation preserves the protective purpose of the child welfare statutes while maintaining the Legislature's carefully balanced mandate that families be afforded support and services whenever possible.

## III. The Court of Appeals correctly held that the trial court's failure to require DHHS to make reasonable efforts to reunify was plain error because it affected the very framework within which the case progressed.

This Court has consistently found that DHHS's failure to make reasonable efforts to reunify a family constitutes plain error requiring reversal of a TPR decision. For example, in *In re Mason*, 486 Mich at 142, this Court reversed the TPR decision after determining that DHHS had failed to offer the incarcerated parent an opportunity to participate in services. *Id.* at 752 ("because the DHS and the court failed to adhere to court rules and statutes, . . . termination of his parental rights was premature."). In *In re Hicks/Brown*, 500 Mich at 79, this Court invalidated a TPR order because DHHS failed to accommodate a parent's disability in the creation of the service plan. *Id.* at 90 (vacating order because TPR was predicated on "incomplete analysis of whether reasonable efforts were made."). And in *In re Rood*, 483 Mich at 73, this Court overturned the TPR of a non-custodial father's rights because DHHS did not offer him any services and instead proceeded directly to terminate his parental rights. *Id.* at 122 (noting the state must make

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"reasonable efforts" and allow the parent "a meaningful opportunity to participate.").

In these and other cases, *see also In re Smith-Taylor*, 509 Mich at 935; *In re Simonetta*, 507 Mich at 943, this Court has reversed TPR decisions because the deprivations "affected the very framework" of the child protective cases. *In re Ferranti*, 504 Mich 1, 31; 934 NW2d 610 (2019) (reversing TPR because the error impacted the framework of the case). As noted by this Court in *Rood*, 483 Mich at 73, after a finding that a parent is neglectful, courts can only make informed decisions about a parent's ability to care for their children when "timely and intensive services are provided." *Id.* at 98. As such, when DHHS fails to make such efforts, courts are prevented "from meaningfully considering whether [a] respondent could become capable of caring for [the] child within a reasonable time." *Id.* at 115. The absence of this critical evidence creates a "hole in the evidence," constituting plain error that precludes courts from terminating parental rights. *In re Mason*, 486 Mich at 160. Anything else would require "a speculative inquiry into what might have occurred in an alternate universe." *US v Gonzalez-Lopez*, 548 US 140, 150; 126 S Ct 2557; 165 LE2d 409 (2006) (noting that some errors defy traditional harmless error analysis). Thus, this Court should follow the unequivocal instruction from *Hicks/Brown*: "[T]ermination is improper without a finding of reasonable efforts." 500 Mich at 90.

## IV. The Court of Appeals correctly held that the trial court's failure to advise the Appellee of her right to appeal the removal order was plain error.

The Court of Appeals correctly ruled that the trial court plainly erred in failing to advise Ms. Espinoza of her right to appeal the order removing her children from her custody. *In re Barber/Espinoza*, unpub op at 11. MCR 3.965(B)(15) states that "[i]f the court orders removal of the child from a parent's care or custody, the court shall advise the parent . . . of the right to appeal that action."

Here, at the preliminary hearing, the trial court removed the children from Ms. Espinoza's legal and physical custody, but the court never advised her of her

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right to appeal its decision. Prior to the trial court's order, Ms. Espinoza shared legal custody of both children and had unsupervised physical custody of one of her children three weekends a month and therapeutic parenting time with the other. 347a. The trial court removed these rights from her.

As the Court of Appeals noted, the failure to inform Ms. Espinoza of her right to appeal constituted plain error because not only was it an obvious mistake, but it also impacted Ms. Espinoza's substantial rights by precluding her from immediately challenging the trial court's incorrect finding that reasonable efforts to reunify the family were not required. At the preliminary hearing, the trial court made an initial finding that efforts were not required because DHHS was seeking termination of parental rights. 15b. In its written order, the court summarily concluded, "[r]easonable efforts shall not be made to preserve and reunify the family because it would be determinantal to the child(ren)'s health and safety." 16b-20b. Neither at the hearing nor in its written order did the court make a finding that any of the statutory exceptions to reasonable efforts in MCL 712A.19a(2) applied.

This error set into motion the process that ultimately resulted in the termination of Ms. Espinoza's parental rights. Neither DHHS nor the court offered her any services to give her an opportunity to remedy her shortcomings. Neither gave her an opportunity to maintain a relationship with her children. Neither honored the wishes of CB, who stated to her mother, "I do, really, want to see you and I do really love you and I just want you to succeed." 31b. Instead, based on incidents that happened between six and ten years prior to the filing of the petition, both DHHS and the court sprinted to terminate Ms. Espinoza's parental rights to the children without informing her of her appellate rights in contravention of the law.

By depriving her of the opportunity to challenge this error at the very outset of the case, as MCR 3.965(B)(15) requires, the trial court plainly erred.

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## Conclusion

For the reasons mentioned above, Ms. Espinoza respectfully asks this Court to either deny the Application for Leave to Appeal or affirm the Court of Appeals' decision finding that the trial court erred by failing to require reasonable efforts to reunify the family.

Respectfully submitted,

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## Statement of Countable Words

This document contains 6,201 countable words. MCR 7.212(B)