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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
(Gadola, C.J., and Patel and Young, JJ.)

IN RE BARBER / ESPINOZA MINORS,

MSC Case No. 167745
COA Case No. 369359
Lower Court Case No. 23-033-NA
(Lenawee County)

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CORRECTED* JOINT *AMICI CURIAE* BRIEF OF THE MICHIGAN PROBATE JUDGES ASSOCIATION and COALITION OF CHILD WELFARE APPELLATE ATTORNEYS IN SUPPORT OF THE LGAL'S APPLICATION FOR LEAVE TO APPEAL, AND OF THE JOINT SUPPLEMENTAL BRIEF OF THE DHHS AND LGAL

** corrected to add MCR 7.312(H)(5) reference **

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STATEMENT OF JURISDICTIONAL BASIS

Amici Curiae agrees this Court has jurisdiction over the Lawyer-Guardian *Ad Litem*'s (LGAL) Application for Leave to Appeal, the Joint Supplemental Brief of the LGAL and Department of Health and Human Services (DHHS), and the issues raised therein. MCR 7.303(B)(1); MCR 7.305(A), (B). *Amici* concur with the LGAL and the DHHS that the issues involved in the present case involve legal principles of major significance to the state's jurisprudence, MCR 7.305(B)(3), and that the decision of the Court of Appeals is clearly erroneous and will cause material injustice. MCR 7.305(B)(5(a). This Court should grant leave to appeal.

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STATEMENT OF QUESTIONS INVOLVED

I. Whether the Michigan Department of Health and Human Services is excused from making reasonable efforts to reunify a mother and her children, where the mother subjects her daughter to aggravated circumstances by abusing her daughter in a manner that includes criminal sexual conduct involving penetration? (responding to: **Michigan Supreme Court's Question #1 in January 24, 2025, Order**).

Lawyer-Guardian *ad Litem* answers: "Yes."

Respondent-Appellee Mother answers: "No."

Petitioner-Appellee DHHS answers: "Yes."

The Court of Appeals answers: "No."

Amici Curiae answer: "Yes."

II. Even assuming that the Michigan DHHS was required to make reasonable efforts to reunify non-custodial parent / respondent with her children, whether the DHHS's failure to make such efforts in this case is plain error affecting respondent's substantial rights? (responding to: **Michigan Supreme Court's Question #2 in January 24, 2025, Order**).

Lawyer-Guardian *ad Litem* answers: "No."

Respondent-Appellee Mother answers: "Yes."

Petitioner-Appellee DHHS answers: "No."

The Court of Appeals answers: "Yes."

Amici Curiae answer: "No."

III. Whether there is plain error when the trial court failed to advise respondent of her rights to appeal per MCR 3.965(B)(15), where the plain language of that rule makes it applicable to a "removal" from a parent, and where there was no "removal" of the children from the non-custodial respondent's care or custody? (responding to: **Michigan Supreme Court's Question #5 in January 24, 2025, Order**).

Lawyer-Guardian *ad Litem* answers: "No."

Respondent-Appellee Mother answers: "Yes."

Petitioner-Appellee DHHS answers: "No."

The Court of Appeals answers: "Yes."

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Amici Curiae answer: "No."

IV. Whether the DHHS satisfied the requirements of MCL 722.638(3) when it filed an amended petition seeking to terminate the respondent's parental rights at the initial disposition? (responding to: **Michigan Supreme Court's Question #3 in January 24, 2025, Order**).

Lawyer-Guardian *ad Litem* answers: "Yes."

Respondent-Appellee Mother would likely answer: "No."

Petitioner-Appellee DHHS answers: "Yes."

The Court of Appeals answers: "No."

Amici Curiae answer: "Yes."

V. Where the DHHS satisfied the requirements of MCL 722.638(3), whether the termination of the respondent's parental rights should be affirmed under that provision? (responding to: **Michigan Supreme Court's Question #4 in January 24, 2025, Order**).

Lawyer-Guardian *ad Litem* answers: "Yes."

Respondent-Appellee Mother would likely answer: "No."

Petitioner-Appellee DHHS answers: "Yes."

The Court of Appeals answers: "No."

Amici Curiae answer: "Yes."

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Curiae, Michigan Probate Judges Association, (MPJA), is an association of Judges whose mission, as referenced in Article II of the MPJA's Constitution, is "to enhance the role of probate judges as servants of justice." Toward that end, the association promotes the proper administration of law, along with sound principles of equity, for the ordering of a just society. The judge members of the MPJA work to advance the rights and interests of children and families who become involved in matters before the Probate Courts and Family Divisions of the Circuit Courts, in the State of Michigan. The MPJA strives to improve courts and agencies serving children and their families, through regular meetings among peers, organizing and attending relevant training events, active engagement by members on multi-disciplinary task forces convened by the Michigan Department of Health and Human Services (DHHS), State Court Administrative Office (SCAO), Courts and other groups; and through participation as *amicus curiae* in cases with the potential for widespread impact in the field of child welfare law, such as this one.

Amicus Curiae, Coalition of Child Welfare Appellate Attorneys, is a group of child welfare attorneys who have worked in the Michigan trial and appellate courts for decades, during which time they have handled countless child welfare cases, including termination of parental rights cases, and have advocated to protect children and families.[1] Over the course of their extensive practice, most Coalition members have represented children as Lawyers Guardians *Ad Litem* (LGAL's); they have also represented parents, relatives and the agency, in child welfare and juvenile justice proceedings and appeals. Over the years, most Coalition members have served as Chairs and Council-persons of the Children's Law Section, and they have participated as members

[1] Per MCR 7.312(H)(5), *Amici* state that no counsel for a party authored the brief in whole or in part and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

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of Children's Law Section committees, including the education, amicus and legislative committees. One Coalition member was Chief Judge of the Wexford County Probate Court Judge and Family Court Judge of the 28th Circuit Court; another was a Wayne County referee, and the State Court Administrative Office's preferred child welfare trainer in the State of Michigan; and another clerked for the Michigan Supreme Court and was a Tenured Professor of Law on Cooley Law School's faculty.

Amici concur with Appellant-LGAL and with the DHHS that the issues involved in the present case involve legal principles of major significance to the state's jurisprudence, MCR 7.305(B)(3), and that the decision of the Court of Appeals is clearly erroneous and will cause material injustice. MCR 7.305(B)(5(a). Further, *Amici* find that the erroneous Court of Appeals' decision has *already caused* material injustice to the emotional, mental, and psychological well-being of CB, the courageous child who remains in limbo due to the Court of Appeals' reversal, after the child testified in open court that though she loves her mother, she remains fearful for the safety of her little brother and her own. The Court of Appeals' erroneous decision in one breath stated that it deferred to the trial court's finding CB credible and acknowledged the sexual abuse CB suffered, but in the next breath that Court effectively tells this courageous child that she must be forced back into the arms of the mother who for her own selfish gain prostituted her daughter and watched while the child was sexually assaulted.

Amici appreciate the fact that the children's LGAL filed the Application in this Court, and that the LGAL has filed a joint supplemental brief to ensure that the children's voices are heard. *Amici* believe it is essential - and should be a consistent practice - that a child's LGAL address issues in the appellate courts to ensure the child's voice is heard throughout the entire case.

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INTRODUCTION

Where the trial court and the Court of Appeals found that respondent mother offered her young daughter to drug dealers and watched as they sexually assaulted the child so the mother could obtain her drugs, respondent mother "has abused" the child, and "the abuse included" criminal sexual conduct of the child. MCL 722.638(1)(a)(ii).

Amici concur fully with the LGAL and DHHS's assertion that: "It is dangerous precedent indeed to hold that a parent who sold her child's body and innocence in exchange for drugs" is entitled to more legal protections than those afforded to the innocent and traumatized child. LGAL/DHHS Joint Supplemental Brief, pp 16-17 of 35.[1]

The published *Barber/Espinoza* decision violates canons of statutory construction when it adds a "requirement" to Michigan's "aggravated circumstances" statute that is not contained in the statute. *In re Barber/Espinoza*, __ Mich App __; __ NW3d __; 2024 WL 4244578 (2024).

The *Barber/Espinoza* decision erroneously holds that for a parent's rights to be terminated at initial disposition based on "aggravated circumstances" – thus excusing the DHHS from making "reasonable efforts" to reunify parent and child – the parent "must commit" the egregious act. *In re Barber/Espinoza*, __ Mich App __; __ NW3d __; 2024 WL 4244578, pp 4-5 (2024). Contrary to the Court of Appeals' erroneous construction, the statute merely requires that a parent "has abused" the child, and that "the abuse included 1 or more of the following…(ii) criminal sexual conduct." As explained by the LGAL, the DHHS, and here by *Amici*, if the Michigan Legislature had intended to impose a requirement for the parent to be the actual perpetrator of the egregious act, it easily could have and would have said so.

[1] Per MCR 7.312(H)(5), *Amici* state that no counsel for a party authored the brief in whole or in part and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

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The *Barber/Espinoza* decision ignores federal policy contained in the Rape Survivor Child Custody Act (RSCCA), 34 USCA 21301, *et seq*., implemented into Michigan law in child custody and parenting time statutes, to protect rape survivors from having to relive their trauma by being exposed to their rapists. The *Barber/Espinoza* decision requires the child survivor of the multiple sexual assaults arranged, facilitated, and watched by her mother, to "reunify" (that is, to visit with, perhaps participate in joint counseling with) the very woman who chose to subject her child to the repeated sexual assaults.

As explained below, the *Barber/Espinoza* decision places the Michigan DHHS, the state's Title IV-E agency, in violation of the state plan between the DHHS and the United States Department of Health and Human Services by mandating that the DHHS force seriously abused and traumatized children to engage in reunification efforts with the mother who subjected them to aggravated circumstances, contrary to federal law. By imposing such a requirement, the *Barber/Espinoza* decision could subject the DHHS to substantial financial penalties imposed by the U.S. Department of Health and Human Services, and could cost the state needed federal funds. See, *e.g*., 42 USC 671(a)(15)(D)(i); *In re Rood*, 483 Mich 73, 102-04 (2009); *In re Mason*, 486 Mich 142 (2010), n 8, citing 42 USC 674(d) (providing a system for reducing a state's funding as a penalty for noncompliance with [federal] program requirements.)

The *Barber/Espinoza* decision creates the surreal situation in which a parent who abandons a child – that is, walks away from the child but does not subject the child to rape and sodomy as the mother did here – will have his rights terminated without the DHHS making reasonable efforts, but the drug-addicted mother who sells her child for sex to maintain her drug habit will be entitled to reasonable efforts with the prostituted child victim. *Cf.*, MCL 722.638(1)(a)(i) with *In re Barber/Espinoza*, __ Mich App __; __ NW3d __; 2024 WL 4244578, pp 3-10 (2024).

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Beyond the material adverse effects of the *Barber/Espinoza* decision detailed by the DHHS and LGAL and referenced above, the Michigan Supreme Court should be concerned with the Court of Appeals' process in arriving at its disturbing and dangerous published decision. In *Barber/Espinoza*, the Court of Appeals did not simply and impartially examine and address respondent's unpreserved issues. That Court *sua sponte* raised additional unpreserved issues that were neither argued nor briefed by respondent, and then the Court decided those unpreserved, non-argued and non-briefed issues. For some unknown reason, the Court of Appeals figuratively "bent over backwards" in favor of respondent, to the extent that the Court became her advocate. Despite respondent's utter failures to preserve issues, to adequately brief arguments, to meet her burden to show prejudice as required by plain error analysis, the Court of Appeals shouldered respondent's burdens and found plain errors for her.

The Court of Appeals is an error-correcting court that should not cross a line into advocacy for one party. But if that Court were to decide to cross that line, then should it not err on the side of advocating for and protecting the children in this Child Protective proceeding brought under Michigan's Juvenile Code and Child Protection Law, whose paramount concerns are the protection of children?

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STATEMENT OF FACTS

Amici Curiae concur with the Statement of Facts set forth in the LGAL's Application for Leave to Appeal filed October 31, 2024, and in the Joint Supplemental Brief of the DHHS and the LGAL filed March 10, 2025, and incorporate same into this brief. MCR 7.305(A)(1)(d).

Amici further note that the Court of Appeals erred in in the "Background" section of its decision, *In re Barber/Espinoza,* __ Mich App __; __ NW3d __; 2024 WL 4244578 (2024), as follows:

"The petition was based largely on a forensic interview with CB." *Barber/Espinoza*, slip op, p 1. In fact, the petition and amended petition filed by the Michigan Department of Health and Human Services (DHHS), were based on much more than the child interview, including the respondent's documented extensive criminal history, documented lengthy previous involvement with Children's Protective Services, her admitted continuing drug use and criminality, respondent's suicide attempts made in the presence of the children, among other acts threatening the children. Joint Appendix of LGAL/DHHS, Appendix 6, Petition and Appendix 7, Amended Petition.

"In a subsequent written order, the trial court … removed the children from respondent's care, placing them with their father." *Barber/Espinoza*, slip op, p 2. In fact, the children had resided solely with their non-respondent father for two years before the initial petition was filed, therefore, the children were not ever "removed" from respondent mother. Joint Supplemental Brief of LGAL/DHHS, pp 1, 27, 29-30 of 35.

"The trial court ultimately found statutory grounds to assume jurisdiction, and it terminated

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respondent's parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), and (j) after finding that respondent neglected her children, abused drugs, engaged in domestic violence against her wife, attempted suicide while in the presence of her children, and sex trafficked CB." *Barber/Espinoza*, slip op, p 2. In fact, the trial court expressly found CB credible, and the trial court found respondent had abused (not merely "neglected") her children. Joint Appendix of LGAL/DHHS, Appendix 10, LGAL Application for Leave to Appeal, pp 13-14. What the Court of Appeals correctly noted is that "CB disclosed that on two separate occasions, **respondent observed adult men sexually abusing CB and failed to do anything to stop the abuse**." *Barber/Espinoza*, slip op, p 1 (emphasis added).

STANDARD OF REVIEW

Amici Curiae concur with the Standard of Review set forth in the LGAL's Application for Leave to Appeal filed on October 31, 2024, and in the Joint Supplemental Brief filed by the DHHS and LGAL March 10, 2025, and incorporate same into this brief. MCR 7.305(A)(1)(d).

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ARGUMENT

Introduction - Overview of Federal Laws bearing upon issues presented in this appeal.

Both the "reasonable efforts" requirement and the "aggravated circumstances" exception to that requirement originate from federal foster care funding law, so it is important to understand federal law requirements and Michigan's legislative enactments in response.[2]

A. Relationship of Federal Law and State Law Requirements

As this Court has previously held: "The processes for removing a child from his home and terminating a parent's rights are . . . governed by federal statutes and regulations." *In re Rood*, 483 Mich 73, 102 (2009).

"Title IV-E [*i.e.*, subchapter IV, part E, of the Social Security Act, 42 USC 670, *et seq*.] establishes federal funding to support state foster care systems and conditions funding on compliance with federal requirements." *Id*.

"Title IV-E requirements are significant in states, including Michigan, that rely on federal funding to support child welfare programs." *Id*. at 103. "Because we choose to accept federal funding, noncompliance with the federal scheme results in substantial funding losses and financial penalties." *Id*. "Accordingly, to comply with federal requirements, our Legislature enacts and amends state statutes to mirror the federal scheme and now provides that Title IV-E prevails to any extent that it conflicts with state law." *Id*. at 103-04. "Federal requirements are also clearly

[2] Although it may seem counterintuitive to mention foster care funding in the context of the present non-foster care case, Michigan's framework governing termination of parental rights generally makes no procedural distinction between proceedings to terminate parental rights that result in termination (and subsequent foster care or adoption placement) and proceedings to terminate parental rights that result in reunification with the family. Because of this lack of distinction in Michigan's framework, statutes and court rules that originate from and implement Title IV-E foster care funding requirements apply equally to proceedings to terminate parental rights that result in termination as well as to proceedings that result in family reunification.

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reflected by the DHS policies …" *Id*. at 104.[3]

B. Genesis of the Federal "Reasonable Efforts" Requirement

During the 1970s, state child welfare systems fell under scrutiny for removing children from their homes unnecessarily and needlessly leaving them to languish in foster care.[4] Congressional hearings revealed that federal policy actually created financial incentives for States to place children in foster care rather than keeping families intact.[5] The federal government reimbursed States for costs of out-of-home placements but not for services provided to families at home.[6] The result was that state child welfare agencies received federal funds for each child in its custody, but "the agency los[t] this money when the child [wa]s returned home, even though the agency must still provide services to the child."[7]

In an effort to correct the overemphasis on foster care, in 1980, Congress enacted the Adoption Assistance and Child Welfare Act of 1980, 42 USC 601, *et seq*. (AACWA), which encouraged states to replace out-of-home placements with preventive and reunification programs.[8] To achieve this end, one requirement imposed by AACWA was that before placing children into foster care state agencies were now required to make "reasonable efforts" to preserve and reunify families, to prevent or eliminate the need for removing children from their homes, and to make it

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[3] When this Court decided *In re Rood*, the Michigan DHHS was then known as the Department of Human Services (DHS); it is the same agency as the petitioner-appellee, DHHS, in this matter.
[4] See *e.g.*, Mnookin, R.H., *Foster Care: In Whose Best Interest?*, 43 Harvard Education Review 599 (1973); Wald, Michael S., *State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stanford Law Review 623 (1976).
[5] Guggenheim, Martin, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 University of Pennsylvania Journal of Constitutional Law 141 (1999).
[6] Wald, Michael S., *State Intervention* …, (note 4, above) 28 Stanford Law Review at 679.
[7] *Id.*
[8] Dorothy Roberts' *Shattered Bonds: The Color of Child Welfare*, (New York, Basic Civitas Books, 2009), p 119.

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possible for a child to safely return to their home.[9]

Specifically, per 42 USC 672, for a State to be eligible to participate in federal foster care funding, the State must have a plan approved by the U.S. Department of Health and Human Services (U.S. DHHS) that satisfies the statutory criteria set forth in 42 USC 671(a)(1)-(35). The pertinent statutory language, as amended, provides:

> (a) Requisite features of State plan
>
> *In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which –*
>
> (15) provides that – * * *
>
> (B) … *reasonable efforts shall be made to preserve and reunify families –*
> (i) prior to the placement of a child in foster care, *to prevent or eliminate the need for removing the child from the child's home; and*
>
> (ii) *to make it possible for a child to safely return to the child's home*. [42 USC 671(a)(15)(B)(i)-(ii) (emphases added).]

See also 45 CFR 1356.21(b).[10]

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[9] Reasonable efforts entail the creation of a Case Service Plan, *i.e.*, a "plan developed by an agency ... that includes services to be provided by and responsibilities and obligations of the agency" as well as "activities, responsibilities, and obligations of the parent." MCL 712A.13a(1)(d). The Case Service Plan must include a "[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement." MCL 712A.18f(3)(d). See also *In re Rood*, 483 Mich 73, 102-04 (2009).

[10] This federal regulation provides: "The title IV-E agency must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, **as long as the child's safety is assured**; to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary **to ensure the immediate safety of the child**); and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. In order to satisfy the "reasonable efforts" requirements of section 471(a)(15) (as implemented through section 472(a)(2) of the Act), the title IV-E agency must meet the requirements of paragraphs (b) and (d) [documentation of judicial determinations] of this section. In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, **the child's health and safety must be the paramount concern**." 45 CFR 1356.21(b) "Reasonable Efforts."

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To implement federal requirements, Michigan law imposes upon the Michigan DHHS "an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks/Brown*, 500 Mich 79, 85 (2017) (citing MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2)). This Court itself codified this requirement in MCR 3.965(C)(4) and MCR 3.973(E)(2), (F)(3). Thus, termination is *generally* improper without a finding of reasonable efforts. *In re Hicks/Brown*, 500 Mich at 90. However, "[t]here are certain enumerated exceptions to this rule …" *Id*. at 86 n 4.

C. Federal Law Genesis of the "Aggravated Circumstances" Exception

This Court recognized in *In re Hicks/Brown* that there are exceptions to the general rule that the DHHS must make reasonable efforts to reunify a child with his or her family prior to termination of parental rights. These exceptions originate from the enactment of the Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89, which "substantially … revised" Title IV-E. *In re Rood*, 483 Mich at 104 n 44.

Because of AACWA's reasonable efforts requirement, "child welfare workers felt they had to make family preservation efforts in every case, no matter how egregious."[11] ASFA was enacted because AACWA's requirement that reasonable efforts to reunify children with their families had resulted in child deaths after children had been returned to the care of abusive parents.[12] The aggravated circumstances provision of ASFA was intended to accelerate permanent placement of children into foster care by making them available for adoption more quickly in cases involving

[11] Bartholet, Elizabeth, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (Boston, Beacon Press, 1999), p 105.
[12] Roberts' *Shattered Bonds: The Color of Child Welfare*, (note 8, above), pp 111-118; Gelles, Richard J., *The Book of David: How Preserving Families Can Cost Children's Lives* (New York, Basic Books, 1996), p 143.

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more extreme abuse.[13]

As relevant here, ASFA created exceptions to AACWA's reasonable efforts requirement by amending 42 USC 671 to read in pertinent part:

> (a) Requisite features of State plan
> *In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which –*
>
> (15) provides that – * * *
> (D) *reasonable efforts of the type described in subparagraph (B)*[14] ***shall not*** *be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that –*
>
> (i) ***the parent has subjected the child to*** *aggravated circumstances (as defined in State law*, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse) [42 USC 671(a)(15)(D)(i) (emphases added).]

See also 45 CFR 1356.21(b)(3).[15]

The legislative intent of ASFA was "to increase the number of adoptions in the United States" by "permit[ing] the State to bypass the Federal reasonable efforts criterion and move expeditiously to terminate parental rights and make a child available for adoption."[16] **Appendix**

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[13] "[T]he bill requires States to define 'aggravated circumstances' in State law, such as child torture or sexual abuse, *that would permit the State to bypass the Federal reasonable efforts criterion and move expeditiously to terminate parental rights and make a child available for adoption*." HR REP. 105-77 at 7 (1997), reprinted in 1997 USCCAN 2739, 2739 (emphasis added).

[14] Subparagraph B is quoted at page 8, above.

[15] This regulation provides, in relevant part: (3) ***Circumstances in which reasonable efforts are not required to prevent a child's removal from home or to reunify the child and family***. Reasonable efforts to prevent a child's removal from home or to reunify the child and family are not required if the title IV-E agency obtains a judicial determination that such efforts are not required because:

(i) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances (as defined in State, or for a Tribal title IV-E agency, Tribal law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse); … 45 CFR 1356.21(b)(3) (bold italics original).

[16] According to a 2002 U.S. Government Accounting Office report, "the annual number of adoptions increased by 57 percent since ASFA was enacted …" U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-585, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING

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A, HR REP. 105-77 at 7 (1997), reprinted in 1997 USCCAN 2739, 2739 (emphasis added).

D. Michigan's Legislative Response to ASFA

In response to ASFA, the Michigan Legislature enacted 2004 PA 473 which added the following language to MCL 712A.19a:[17]

> (2) The court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required. *Reasonable efforts to reunify the child and family must be made in all cases* ***except*** *if any of the following apply*:
>
> (a) There is a judicial determination that *the parent has* ***subjected the child to*** *aggravated circumstances* as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638.[18]
>
> (b) *The parent has been* ***convicted of*** *1 or more of the following*:
> (i) Murder of another child of the parent. … [MCL 712A.19a(2)(a)-(b).]

In light of this amendment, this Court has repeatedly acknowledged that "'[r]easonable efforts to reunify the child and family must be made in all cases' *except those involving aggravated circumstances* …" *In re Mason*, 486 Mich 142, 152 (2010) (emphasis added; citing MCL 712A.19a(2)).

E. Michigan's "Aggravated Circumstances" Statute

Pursuant to MCL 712A.19a(2)(a), reasonable efforts to reunify a child and family need not be made where there is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in MCL 722.638(1) and (2). In turn, MCL 722.638(1) and (2) provide:

PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN, p 3 (June 2002) available at < https://www.gao.gov/assets/gao-02-585.pdf> (accessed February 20, 2025).

[17] The Senate Fiscal Agency Analysis Enrolled Analysis (12-21-04) confirms that 2004 PA 473 was enacted to bring Michigan into compliance with the provisions of ASFA.

[18] "Subjected" is defined as: "to cause or force to undergo or endure (something unpleasant, inconvenient, or trying)." Merriam-Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/subjected#dictionary-entry-3> (accessed April 5, 2025).

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(1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:

(a) The department determines that 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 ***and the abuse included*** *1 or more of the following*:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

* * *

(2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIIA of 1939 PA 288, MCL 712A.19b. [MCL 722.638(1)-(2) (emphases added).]

F. Rules of Statutory Construction

"The primary goal of statutory construction is to give effect to the Legislature's intent." *McCormick v Carrier*, 487 Mich 180, 191 (2010). This is performed "by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute." *Id*. This Court "examine[s] the provision within the overall context of the statute so as to produce, if possible, a harmonious and consistent enactment as a whole." *People v Cunningham*, 496 Mich 145, 153-54 (2014) (cleaned up). "This Court must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id*. (cleaned up). This Court must "consider the statute's placement and purpose in the statutory scheme, and in interpreting related statutes, those *in pari materia*, we construe the statutes together so as to give the fullest effect to each provision." *Id*. (cleaned up).

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"In attempting to find a harmonious construction of the statutes, we will regard all statutes upon the same general subject-matter as part of one system …" *Intl Bus Machines Corp v Dept of Treasury*, 496 Mich 642, 652 (2014) (quotation marks and citation omitted). "Further, statutes *in pari materia*, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each …" *Id*. (cleaned up). "[I]n the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another." *Id*. "The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time." *Id*. Again, however, "the interpretive aid of the doctrine of *in pari materia* can only be utilized in a situation where the section of the statute under examination is itself ambiguous." *Tyler v Livonia Pub Sch*, 459 Mich 382, 392 (1999).

I. Reasonable efforts to reunify respondent and her children were not required to be made where respondent subjected her daughter to aggravated circumstances by abusing her daughter in a manner that included criminal sexual conduct involving penetration.

A. Reasonable efforts were not required because the children were not removed from respondent's home.

As a threshold matter, no duty to provide reasonable efforts to reunify respondent and her children were required in this case because the children were not removed from respondent's home. When respondent's minor daughter reported the sexual abuse, she and her younger brother had already been residing solely in her father's custody for some years pursuant to a pre-existing court custody order. As such, respondent's children were never removed from her home.

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The mandate to provide reasonable reunification efforts to reunify child and family is a condition imposed by federal law to receive Title IV-E federal foster care funding, which applies only when a child is removed "from the home." 42 USC 672(a)(2)(A)(ii) and 42 USC 671(a)(15)(B)(i)-(ii). See also 45 CFR 1356.21(b) ("The title IV-E agency must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child *from his/her home*, as long as the child's safety is assured …") (emphasis added); and 45 CFR 1356.21(b)(1). This standard was adopted by the Michigan Legislature in MCL 712A.13a(9)(d); MCL 712A.14b(1)(c); MCL 712A.18f(4) ("The order of disposition shall state whether reasonable efforts have been made to prevent the child's removal *from his or her home* or to rectify the conditions that caused the child's removal *from his or her home*.") (emphases added).

This Court likewise adopted this standard in MCR 3.963(B)(1)(c); MCR 3.965(C)(1)(d); MCR 3.965(C)(4) ("When the court has placed a child *with someone other than the custodial parent*, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required.") (emphasis added); MCR 3.973(E)(2) ("… the agency shall report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, *of the child from the home*.") (emphasis added); MCR 3.973(F)(3) ("The court, on consideration of the written report prepared by the agency responsible for the care and supervision of the child pursuant to MCL 712A.18f(1), shall, when appropriate, include a statement in the order of disposition as to whether reasonable efforts were made: (a) to prevent the child's removal from home, or (b) to rectify the conditions that caused the child to be removed from the child's home.")

Here, respondent's children were not removed from respondent's home, so respondent had no legal right to receive, and the DDHS had no legal duty to provide, reasonable efforts to reunify

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respondent and children where the trial court's order merely affected the Respondent's parenting time as the non-custodial parent with her children. See, *e.g.*, *In re AJR*, 342 Mich App 1, 6-7 (2022) (Court of Appeals defining the terms "remove/removal" as: "…a child is removed from a parent's care and custody when he or she is taken from that parent's residence and placed in a different residence." *Id.*, citing *In re Detmer*, 321 Mich App 49, 64 (2017) ruling that the term "removed" means: "the instance when a court orders that a child be physically transferred or moved from the care and residence of a parent or … custodian to the care or residence of some other person or institution." *AJR*, 342 Mich App at 7, n 3, citing *Detmer*, 321 Mich App at 64.

B. MCL 712A.19a(2)(a) does not incorporate MCL 722.638 in its entirety.

To the extent reasonable efforts were required in a case where the children were not removed from the home of their custodial parent, the aggravated circumstances statute, MCL 712A.19a(2), relieves the State from making reasonable efforts to reunify the child and family when "[t]here is a judicial determination that the parent has subjected the child to *aggravated circumstances as provided in section 18(1) and (2) of the child protection law*, 1975 PA 238, MCL 722.638." MCL 712A.19a(2)(a). According to the plain language of MCL 712A.19a(2)(a), not every aspect of MCL 722.638(1) and (2) was incorporated into MCL 712A.19a(2)(a). Rather, only the "aggravated circumstances" portions of MCL 722.638(1) and (2) were incorporated. The Court of Appeals erred when it incorporated MCL 722.638(1) and (2) in their entirety, instead of incorporating *only* the aggravated circumstances portions enumerated in MCL 722.638(1)(a)(i)-(vi) and (b)(i)-(ii).

To understand the nature of the Court of Appeals' error in this regard, one must distinguish between the substantive and the procedural components of MCL 722.638 as well as the dual purpose that the statute serves. This statute identifies those cases in which the DHHS must file a

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statutorily-mandated petition. The *substantive* provisions of this statute are set forth in MCL 722.638(1)(a)-(b), and they identify conduct that constitutes aggravated circumstances requiring the DHHS to file a statutorily-mandated petition. The *procedural* provisions of this statute are set forth in MCL 722.638(1), (1)(a), (2) and (3) and identify actions that the DHHS must take if particular circumstances occur. This construction is paramount because MCL 722.638 includes procedural requirements relevant to filing statutorily-mandated petitions that are inapposite when determining whether the State may lawfully refrain from providing reasonable efforts to the parent who subjected the child to aggravated circumstances.

For example, per MCL 722.638(1)(a), if the DHHS determines that a parent, guardian, or custodian, or a person 18 years of age or older who resides for any length of time in the child's home, has abused the child and the abuse included one or more aggravated circumstances, then the DHHS "shall submit a petition for authorization by the court under … MCL 712A.2." Similarly, pursuant to MCL 722.638(2), if a parent is suspected of being a perpetrator or of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the DHHS "shall include a request for termination of parental rights at the initial dispositional hearing as authorized under … MCL 712A.19b." *Id.* Lastly, pursuant to MCL 722.638(3), if the DHHS is considering petitioning for termination of parental rights at the initial dispositional hearing in a case that does not require the DHHS to file a statutorily-mandated petition, then the DHHS "shall hold a conference among the appropriate agency personnel to agree upon the course of action." *Id.* The DHHS "shall notify the attorney representing the child of the time and place of the conference, and the attorney may attend." *Id.* If an agreement is not reached at this conference, the DHHS "director or the director's designee shall resolve the disagreement after consulting the attorneys representing both the department and the child." *Id.*

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The Court of Appeals erred when it failed to distinguish between the substantive aggravated circumstances portions of MCL 722.638(1) and (2), which relieve the State from making reasonable efforts at family reunification, from the procedural requirements of the statute applicable only to the filing of statutorily-mandated petitions. Applying the procedural requirements applicable only to the filing of statutorily-mandated petitions to determinations regarding aggravated circumstances results in absurdity and *non sequitur* outcomes. "[S]tatutes must be construed to prevent absurd or illogical results and to give effect to their purposes." *Gross v Gen Motors Corp*, 448 Mich 147, 164 (1995).

For example, when applying the procedural provisions of MCL 722.638(1) to determine whether the DHHS must file a statutorily-mandated petition, the petition language – "The department shall submit a petition for authorization by the court under … MCL 712A.2, if 1 or more of the following apply" – makes perfect sense. However, when the procedural provisions of MCL 722.638(1) are applied to determinations whether the DHHS must provide reasonable efforts to reunify the children with their family, this same petition language no longer makes sense because, for the obligation to provide reasonable efforts to arise, *a petition must have already been filed to initiate the action*. "It is elementary that the rules of common sense shall apply to the construction of statutes." *Kalamazoo Tp Kalamazoo Cnty v Stamm*, 339 Mich 619, 635 (1954) (cleaned up). See also *In re Guardianship of AMMB*, __ Mich App __; __ NW3d __; 2024 WL 3907177, p 4 (2024) ("Courts should not abandon common sense when construing a statute.") (cleaned up). Thus, "[i]n construing a statute, a court should not do so at the expense of common sense." *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 15 (2004), *aff'd* 474 Mich 36 (2006).

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Similarly, when applying the procedural provisions of MCL 722.638(1) to determine whether a petition is statutorily-mandated, the language identifying individuals who can commit aggravated circumstances – "*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*" – again makes sense. However, applying the procedural provisions of MCL 722.638(1) to determine whether the DHHS must provide reasonable efforts to reunify the children with their family, this same petition language no longer makes sense *because the DDHS is never required to make reasonable efforts to reunify a child with "a guardian, custodian, or person who is 18 years of age or older and who resides for any length of time in the child's home*." It is for this reason that both statute and court rule recognize that aggravated circumstances relieve the DHHS from making reasonable efforts only when "*the parent* has subjected the child to aggravated circumstances." MCL 712A.19a(2)(a) (emphasis added); MCR 3.965(C)(4) (emphasis added).

The Court of Appeals' ruling in this matter places millions of dollars of Title IV-E funding squarely at risk. As noted above, for a State to be eligible for federal participation in Title IV-E federal payments, it must have a plan approved by the U.S. DHHS which provides that "reasonable efforts … *shall not* be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that ***the parent*** *has* ***subjected the child to*** *aggravated circumstances* (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)." 42 USC 671(a)(15)(D)(i) (emphases added). To ensure Title IV-E funding, the Michigan Legislature adopted the "subjected the child to" standard upon enacting MCL 712A.19a(2)(a) ("Reasonable efforts to reunify the child and family must be made in all cases except if … [t]here is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in … MCL 722.638[(1) and (2)].") This Court similarly

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adopted the "subjected the child to" standard upon promulgating MCR 3.965(C)(4) ("Reasonable efforts to prevent a child's removal from the home are not required if a court of competent jurisdiction has determined that (a) *the parent has subjected the child to aggravated circumstances* as listed in sections 18(1) and (2) of the Child Protection Law, MCL 722.638 (1) and (2) …") (emphasis added). The "subjected the child to" standard set forth in both MCL 712A.19a(2)(a) and MCR 3.965(C)(4) ensures that Michigan complies with the ASFA provision of 42 USC 671(a)(15)(D)(i) and thereby secures millions of dollars of Title IV-E funding.

Not only does the Court of Appeals' interpretation of MCL 722.638(1) violate the ASFA aggravated circumstances provision set forth in 42 USC 671(a)(15)(D)(i), and adopted in MCL 712A.19a(2)(a) and MCR 3.965(C)(4), it results in the bizarre and absurd result of parents being denied reasonable efforts and having their parental rights terminated when a third party, *i.e*., a "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" subjected the child to aggravated circumstances. Such a practice would result in the termination of parental rights for innocent parents whose only fault is failing to foresee criminal conduct by third parties when such conduct is generally considered to be unforeseeable. See *MacDonald v PKT, Inc*, 464 Mich 322, 335 (2001) ("Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime."); *Graves v Warner Bros*, 253 Mich App 486, 499 (2002) ("[T]he general rule that criminal conduct is unforeseeable as a matter of law …") Thus, "every person [including a parent] has a right to presume that every other person will perform his duty and obey the law; and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that she is not exposed to danger which can come

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to her only from violation of the law or duty to such other person." *Gibbs v Guild*, 332 Mich 671, 679 (1952).

Incorporating into MCL 712A.19a(2)(a) portions of MCL 722.638(1) and (2) that do not pertain to aggravated circumstances results in further absurdity and *non sequitur* outcomes. For example, MCL 722.638(1) requires that the DDHS "shall submit a petition for authorization by the court under … MCL 712A.2, if 1 or more of the following apply …" However, the DHHS's *act of filing a petition* obviously does not constitute aggravated circumstances. Likewise, a DHHS determination made pursuant to MCL 722.638(1)(a) that aggravated circumstances exist cannot in itself constitute aggravated circumstances. Nor can a DHHS request made pursuant to MCL 722.638(2) for termination of parental rights of a parent who placed the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk constitute aggravated circumstances. Neither can the statutorily-mandated case conference requirement of MCL 722.638(3) constitute aggravated circumstances. Such absurdities result because, again, only the aggravated circumstances portions enumerated in MCL 722.638(1)(a)(i)-(vi) and (b)(i)-(ii) were to be incorporated into MCL 712A.19a(2)(a), and not the *procedural* aspects applicable to determining when a petition is statutorily mandated.

In short, the Court of Appeals clearly erred when it incorporated the *procedural* requirements of MCL 722.638(1) and (2) applicable to the filing of statutorily-mandated petitions as though these procedural requirements themselves constituted aggravated circumstances. As noted, reasonable efforts to reunify the child and family must be made in all cases except if "[t]here is a judicial determination that the parent has subjected the child *to aggravated circumstances as provided in … MCL 722.638[(1) and (2)]*." MCL 712A.19a(2)(a). According to this plain language, the only portions of MCL 722.638(1) and (2) that are incorporated into MCL

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712A.19a(2)(a) are those portions establishing what constitute "aggravated circumstances as provided in … MCL 722.638[(1) and (2)]." MCL 712A.19a(2)(a).

C. 42 USC 671(a)(15)(D)(i) and MCL 712A.19a(2)(a) require only that "the parent has subjected the child to aggravated circumstances."

The Court of Appeals further erred when it predicated its ruling upon the language of MCL 722.638, the statute which addresses when a petition is statutorily mandated, rather than the language of MCL 712A.19a(2)(a), the statute that actually addresses when the DHHS is relieved from making reasonable efforts to reunify the family.

As noted above, ASFA mandates that "reasonable efforts … *shall not* be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that ***the parent*** *has* ***subjected the child to*** *aggravated circumstances* (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)." 42 USC 671(a)(15)(D)(i) (emphases added). This same legal standard was adopted by the Michigan Legislature in MCL 712A.19a(2)(a) and further adopted by this Court in MCR 3.965(C)(4). Thus, properly formulated, the issue is whether respondent-mother "has subjected the child to aggravated circumstances" enumerated in MCL 722.638(1)(a)-(b).

Criminal sexual conduct involving penetration constitutes one of the enumerated aggravated circumstances defined by state law. MCL 722.638(1)(a)(iii). The trial court found that respondent subjected her daughter to criminal sexual conduct involving penetration when respondent arranged for men to have sex with her minor daughter, and the Court of Appeals properly deferred to the trial court's factual finding that was predicated upon the credibility determination of respondent's daughter. *Barber/Espinoza*, slip op, p 4 ("***CB unquestionably alleged abuse via criminal sexual conduct*** involving penetration, attempted penetration, or assault with intent to penetrate."); *Barber/Espinoza*, slip op, p 8, n5 ("We find no issue with the trial

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court's underlying factual finding that ***CB was subjected to the sexual abuse alleged, which respondent either facilitated or knew about without intervening***."); *Barber/Espinoza*, slip op, p 8, n5 ("Respondent essentially challenges the credibility of CB's allegations, but we defer to the trial court on this matter… ***the trial court explicitly found CB credible***…"). See, *Omer v Steel Techs, Inc*, 507 Mich 492, 496 (2021); *Pocius v Smykowski*, 332 Mich 578, 581 (1952) ("It is the province of the trial court to determine the credibility of witnesses and give such weight to their testimony as he may see fit.")

Thus, it is established – and confirmed by the Court of Appeals itself – that respondent subjected her daughter to at least one of the aggravated circumstances enumerated in MCL 722.638(1)(a)-(b). This was the proper analysis consistent with the standard set forth in 42 USC 671(a)(15)(D)(i) and its implementing state statute, MCL 712A.19a(2)(a) and state court rule, MCR 3.965(C)(4). By becoming ensnared in the quagmire of procedural requirements applicable only to statutorily-mandated petitions, the Court of Appeals improperly focused and predicated its ruling upon the language of MCL 722.638 instead of the proper standard set forth in 42 USC 671(a)(15)(D)(i) as adopted in Michigan by MCL 712A.19a(2)(a) and MCR 3.965(C)(4).

When this Court has had occasion to apply MCL 712A.19a(2)(a), the Court has likewise focused upon "the parent has subjected the child to" language. *In re Smith-Taylor*, 509 Mich 935 (2022) ("Under MCL 712A.19a(2)(a), there must be a 'judicial determination that *the parent has subjected the child to* aggravated circumstances' before the Department is excused from making reasonable efforts.") (emphasis added; quoting MCL 712A.19a(2)(a)). The Court of Appeals has likewise focused upon this same language when applying this statute. *In re Simonetta*, 340 Mich App 700, 703 (2022); *In re Rippy*, 330 Mich App 350, 355 (2019).

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In sum, the Court of Appeals clearly erred when it focused and predicated its ruling on the portion of the statute which addresses when a petition is statutorily mandated, MCL 722.638, rather than the language of the statute that actually addresses when the DHHS is relieved from making reasonable efforts to reunify the family, MCL 712A.19a(2)(a).

D. Respondent met the criteria erroneously adopted by the Court of Appeals.

Even if the Court of Appeals properly focused and predicated its ruling on the language of MCL 722.638, that Court still erred because respondent clearly satisfied the standard set forth in this statute as well.

According to the Court of Appeals, MCL 722.638(1)(a)(ii) required that the DHHS show that "a parent … has abused the child … and the abuse included … [c]riminal sexual conduct involving penetration …." MCL 722.638(1)(a)(ii). It is undisputed that Respondent is the parent of her minor daughter. It is further settled that Respondent abused her daughter by allowing adult males to engage in sexual intercourse with the child, sometimes for drugs and sometimes free of charge. See MCL 722.622(g) (defining "child abuse" as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, *sexual abuse, sexual exploitation*, or maltreatment, by a parent …") (emphasis added). It is also settled that the abuse included criminal sexual conduct involving penetration. Thus, even if the Court of Appeals properly incorporated the procedural language of MCL 722.638(1)(a), the record is clear that respondent abused her daughter and the abuse included criminal sexual conduct involving penetration.

The Court of Appeals clearly erred when it construed the language "a parent … has abused the child … and the abuse included … [c]riminal sexual conduct involving penetration …" to mean that the ***parent*** must be the actual ***perpetrator*** of the criminal sexual conduct. According to the

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plain language of MCL 722.638(1)(a), a parent is ***only*** required to have "abused" the child, and the abuse is only required to have "included" criminal sexual conduct involving penetration. Prostituting one's daughter out to adult men constitutes abuse, MCL 722.622(g), and such abuse "included" criminal sexual conduct involving penetration.

"When interpreting a statute, our primary goal is to ascertain and give effect to the Legislature's intent," and "[t]he best indicator of that intent is the language used." *In re Receivership of 11910 S Francis Rd (Price v Kosmalski)*, 492 Mich 208, 222 (2012) (footnotes omitted). "[T]he Legislature must be presumed to have intended the meaning expressed by the language it has chosen," and "[w]hen that language is clear and unambiguous, no further interpretation is necessary." *Owendale-Gagetown Sch Dist v State Bd of Ed*, 413 Mich 1, 8 (1982).

The plain language of MCL 722.638(1)(a) requires only that "a parent … has abused the child … and the abuse included … [c]riminal sexual conduct involving penetration …" By superimposing through judicial gloss the "requirement" that the parent also be the perpetrator who committed the criminal sexual conduct, the Court of Appeals effectively rewrote MCL 722.638(1)(a) to read "a parent … has [committed] … [c]riminal sexual conduct …" "The Legislature could have elected to include such language, but did not." *Perkovic v Zurich Am Ins Co*, 500 Mich 44, 54 (2017). "This Court will not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 35 (2016). Nowhere does the statutory language require the parent who abused the child also be the perpetrator who committed the criminal sexual conduct. Thus, the Court of Appeals clearly erred when it concluded that "criminal sexual conduct as an aggravating circumstance *must be committed by a parent or other specifically listed person* in MCL 722.638(1)(a)." *In re Barber/Espinoza*, p 5 (emphasis added).

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Even assuming that the plain language of MCL 722.638(1)(a) could somehow be construed to require that the criminal sexual conduct as an aggravated circumstance "must be committed by a parent or other specifically listed person in MCL 722.638(1)(a)" – which it cannot – respondent still satisfied this criterion. "A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained." *Bush v Shabahang*, 484 Mich 156, 167 (2009). Michigan policy is that "[e]very person concerned in the commission of an offense, *whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission* may hereafter be prosecuted, indicted, tried and on conviction shall be punished ***as if he had directly committed such offense***." MCL 767.39 (emphases added). The purpose of this statute is "to abolish the common law distinction between accessories before the fact and principals so that one who counsels, aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense." *People v Moore*, 470 Mich 56, 63 (2004). "The phrase 'aids or abets' is used to describe *any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime*." *Id.* "Where one acts intentionally in pursuit of a common plan, liability may be established on agency principles." *People v Lawton*, 196 Mich App 341, 352 (1992). "'Aiding or abetting' includes all forms of assistance." *Id.* "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *Id.*

There is no question that respondent arranged to prostitute her daughter and in doing so acted intentionally in pursuit of a common plan with her daughter's rapists. Respondent had to arrange to have her daughter present to offer the child to her rapists. Respondent had to further ensure a private location where the rapes could occur. Indeed, as the Court of Appeals found, respondent even watched while some of the sexual assaults of her young daughter occurred.

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Barber/Espinoza, slip op, p 1. These reprehensible actions are more than sufficient to try, convict, and punish respondent "as if [s]he had directly committed such offense." MCL 767.39. Case law is clear that prostituting one's children to others for sex is sufficient to convict for criminal sexual conduct involving penetration based on an aiding and abetting theory.[19]

Additionally, respondent also took steps to ensure that the rapes were not detected by instructing her daughter to clean herself after the sexual assaults occurred, which gives rise to her criminal liability as an accessory after the fact.[20] *People v Perry*, 460 Mich 55, 62 (1999) ("[A]n accessory after the fact is 'one who, with knowledge of the other's guilt, renders assistance to a

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[19] See *e.g.*, *People v McDaniel*, unpublished opinion of the Court of Appeals, issued June 20, 2024 (Docket No. 365866), 2024 WL 3077599, p 1 (**Appendix B**) ("For her role in aiding and abetting her codefendant's, Richard Allen-Bass's, sexual assault of her daughter, JM, defendant, Patricia Myia McDaniel, was convicted by a jury of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b."); *People v Williams*, unpublished opinion of the Court of Appeals, issued March 19, 2020 (Docket No. 345096), 2020 WL 1333001, p 3 (**Appendix C**) ("The prosecution alleged that defendant committed CSC-I by using his penis to penetrate his victim's anus. The prosecution alleged that Connie committed CSC-I by aiding and abetting men other than defendant to penetrate the same daughter's anus."); *People v Stevens*, unpublished opinion of the Court of Appeals, issued December 15, 2016 (Docket No. 327160), 2016 WL 7333391, p 2 (**Appendix D**) ("Notably, in addition to charges as a principal for his own personal acts of CSC, Stevens was charged in this case with aiding and abetting the CSC committed by Tingley against BH. The prosecutor presented evidence that Stevens sent BH to Tingley's home and that Stevens received money and favors from Tingley."); *People v Blackwell*, unpublished opinion of the Court of Appeals, issued January 29, 2013 (Docket No. 305243), 2013 WL 331552, p 1 (**Appendix E**) ("Defendant's CSC convictions were based on a theory of her aiding and abetting Johnnie Griffin in his sexual assault of defendant's granddaughters.") Per MCR 7.215(C), these unpublished decisions are cited because they are relevant to the fact that respondent mother in this case is equally culpable for the child sexual abuse she facilitated, arranged and observed, as the drug dealer who sexually assaulted respondent's daughter. It does not appear there is a published decision on this specific point.

[20] CB testified the sexual abuse was painful, she was bleeding from her "butt," and that she told her mother about it. LGAL/DHHS Joint Appendix, Appendix 5, TR 12/08/23, p 19. Ms. Espinoza minimized the serious physical injury to the child, replying, "[H]e ain't doin' it and [gave CB] toilet paper." *Id*. Additional parts of the cover-up are hinted at in the petition: "Allegations of maternal grandmother coaching CB to tell doctors she was fine. Maternal grandmother telling CB that her father had sexually abused her, which was not true. Maternal grandmother telling CB that she had sexually touched her younger brother, which was also not true." Appendix 7, LGAL/DHHS Joint Appendix, p 2.

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felon in the effort to hinder his detection, arrest, trial or punishment.'") To ignore this corpus of law would be to rule that MCL 722.638(1)(a) impliedly repealed MCL 767.39, which imposes liability upon principal and aiders and abettors alike.[21]

The Court of Appeals thus clearly erred when it held that only the person who actually sexually penetrated the child could be held criminally liable for criminal sexual conduct involving penetration when Michigan law clearly imposes criminal liability upon aiders and abettors as though they "directly committed" the offense, MCL 767.39, and further imposes criminal liability upon accessories after the fact. Only by ignoring these aspects of Michigan's corpus of criminal law was the Court of Appeals able to conclude as it did in *Barber/Espinoza* that Michigan's Child Protection Law is powerless to protect children from being prostituted out by their parents.

In short, whether applying the standard "that the parent has subjected the child to aggravated circumstances" set forth in 42 USC 671(a)(15)(D)(i) and adopted by MCL 712A.19a(2)(a) and MCR 3.965(C)(4) or the standard that "a parent … has abused the child … and the abuse included … [c]riminal sexual conduct involving penetration" set forth in MCL 722.638(1)(a)(iii), Respondent's conduct clearly satisfied the plain language of either standard.

E. <u>Respondent also met the criteria of MCL 722.638(2)</u>.

The Court of Appeals' interpretation of MCL 722.638(2) is equally erroneous and, if possible, even more puzzling. This subsection provides:

[21] It is axiomatic that "that repeals by implication are disfavored." *Intl Bus Machines Corp v Dept of Treasury*, 496 Mich 642, 651 (2014) (quotation marks and citation omitted). Courts "will presume, in most circumstances, that if the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly." *Id.* "Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary." *Wayne Cnty Prosecutor v Dept of Corr*, 451 Mich 569, 576 (1996) (quotations, footnote, and citation omitted).

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> In a petition submitted as required by subsection (1), *if a parent is a suspected perpetrator* ***or*** *is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing* as authorized under section 19b of chapter XIIA of 1939 PA 288, MCL 712A.19b. [MCL 722.638(2) (emphasis added).]

The Court of Appeals held that "[b]y the statute's plain language, MCL 722.638(2) requires that DHHS file for termination at the initial disposition when the parent is 'suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk' *and* the petition is mandatory under MCL 722.638(1)." *In re Barber/Espinoza*, __ Mich App at __; 2024 WL 4244578, p 7 (emphasis original). The Court further contended that "MCL 722.638(1)(a) clearly contemplates abuse perpetrated by only certain limited categories of people," so "allowing aggravating [sic] circumstances to apply generally to cases involving criminal sexual conduct perpetrated by anyone so long as the parent is 'suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk' would render superfluous the Legislature's clear instruction that the various categories of abuse be perpetrated 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.'" *Id*.

The Court of Appeals clearly erred in its above-referenced analyses by ignoring the disjunctive "or" contained within the statute. According to the plain language of the statute, "[i]n a petition submitted as required by subsection (1), if a parent *is a suspected perpetrator* ***or*** *is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk*, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under … MCL 712A.19b." MCL 722.638(2) (emphasis added). "The statutory language must be read and

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understood in its grammatical context, unless it is clear that something different was intended." *Rock v Crocker*, 499 Mich 247, 262 (2016). "The Legislature's use of the disjunctive word 'or' indicates 'an alternative or choice between two things.'" *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 209 (2017). See also *People v Kowalski*, 489 Mich 488, 499 n 11 (2011) ("Or is a disjunctive term, used to indicate a disunion, a separation, an alternative.") (cleaned up).

By the plain language of MCL 722.638(2), in a petition submitted as required by subsection (1), the DHHS shall include a request for termination of parental rights at the initial dispositional hearing pursuant to MCL 712A.19b under one of two circumstances. Specifically, the DHHS shall include such a request if (1) "a parent is a suspected perpetrator," or (2) "[if a parent] is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk …" MCL 722.638(2). According to the plain language of MCL 722.638(2), this subsection applies only to "a parent." This is precisely how this Court interpreted this subsection in *In re Smith-Taylor*, 509 Mich 935 (2022) when it ruled: "[a]ggravated circumstances are present both for a parent who is a 'suspected perpetrator' of such abuse *and a parent who is "suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk[.]"* MCL 722.638(2).") (emphasis added). The Court of Appeals' opinion is silent as to how it could conclude that "a parent" referenced in subsection (2) could also somehow be a "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 referenced in subsection (1).

The Court of Appeals contends that "allowing aggravating [sic] circumstances to apply generally to cases involving criminal sexual conduct perpetrated by anyone so long as the parent

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is 'suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk' would render superfluous the Legislature's clear instruction that the various categories of abuse be perpetrated 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.'" *In re Barber/Espinoza*, p 7. However, by requiring that subsection (2) apply only when the rapist is one of the enumerated perpetrators identified in subsection (1), the Court of Appeals rendered superfluous the Legislature's clear instruction that subsection (2) apply only to "a parent." MCL 722.638(2). Consequently, the Court of Appeals itself engages in the very act it sought to protect against, *i.e.*, rendering statutory language superfluous.

The Court of Appeals' ruling in this respect results in further absurdity and *non sequitur* outcomes. According to the Court of Appeals, if a parent is suspected of placing a child at an unreasonable risk of harm by failing to take reasonable steps to intervene to eliminate the risk of criminal sexual conduct committed by one of the four enumerated perpetrators identified in subsection (1), then the DHHS shall include a request for termination of parental rights at the initial dispositional hearing as authorized under MCL 712A.19b. MCL 722.638(2). However, if a parent is suspected of placing a child at an unreasonable risk of harm by failing to take reasonable steps to intervene to eliminate the risk of sexual conduct *committed by anyone else*, then the DHHS need not include a request for termination of parental rights at the initial dispositional hearing. Conspicuously absent from the Court of Appeals' opinion is why that Court believed that the Legislature viewed criminal sexual conduct committed by one of the four enumerated perpetrators identified in subsection (1) so heinous as to mandate termination of parental rights at the initial dispositional hearing, but not criminal sexual conduct committed by anyone else. Interpreting a child protection statute in a manner to require termination of parental rights at the initial

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dispositional hearing when children are raped by certain identified perpetrators but not when children are raped by anyone else is perhaps the epitome of absurdity. Again, "statutes must be construed to prevent absurd or illogical results and to give effect to their purposes." *Gross*, 448 Mich at 164.

Resolving the tension in the Court of Appeals' interpretation is easily accomplished by simply recognizing that, according to the plain language of subsection (2), the DHHS must include a request for termination of parental rights at the initial dispositional hearing if "*a parent* is a suspected perpetrator" ***or*** if *a parent* "is suspected of placing the child at an unreasonable risk of harm due to the *parent*'s failure to take reasonable steps to intervene to eliminate that risk …" MCL 722.638(2) (emphases added). By ignoring the plain language of subsection (2), which makes that subsection applicable only to "a parent," and by importing the four enumerated perpetrators identified in subsection (1), the Court of Appeals undermined and ignored the clear legislative intent of this statute to mandate that the DHHS seek termination of parental rights at the initial dispositional hearing *either* when the parent is a perpetrator or when the parent otherwise places their child at an unreasonable risk of harm by failing to take reasonable steps to intervene to eliminate that risk.

In this case, respondent placed her daughter at an unreasonable risk of harm by failing to take reasonable steps to intervene to eliminate the risk, *i.e.*, criminal sexual conduct involving penetration, so the DHHS was required to seek termination of respondent's parental rights at the initial dispositional hearing. Had the Court of Appeals properly interpreted and applied subsection (2), the lower court's ruling should have been affirmed on this basis alone.

F. Legislative intent validates *Amici*'s analysis.

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Lastly, and importantly, the Legislative intent underlying the Child Protection Law and the aggravated circumstances exception to the reasonable efforts requirement resonate most loudly against the Court of Appeals' erroneous ruling. "Remedial statutes, and the remedial portions of penal statutes, are to be liberally construed." *W Michigan Univ Bd of Control v State*, 455 Mich 531, 546 (1997). The Child Protection Law is "a remedial stat ute … that … should be liberally construed." *Williams v Coleman*, 194 Mich App 606, 612 (1992), *revs'd on other grds Jones v Bitner*, 300 Mich App 65 (2013). "Remedial statutes are to be liberally construed in favor of the persons intended to be benefited," *Leelanau Cnty Sheriff v Kiessel*, 297 Mich App 285, 295 (2012), and "to suppress the evil and advance the remedy." *Birznieks v Cooper*, 405 Mich 319, 331-32 n 12 (1979). To achieve these ends, statutes that require liberal construction "are to be construed giving the words the largest, the fullest, and most extensive meaning of which they are susceptible." *Id*. (cleaned up; quoting Enlich, Interpretation of Statutes, § 73, p 94.). Such a construction "makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." *Birznieks*, 405 Mich at 331-32 n 12 (quoting 3 Sutherland, Statutory Construction, § 60.01, p 29).

Despite the above-cited principles, the Court of Appeals in this case acknowledged "the extremely serious facts of this case" and suggested that "***we might personally view a parent sex trafficking their child as particularly egregious conduct*** …." *In re Barber/Espinoza*, p 6 n 4. The Court nonetheless held that a mother who prostitutes her minor daughter, sometimes for drugs other times not, does not constitute aggravated circumstances, so the DHHS must make reasonable efforts to force the rape victim back into the arms of her panderer who arranged for the rapes to occur.

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The Child Protection Law must be liberally construed in favor of children and interpreted to prevent the evil of returning children home to abusive parents in the face of aggravated circumstances and to advance the ASFA's remedy of swift termination of parental rights of parents who subject their children to aggravated circumstances. Giving the words within the Child Protection Law in general, and those pertaining to aggravated circumstances in particular, the largest, the fullest, and most extensive meaning of which they are susceptible, the Act would clearly apply to a mother who prostitutes out her minor daughter to adult men. Applying the Child Protection Law in this manner makes the Act apply to more things or in more situations than would be the case under the Court of Appeals' more strict construction. Thus, strictly from the perspective of effectuating the liberal remedial purpose of the Child Protection Law, it is clear that the Court of Appeals' ruling is erroneous and, therefore, must be reversed.

II. Even assuming that the Michigan DHHS was required to make reasonable efforts to reunify non-custodial parent / respondent with her children, the DHHS's failure to make such efforts in this case was not plain error affecting respondent's substantial rights.

"[A]djudication errors raised after the trial court has terminated parental rights are reviewed for plain error." *In re Ferranti*, 504 Mich 1, 29 (2019). To satisfy the plain error standard, respondent "must establish that (1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected [her] substantial rights." *Id*. Additionally, "the error must have 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[] ...'" *Id*.

A. <u>No error occurred</u>.

For all of the reasons set forth more fully in Argument I, no error occurred in the trial court because the presence of aggravated circumstances relieved the DHHS from the general requirement that reasonable efforts must generally be made to reunify children with their family prior to termination.

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B. <u>The error was not plain</u>.

Even assuming that reasonable efforts at reunification were required, the failure to provide such efforts was not plain, *i.e.*, clear or obvious. "A 'clear or obvious' error under the second prong is one that is not 'subject to reasonable dispute.'" *People v Randolph*, 502 Mich 1, 10 (2018). The Court of Appeals "acknowledge[d] the dearth of any published authority addressing the facts and question at issue, and … the conflicting unpublished authority on the matter."[22] *In re Barber/Espinoza*, p 8. The Court nevertheless concluded "that because our interpretation of MCL 722.638 is clearly provided by the statute's plain language and supported by a recent case from this Court, this is not an issue subject to a reasonable dispute." *Id*.

Again, for all of the reasons set forth in Argument I, the Court of Appeals' interpretation of MCL 722.638 is not "clearly provided by the statute's plain language" and, in fact, is quite contrary to the plain language of the applicable statutes. As set forth above, there are at least three different standards at issue, namely the "**subjected the child to**" standard of 42 USC 671(a)(15)(D)(i), MCL 712A.19a(2)(a), and MCR 3.965(C)(4); the "**has abused the child** … and the abuse included" standard of MCL 722.638(1)(a)(iii); and the "**suspected of placing the child at an unreasonable risk of harm** due to the parent's failure to take reasonable steps to intervene to eliminate that risk" standard of MCL 722.638(2). The parties and lower courts have not even been able to agree on which of these three standards are applicable to this case. For this reason alone, the Court of Appeals erred when it concluded that the alleged error here was plain, *i.e.*, clear or obvious, because the applicable standard was "clearly provided by the … plain language" of

[22] *In re Boyce*, unpublished opinion of the Court of Appeals, issued January 23, 2020 (Docket No. 348992), 2020 WL 402246; and *In re Bergren*, unpublished opinion of the Court of Appeals, issued June 3, 2021 (Docket No. 354767), 2021 WL 2285224. (*Boyce* and *Bergren* discussed at pp 5-8 of *Barber/Espinoza* slip op).

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MCL 722.638.

Likewise, the fact that the Court of Appeals' analysis was "supported by a recent case"[23] did not render the issue one that was not subject to reasonable dispute, especially where the case preferred by the Court of Appeals – *In re Bergren* – is an unpublished case that lacks any precedential value. "[W]e take it as well settled that an unpublished opinion of the Court of Appeals is of no precedential value …" *Stine v Contl Cas Co*, 419 Mich 89, 95 (1984). "Trial courts are not bound by decisions having no precedential value." *Id*. It is difficult to envision how a trial court could commit plain error when it is not bound by decisions having no precedential value. This is especially true where, sixteen months prior to the issuance of *In re Bergren*, the Court of Appeals reached the opposite conclusion in *In re Boyce*. If different panels of the Court of Appeals are unable to agree on an issue, the issue is clearly subject to reasonable dispute. In short, when there exist two conflicting unpublished Court of Appeals' opinions on a particular issue, it cannot be said that the issue is not subject to reasonable dispute, and some might say that such circumstances constitute the very definition of when an issue is in fact subject to reasonable dispute.

Upon incorrectly ruling that the issue was not subject to reasonable dispute, the Court of Appeals further erred when it ignored federal and state public policy as codified in federal and state law. "In identifying the boundaries of public policy, … the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Terrien v Zwit*, 467 Mich 56, 66–67 (2002).

Pursuant to the Rape Survivor Child Custody Act (RSCCA), 34 USCA 21301, *et seq*., and

[23] *Barber/Espinoza*, slip op, p 8.

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Michigan's implementing legislative responses thereto, both Congress and the Michigan Legislature have gone to great lengths to ensure that the law protects rape victims by enabling them to avoid contact with their rapists in cases where a child was conceived as a result of nonconsensual sexual penetration. MCL 722.1445(2) (mandating termination of rapists' parental rights to child conceived as a result of nonconsensual sexual penetration), MCL 722.25(2) (mandating that rapists be denied custody of child conceived as a result of nonconsensual sexual penetration); and MCL 722.27a(4) (mandating that rapists be denied parenting time with child conceived as a result of nonconsensual sexual penetration). See also *Blackman v Millward*, __ Mich App __; __ NW3d __; 2024 WL 4610314, pp 4-5 (2024).

Having gone to such lengths to provide such protections to rape victims, it would be anomalous indeed if Congress or the State of Michigan mandated that reasonable efforts be made to reunite child rape victims with the parents who arranged for nonconsensual sexual penetration of the child by prostituting their child. According to the Court of Appeals' ruling in this matter, not only does the State of Michigan mandate this bizarre outcome, but the State further requires that a child rape victim work together with her parent who arranged to have the child raped so that the child can be returned to the home of the parent who arranged for the child to be raped. Once reunited, the child rape victim will be forced to live with her prostituting parent and every day relive her grotesque nightmare until the child is old enough and able to move out of the home as an adult.

For the issue to have not been subject to reasonable dispute, the trial court would have had to ignore the well-established public policy to protect rape victims from compelled continued contact with those who subjected them to nonconsensual sexual penetration (not to mention the well-established policies regarding construing the Child Protection Law to safeguard the well-

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being of children). The Court of Appeals' opinion appears lost on the fact that attempting to force a child rape victim back into the arms of the parent who arranged to have the child raped under the guise of making reasonable efforts would itself constitute child abuse under Michigan's Child Protection Law. MCL 722.622(g) (defining "child abuse" as "harm or threatened harm to a child's … welfare that occurs through nonaccidental … mental injury … or maltreatment, by a parent, a legal guardian, any other person responsible for the child's health or welfare …") For this reason alone, the Court of Appeals' ruling that the DHHS is statutorily required to make reasonable efforts to reunite child rape victims with the parent who arranged for the child to be raped was clearly subject to reasonable dispute.

C. <u>Any error did not affect respondent's substantial rights</u>.

Even assuming for argument's sake that an error occurred and that it was plain, the error did not affect respondent's substantial rights. "Generally, an error affects substantial rights if it caused prejudice, *i.e.*, it affected the outcome of the proceedings." *In re Baham*, 331 Mich App 737, 745 (2020). See also *Mr Sunshine v Delta Coll Bd of Trustees*, 343 Mich App 597, 601 (2022) (cleaned up).

The Court of Appeals acknowledged that "respondent provide[d] no substantive argument that the outcome of this case was affected by the trial court's error, *i.e.*, that she would have successfully attained reunification if services were properly provided." *In re Barber/Espinoza*, p 9. That Court nevertheless concluded that the trial court's error prejudiced respondent because "it is unclear how an aggrieved respondent could establish outcome-determinative error concerning the denial of reunification services altogether …" *Id*. Regarding the difficulty to establish outcome-determinative error, the Court of Appeals conceded that it had "not found authority addressing the matter …" *Id*. Notwithstanding this fact and the fact of the material distinctions between the two

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cases, the Court of Appeals in *Barber/Espinoza* went to great lengths to bring its decision within the purview of this Court's ruling in *In re Ferranti*.

The Court of Appeals acknowledged that (1) "it is the adjudication that protects the parents' fundamental right to direct the care, custody, and control of their children," (2) that this Court's *Ferranti* decision "partially relied on the specific due-process protections provided in adjudication trials," and (3) that "[h]ere, the error took place before the adjudication, which was not tainted in any constitutional manner." *In re Barber/Espinoza*, p 10.[24]

Despite the material distinctions between the instant case and *Ferranti*, the Court of Appeals leapt to the unsupported conclusion that the DHHS's failure to provide reunification services "impaired respondent's fundamental right to direct the care, custody, and control over her children in the first instance, and it unquestionably affected the very framework within which this case progressed and undermined the foundation of the rest of the proceedings." *In re Barber/Espinoza*, p 10. The Court of Appeals speculated that "*there is simply no way to know how*

[24] The LGAL and the DHHS aptly note how the Court of Appeals' holding in this regard "suggests a fundamental misunderstanding about the process of child protective proceedings and constitutes a misapplication of the law. LGAL/DHHS supplemental brief, pp 12-13 of 35. What is more, the alleged "error" the Court of Appeals focuses upon here is an unpreserved error from the preliminary hearing stage of the proceedings, that was neither objected to nor raised by respondent in the trial court, nor adequately presented to or briefed in the Court of Appeals. Indeed, respondent's claimed "error" concerning notice of appellate rights is a cursory and waived/abandoned two paragraph, one-page "argument," in which she cites an inapplicable court rule, MCR 3.971(B)(6)-(8) only. Appellant Crystal Bowman's (Espinoza's) brief filed in the Court of Appeals March 18, 2024, p 8. Respondent stated as the issue: the trial court's failing to advise her of appeal rights "is clear error initially prejudicing the Mother *by reinforcing her belief* that the Court was not interested in being fair or objective as to her legal position, ..." *Id.*, emphasis added. Respondent's "argument" on this alleged error claims: "*Being unaware that she could have challenged the factual assertion by the Petitioner* that 'aggravated circumstances' existed caused her to suffer an unsubstantiated termination of her parental rights …" *Id.*, emphasis added. But, of course, respondent well understood she "could have challenged the factual assertion(s)" made by the DHHS – as she did in the trial court when she fully presented her own case and challenged the DHHS's proofs with assistance of court-appointed counsel.

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termination may have proceeded differently when respondent was improperly denied any opportunity to rectify her situation and demonstrate a willingness and ability to parent notwithstanding her earlier concerning conduct." *Id*. (emphasis added). Relying on this Court's distinguishable ruling in *Ferranti*, the Court of Appeals erroneously concluded "that the trial court's error was prejudicial and affected respondent's substantial rights." *Id*.

Notwithstanding the obvious lengths to which the Court of Appeals went in an effort to link the cases, the rationale for this Court's *Ferranti* opinion has absolutely no application to the present case. The respondents in *Ferranti* entered a plea at the adjudication phase, but "the court did not advise them that they were waiving any rights" "[n]or did the court advise them of the consequences of their pleas, as required by our court rules." *In re Ferranti*, 504 Mich at 9-10 (citing MCR 3.971). Nor did the trial court advise the *Ferranti* respondents that they could appeal the court's decision to take jurisdiction over their child. *Id*.

This Court premised its decision in *Ferranti* on the fact that "[t]he respondents have a fundamental right to direct the care, custody, and control," that "the Due Process Clause of the Fourteenth Amendment requires that, for a plea to constitute an effective waiver of a fundamental right, the plea must be voluntary and knowing," and that MCR 3.971 "reflect this due-process guarantee." *Id*. at 21. This Court concluded that "[t]hese constitutional deprivations affected the very framework within which respondents' case proceeded," so the error was plain, and it affected the respondents' substantial rights. *Id*. at 30-31.

In contrast, in *Barber/Espinoza*, respondent was afforded an adjudicative hearing [trial], and this Court acknowledged in *Ferranti*, that "adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *In re Ferranti*, 504 Mich at 15-16. See also *In re Sanders*, 495 Mich 394, 417 (2014) ("The procedures used in adjudicative hearings protect

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the parents from the risk of erroneous deprivation of their parental rights.") Consequently, "after the adjudication phase, there is 'no constitutional basis on which respondent may prevent the court's interference with her control of her children …'" *In re Deng*, 314 Mich App 615, 626-27 (2016). And, again, the Court of Appeals itself held that the adjudication "*was not tainted in any constitutional manner*." *In re Barber/Espinoza*, p 10 (emphasis added).

Having received an adjudicative hearing in the present case, respondent's constitutional right to parent her minor children were fully protected. To the extent respondent may claim that reunification services are constitutionally required, she is wrong. "The entitlement to reunification services is a statutory one and does not evolve from a constitutional right." *In re Phillips*, 806 A2d 616, 619 (Del Fam Ct, 2002). Because "[r]eunification services are a gratuity provided to parents by the Legislature, … appellants thus have no constitutional right to receive these services." *State in Interest of NR*, 967 P2d 951, 955-56 (Utah Ct App, 1998) (**Appendix F**). See also *Adoption of Riahleigh M*, 202 A3d 1174, 1183 (Me, 2019) (**Appendix G**); *Renee J v Superior Court*, 26 Cal 4th 735, 750; 28 P3d 876 (2001) (**Appendix H**); *State in Interest of NR, supra*, 967 P2d at 955–56 ("Reunification services are a gratuity provided to parents by the Legislature, and appellants thus have no constitutional right to receive these services."); *In re Baby Boy H*, 63 Cal App 4th 470, 475; 73 Cal Rptr 2d 793 (1998) (**Appendix I**) ("Preliminarily, appellant appears to assume she is constitutionally entitled to reunification services. However, such services are a 'benefit.' There is no constitutional 'entitlement' to these services.") Virtually every jurisdiction to have addressed such an argument has rejected it out of hand.

This Court has made clear that "[c]ertainly, a party can waive its statutory rights." *In re Receivership of 11910 S Francis Rd (Price v Kosmalski)*, 492 Mich 208, 228 (2012). See also *Staple v Staple*, 241 Mich App 562, 564 (2000). This is precisely what Respondent did in this case

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where **she made no demand for services in the trial court** when she could receive them but, rather, waited to demand such services only on appeal (and then, only in such a cursory manner that her argument could have been deemed waived or abandoned for insufficient briefing. *Southfield Educ Ass'n v Bd of Educ of Southfield Pub Schs*, 320 Mich App 353, 379 (2017)

The Court of Appeals has previously held that a respondent's "fail[ure] to object or indicate that the services provided to them were somehow inadequate" constitutes a "fail[ure] to preserve this issue." *In re Frey*, 297 Mich App 242, 247 (2012). "Respondent may not assign as error on appeal something that she deemed proper in the lower court because allowing her to do so would permit respondent to harbor error as an appellate parachute." *In re Hudson*, 294 Mich App 261, 264 (2011). In short, the violation of the parents' fundamental constitutional right to parent their child that occurred in *Ferranti* is simply not present in this case. Respondent received all the process she was due when she received a full adjudicative hearing. *Sanders*, 495 Mich at 417.

The Court of Appeals in this case further erred when it likened the deprivation of reunification services to structural errors that are not amenable to a harmless error analysis. "Only structural due-process errors mandate automatic reversal; otherwise, due-process errors are reviewed for harmlessness." *In re Contempt of Pavlos-Hackney*, 343 Mich App 642, 666 (2022). "[P]reserved structural errors are a limited class of constitutional errors that are not subject to harmless-error analysis, but are instead subject to automatic reversal." *People v King*, 512 Mich 1, 10 (2023) (citations omitted). "[T]he defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *King*, 512 Mich at 10 n 5. "Structural errors are errors that affect the 'entire conduct of the proceeding from beginning to end.'" *Greer v United States*, 593 US 503, 513 (2021). Structural errors are considered "highly exceptional" and include the "denial of counsel of choice, denial of

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self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt." *Id.*

In *Ferranti*, although this Court did not expressly cite the body of case law regarding structural errors, the Court did employ the language used for such errors. *Cf. In re Ferranti*, 504 Mich at 30-31 (holding that pleas that were not knowingly, understandingly, and voluntarily made constituted plain error where they "affected the very framework within which respondents' case proceeded.") *with King*, 512 Mich at 10 n 5 ("[T]he defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.")

In *Ferranti*, this Court found that "the invalid pleas relieved the [DHHS] of its burden to prove that the respondents were unfit at a jury trial, with all of its due-process protections" such as a jury trial, application of the rules of evidence, and the burden of proof being placed on DHHS. *In re Ferranti*, 504 Mich at 30. In stark contrast, respondent here received an adjudication hearing and the plethora of procedural protections attendant thereto. Thus, unlike in *Ferranti*, terminating respondent's rights at the initial disposition rather than providing respondent services did not affect the very framework within which respondent's case proceeded. This is particularly true where, as noted above, respondent has no legitimate constitutional claim to receive services.

Assuming again merely for argument's sake that respondent was improperly denied statutory services to which she was entitled, it is not clear how respondent could establish outcome-determinative error concerning the denial of reunification services. If respondent had previously benefited from services (which she failed to do in her many prior CPS cases),[25] it could possibly

[25] The DHHS's initial petition listed respondent's CPS history as:
a. 2/14/14-CAT II Maltreatment, Physical Abuse, Substance Abuse, Threatened Harm, Lenawee County

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help to establish outcome-determinative error concerning the denial of reunification services. However, when the DHHS provided various services to respondent during prior cases, she failed to benefit from them. *In re Gazella*, 264 Mich App 668 (2005) (respondent parent must show benefit from services). See, *e.g.*, LGAL Application for Leave to Appeal, p 9 (citing TR 2/17/23, p 16; TR 12/08/23, pp 62-63 (Ms. Kelly detailed how Ms. Espinoza had been offered services in the past, including drug screens, Community Mental Health involvement, attempts to get Ms. Espinoza in touch with Hands Across the Water, a wrap-around program, Ms. Espinoza was offered parenting services, but she does not cooperate, and she had not benefited from any prior services.)

As the Court of Appeals itself acknowledged, respondent is no stranger to child protection proceedings, and "termination may well ultimately be warranted" in light of "not only the sexual-abuse allegations, but also respondent's suicide attempt, her neglect of [her daughter's] physical and mental health needs, her criminal history, her drug abuse, the trauma respondent caused ME [her son], respondent's refusal to cooperate with Children's Protective Services (CPS), domestic violence between respondent and her spouse, and respondent's lifestyle." *In re Barber/Espinoza*, p 10, n 7. "While the DH[H]S has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248 (2012). The lack of services in this case was not outcome-determinative in light of respondent's habitual failure to

b. 3/7 /18-CAT IV Failure to Protect, Improper Supervision, Lenawee County
c. 10/5/19-CAT IV Physical Abuse, Lenawee County
d. 1/30/20-CAT IV Improper Supervision, Medical Neglect, Lenawee County
e. 4/7 /21-CAT IV Physical Abuse, Lenawee County
f. 5/18/21-CAT II Improper Supervision, Lenawee County
g. 11/8/21-CAT II Improper Supervision, Lenawee County. Joint Appendix, Appendix 7, p 2.

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benefit from past services. See *In re MJC*, __ Mich App __; 2023 WL 8101267, p 5 (2023) (holding that failure to provide updated service plan was not plain error because it did not affect the outcome of the proceedings since "respondent-father was chronically noncompliant and wholly failed to benefit from the services offered," so he "cannot establish that he would have successfully attained reunification if a proper case service plan had been prepared and regularly updated.").[26]

The trial court's ruling clearly satisfied all requirements of MCL 712A.19b(5) and MCL 712A.19b(3)(b)(i)-(ii). See Appendix 5 (Bench Trial Transcript (12-28-2023), pp 98-109), LGAL/DHHS Joint Appendix. For this reason, not only were reunification efforts not required in this case but the trial court was mandated by law to order that no reunification efforts be made. MCL 712A.19b(5).

D. Any error did not seriously affect the fairness, integrity or public reputation of judicial proceedings.

Lastly, the failure to provide respondent services in this case did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. As noted, respondent here received a full and fair adjudicative hearing and thus receive all the process that she was due.

What *could* fairly be viewed as having "seriously affected the fairness, integrity, or public reputation of judicial proceedings," however, is this the Court of Appeals' willingness to not only consider and decide unpreserved, cursory, inadequately briefed, waived, and abandoned issues, but to create new and non-briefed issues, all in favor of respondent. The Court of Appeals

[26] As noted above and in the LGAL Application for Leave to Appeal, statement of facts section, two DHHS witnesses testified in this matter about respondent having been offered services in previous cases, and how she failed to benefit from same. Further, as the LGAL's Application pointed out: there were many ways in which respondent could easily demonstrated her willingness to change and to try to safely parent these children, including refraining from domestic violence, suicide attempts, drug use and overdoses, and including attending NA meetings and/or seeking out counseling for anger management and parenting skills, among others, none of which she did. LGAL/DHHS Joint Appendix, Appendix 10 and Appendix 17 (LGAL reply brief).

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dispensed with its required impartiality and advocated for respondent to the detriment of the children. For the Court of Appeals to advocate for a party is unfair to the traumatized children at the heart of this child protective proceeding, and such partiality adversely affects and undermines the integrity of the proceedings to an immense extent. If *Amici* or any child welfare attorney were to poll Michigan residents about whether a mother who has prostituted her little girl in exchange for drugs should be "reunified" with that child victim of sexual abuse, *Amici* believe a high percentage would adamantly reject that disturbing notion. The Michigan citizenry – to the extent they are aware of this Court of Appeals' decision – would likely, and understandably, be concerned about the integrity of these judicial proceedings in the Court of Appeals.

Similarly, the "fairness, integrity, or public reputation of judicial proceedings" are very seriously affected where, as here, the **Court of Appeals itself acknowledged** that the courageous **child witness was credible and that the child was sexually abused and "sex trafficked"** – at times, as respondent mother "observed" the assaults – yet that Court reversed the well-reasoned termination decision and remanded for the trial court to reunify the child victim with the panderer mother. Such an outcome begs the question: where is the respect for this child's bravery, her credibility, and her eminently reasonable and clearly stated preference both to not see her mother and to ask the court to protect herself and her little brother from her mother?

Two Michigan children have been adversely affected by the Court of Appeals' outlier and unsupported decision. The lives of these two Michigan children remain in limbo due to the Court of Appeals' erroneous decision. As the LGAL/DHHS supplemental brief summarized, the *Barber/Espinoza* decision stands to impact the lives, safety, and well-being of many other Michigan children, as decision after decision issues from that Court citing to *Barber/Espinoza*.

This Court is urged to reverse the Court of Appeals' dangerous precedent, to ensure that

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Michigan appellate courts return to a baseline of taking child sexual abuse seriously, and to avoid future erroneous decisions which elevate arcane legal distinctions over the well-being of real children.

III. No plain error existed by the trial court failing to advise respondent of appellate rights per MCR 3.965(B)(15), where the plain language of that rule makes it applicable to a "removal" from a parent, and where there was no "removal" of the children from the non-custodial respondent's care or custody.

The fifth question propounded by this Court is whether the failure to advise respondent of her appellate rights constitutes plain error requiring reversal. This question is very simply addressed by the language of the court rule itself. MCR 3.965(B)(15) provides:

> (15) *If the court orders removal of the child from a parent's care or custody*, the court shall advise the parent, guardian, or legal custodian of the right to appeal that action. MCR 3.965(B)(15).

In the present case, as detailed above, there was no "removal" of the children from respondent. *In re AJR*, 342 Mich App 1, 6-7 (2022) (Court of Appeals considering and defining the term "remove/removal" as: "…a child is removed from a parent's care and custody when he or she is taken from that parent's residence and placed in a different residence." *Id*., citing *In re Detmer*, 321 Mich App 49, 64 (2017) where the Court held that the term "removed" means: "the instance when a court orders that a child be physically transferred or moved from the care and residence of a parent or … custodian to the care or residence of some other person or institution." *AJR*, 342 Mich App at 7, n 3, citing *Detmer*, 321 Mich App at 64.

For approximately two years prior to the child protective petition being filed, the children had been residing full-time with their non-respondent father and their stepmother. Joint Supplemental Brief of LGAL/DHHS, pp 1, 27, 29-30. Thus, the children were not "removed" from respondent's care, custody, or home, and MCR 3.965(B)(15) simply does not apply. Thus, any "failure" of the trial court to advise respondent of any rights based in an inapplicable court rule,

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then, cannot and does not constitute plain error.

IV. The Department satisfied the requirements of MCL 722.638(3), when it utilized its discretion to seek termination of the respondent's parental rights at initial disposition with the concurrence of the LGAL.

Due to word limitations, *Amici* do not provide additional briefing to answer questions 3 and 4 from the Michigan Supreme Court's January 24, 2025, Order. *Amici* concur in, fully agree with, and adopt by reference, the answers and briefing provided by the LGAL and the DHHS in their joint supplemental brief on these two questions. *Amici* urge this Court to reverse the Court of Appeals' decision and to affirm the trial court's decision terminating parental rights on the additional basis of MCL 722.638(3).

V. Because the Department satisfied the requirements of MCL 722.638(3), termination of the respondent's parental rights should also be affirmed under that provision because the trial court's findings under MCL 712A.19b(3) and (5) were appropriate and remain uncontested.

Due to word limitations, *Amici* do not provide additional briefing to answer questions 3 and 4 from the Michigan Supreme Court's January 24, 2025, Order. *Amici* concur in, fully agree with, and adopt by reference, the answers and briefing provided by the LGAL and the DHHS in their joint supplemental brief on these two questions. *Amici* urge this Court to reverse the Court of Appeals' decision and to affirm the trial court's decision terminating parental rights on the additional basis of MCL 722.638(3).

RELIEF

WHEREFORE, *Amici curiae* respectfully request that this Honorable Court issue a peremptory order REVERSING and VACATING the Court of Appeals' erroneous and harmful published decision in this matter and AFFIRM the trial court's well-supported and well-reasoned decision terminating respondent's parental rights. Alternatively, *Amici* ask this Court to grant the LGAL's Application for Leave to Appeal, and grant any other relief the Court deems appropriate.

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Respectfully submitted,
***Amicus* Michigan Probate Judges Association**

/s/ Cheryl E. Lohmeyer

Dated: April 8, 2025* By: Hon. Cheryl E. Lohmeyer (P55710)
President-Elect, Michigan Probate Judges Association

Respectfully submitted,
***Amicus* Coalition of Child Welfare Appellate Attorneys**

/s/ Paula A. Aylward

Dated: April 8, 2025* By: Paula A. Aylward (P60757)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, based upon the word count function of the word-processing system used to prepare *Amici Curiae* Joint Brief of Michigan Probate Judges Association and Coalition of Child Welfare Appellate Attorneys, there are 15,750 countable words contained within those portions of *Amici* Brief subject to the type-volume limitation.

Respectfully submitted,
***Amicus* Michigan Probate Judges Association**

/s/ Cheryl E. Lohmeyer

Dated: April 8, 2025* By: Hon. Cheryl E. Lohmeyer (P55710)
President-Elect, Michigan Probate Judges Association

Respectfully submitted,
***Amicus* Coalition of Child Welfare Appellate Attorneys**

/s/ Paula A. Aylward

Dated: April 8, 2025* By: Paula A. Aylward (P60757)

**** Corrected Amici Brief filed April 8, 2025, to add MCR 7.312(H)(5) reference. ****