STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE BABY BOY DOE,

Supreme Court No. 163807

COA Docket No. 353796

Kalamazoo County Circuit Court
Case No. 2018-6540-NB

Filed under AO 2019-6

ADOPTIVE PARENTS' SUPPLEMENTAL BRIEF

Liisa R. Speaker (P65728)

Speaker Law Firm, PLLC
819 N Washington Ave.
Lansing, MI 48906
(517) 482-8933
lspeaker@speakerlaw.com

Counsel for Cross-Appellants

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Statutes and Court Rules:

INTRODUCTION

This case is not an academic exercise. It will affect the lives of real people who have developed a real and significant parent-child bond. Should this Court allow the Court of Appeals' decision to stand, this case will have a chilling effect on all adoptions in this State, but especially in Safe Delivery of Newborn cases where the child is in need of loving caretakers after being surrendered by a mother in distress. It will not only have a chilling effect on prospective adoptive parents whose worst nightmare is that a court could jeopardize a finalized adoption years later – and do so without notice to them or their participation – but it will also have a chilling effect on distressed mothers who feel they have no other choice but to surrender their newborn into the safe hands of a hospital or emergency service provider. This Court should vacate the Court of Appeals' decision, for the many reasons explained in Adoptive Parents' Cross-Application and Reply to Answer to Cross-Application, plus for the answers below to the questions this Court posed in its order granting oral argument.

First, Non-Surrendering parent did not comply with the Safe Delivery of Newborns Law when he filed a divorce complaint in Ottawa County requesting custody and requesting DNA testing to determine whether he is the biological father of the child. The Act requires there to be both a newborn and a surrender, and there is no authority to support a prebirth custody petition under the Safe Delivery of Newborns Law. Moreover, the Legislature could have permitted a prebirth petition, like it has in another statutory scheme, but it chose not to. Even if this Court allows a prebirth petition under the Safe Delivery of Newborns Law, there is no way it could qualify as being filed in accordance with the Act when the Safe Delivery Court was not informed about the custody request – as it could have been had the Divorce Court followed the required statutory language of the Safe Delivery of Newborn Law, which mandated the Divorce Court to not only locate the Safe Delivery Court but to transfer the custody case to the Safe Delivery Court. Without these critical steps. While Non-Surrendering Parent's divorce filings informed the Divorce Court of the anticipated safe surrender and a statutory cite, he did not include in his requested relief for the judge to locate the Safe Delivery case and transfer his custody request to that other court. All of these steps could have been performed before Non-

Surrendering Parent's rights were terminated. His so-called custody request cannot satisfy the Safe Delivery of Newborns Law.

Second, the Non-Surrendering Parent's constitutional rights to this child have not only long-since passed, but his rights are subservient to the constitutional rights of the Child and the Adoptive Parents. Non-Surrendering Parent did have constitutional rights up until the time had passed to appeal the termination of parental rights. He did not appeal. But even before the appeal period had passed, his rights were lesser than the constitutional rights and these Adoptive Parents and Child held in their established custodial relationship with each other. As the United States Supreme Court has stated on multiple occasions, the constitutional right of a biological father stems from his relationship with his children and not biology alone. Not only is it unknown whether Non-Surrendering Parent is the biological father (because he came to the Safe Delivery Court so late in the process and has not had DNA testing required under the Act), but the Adoptive Parents' constitutional rights fully attached the moment their adoption was finalized. The Adoptive Parents are the child's parents; they are the only parents with the established relationship with this child and to whom the liberty interest outlined in *Troxel v Granville* apply. Theirs is a higher constitutional right than a Non-Surrendering Parent who failed to ensure that the Divorce Court located the Safe Delivery case and transfer his request for custody to the Safe Delivery Court.

QUESTION PRESENTED

1. Did the Non-Surrendering Parent's prebirth divorce action where he made a contingent request for custody (depending on the outcome of a DNA test) satisfy the Safe Delivery of Newborns Law, when that divorce case was filed both before the child's birth and before the child's surrender, and even if it qualifies as a custody petition, when Non-Surrendering Parent took no action to move the Divorce Court to locate the safe surrender case and transfer the custody request to the safe surrender court, even though he cited the Safe Delivery of Newborns Law in his divorce complaint and that Law requires the Divorce Court to locate the safe surrender case and transfer the custody request to the Safe Delivery Court?

Adoptive Parents Answer: No.

2. Does the Safe Delivery of Newborns Law adequately protect the rights of a Non-Surrendering Parent who has received notice by publication (because the child placing agency had no identifying information to locate him after checking various documents and registries), and when the Non-Surrendering Parent has no established relationship with the Child, as recognized by the United States Supreme Court in *Lehr v Robertson*, and its progeny?

   Adoptive Parents Answer: Yes.

STATEMENT OF FACTS

Adoptive Parents will not restate the facts here, but instead ask this Court to refer to the Statement of Facts contained in their Cross-Application for Leave to Appeal.

ARGUMENT

I. The Non-Surrendering Parent's Divorce did not qualify as a petition for custody under the Safe Delivery of Newborns Law.

A. A Prebirth custody petition in a divorce case does not satisfy the requirement of a petition for custody under the Safe Delivery of Newborns Law.

It is axiomatic that the custody petition in the divorce action here could NOT have been filed under Safe Delivery of Newborns Law if the Safe Delivery court did not know about it. But there are several other reasons why Non-Surrendering Parent's divorce case did not qualify as a petition custody under the Safe Delivery of Newborns Law.

First, the Michigan Court of Appeals recently issued a published opinion that explained the significance of the Legislature's use of the term "child" rather than "fetus" in the Probate Code. *In re Simonetta, Minor*, ___ Mich

App ___ (Docket 357909, issued February 24, 2022). The *Simonetta* decision sheds light on this Court's first question and should lead this Court to the conclusion that the prebirth custody petition did not and cannot satisfy the Safe Delivery of Newborns Law.

In *Simonetta*, a mother gave birth to a child who tested positive for opiates and THC, and the mother further admitted to using marijuana and Norco prior to the child's birth. *Id.* slip op at 1. Shortly after her birth, DHHS filed a petition to terminate the mother's parental rights at the initial disposition on the ground that aggravated circumstances were present. *Id.* slip op at 1. When aggravated circumstances are present, DHHS does not have to make reasonable efforts to reunify the parent and child. MCL 712A.19a. DHHS alleged that taking controlled substances while pregnant amounted to "severe physical abuse" sufficient to terminate the mother's parental rights without offering reasonable efforts toward reunification. *Id.* slip op at 2. During the adjudication trial, a pediatrician confirmed that the child had prebirth exposure to opioids and THC, but also testified that the baby did not require medication or medical intervention of any kind because her withdrawal scores were relatively low. *Id.* slip op at 2. The pediatrician also testified generally that narcotic exposure in utero could lead to developmental delays. *Id.* slip op at 2. The trial court terminated the mother's parental rights without making a specific finding that aggravated circumstances existed.

On initial appeal, the Court of Appeals upheld the trial court's determination because "respondent's consumption of marijuana and opiates while pregnant . . . resulted in a life-threatening injury." *Id.* slip op at 2. The mother appealed to this Court, which vacated the Court of Appeals' decision and remanded to the trial court to either order DHHS to provide services or to make factual findings that articulated by clear and convincing evidence that aggravated circumstances were present. *Id.* slip op at 2.

On remand, the trial court again found aggravated circumstances because the mother "abused [the baby] by ingesting multiple opiates and THC during her pregnancy" and that the withdrawal and potential complications constituted severe physical abuse. *Id.* slip op at 3. The mother once again appealed to the Court of Appeals, which then vacated the trial court's order terminating parental rights. *Id.* slip op at 1. The Court of

Appeals held that the mother's drug use during pregnancy did not qualify as an "aggravated circumstance" under the Juvenile Code. *Id.* slip op at 4. The Court of Appeals in *Simonetta* reasoned that a fetus is not a "child" and there was no evidence to allow a finding of "severe physical abuse" to warrant termination without reasonable efforts. *Id.* slip op at 4-6.

The Court of Appeals went on to explain that under both the Child Protection Laws and the Probate Code, a "child" is defined as "an individual less than 18 years of age." MCL 722.622(f); MCL 710.22(j). *Id.* slip op at 5. The Court of Appeals in *Simonetta* relied on *People v Jones*, 317 Mich App 416 (2016), which held that criminal child abuse does not extend to fetuses because the definition of a "child" expressly omits the term "fetus." *Id.* at 424-426. The Court of Appeals observed from *Jones* that the Legislature has criminalized conduct that harms fetuses, but the Legislature consistently has declined to expand the definition of "child" to include a fetus. Because the term "fetus" has been used in other laws, the Court of Appeals determined that the omission of a fetus in the Probate Court's definition of a "child" was intentional. The Court of Appeals then held that the express exclusion of a fetus from the definition of a "child" meant that drug use during pregnancy does not mean that a mother will abuse her child after birth, such that aggravated circumstances to support termination of parental rights without reasonable efforts did not exist in *Simonetta*.

Like the Juvenile Code at issue in *Simonetta*, the Safe Delivery of Newborns Law also appears in the Probate Code. It is even more compelling here because the statute at issue explicitly applies to newborns. According to the Safe Delivery of Newborns Law, a "newborn" is defined as "a child who a physician reasonably believes to be not more than 72 hours old." MCL 712.1(k). By its very definition, then, the Legislature could not have intended a prebirth request for custody to satisfy the Safe Delivery of Newborns Law. Indeed, the provision regarding a request for custody specifically states that "an individual claiming to be the nonsurrendering parent **of that newborn** may file a petition with the court for custody." MCL 712.10(1). The petition for custody of a newborn actually requires a child to be born to satisfy the statute.

Second, a review of other statutes involving children demonstrates that the reference to a child or newborn does not include a fetus unless the

Legislature explicitly says so. For example, under the Child Custody Act, the definition of "child" is not broad enough to encompass an unborn child. The Child Custody Act defines "child" as follows:

> [A] minor child and children. Subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, for purposes of providing support, child includes a child and children who have reached 18 years of age.

MCL 722.22(d). It is not even clear that Non-Surrendering Parent was permitted to file a "DM" case prebirth!

The Acknowledgment of Parentage Act, defines a "child" as "a child conceived and born to a woman." MCL 722.1002 (emphasis added). Thus, like the Safe Delivery of Newborns Law, the Acknowledgment of Parentage Act only applies after a child is born. That Act goes on to state that "The child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father as a child born or conceived during a marriage and shall have the identical status, rights, and duties of a child born in lawful wedlock effective from birth." MCL 722.1004 (emphasis added).

The Genetic Parentage Act only applies to a "child born out of wedlock" which is defined as a child both "conceived and born." MCL 722. 1463(b) (emphasis added). That Act only allows a man to pursue genetic testing to establish paternity after the child is born. MCL 722.1467.

Likewise, the Adoption Code defines a "child" as "an individual less than 18 years of age." MCL 710.22(j). The Adoption Code requires a child to have been born in order to file an adoption petition. MCL 710.24(4)(a) (requiring the adoption petition to identify the date and place of birth of the adoptee).

These various Acts demonstrate that the Legislature identifies when a court filing occurs post-birth, based on the language selected the Legislature, and particularly through their definitions. Here, the Legislature chose to refer to a "newborn," which requires that a child have been born. But not only that, but the Legislature also required the newborn to have been surrendered. MCL 712.10(1). Thus, any so-called petition for custody

filed before the birth or even before the surrender does not qualify as a petition for custody under the Safe Delivery of Newborns Law. The Non-Surrendering Parent's prebirth divorce case in Ottawa County did not count as a custody petition under the Safe Delivery of Newborns Laws, and the Safe Delivery Court did exactly what it should have when Non-Surrendering Parent failed to file a petition for custody under the Act – it terminated the rights of the Non-Surrendering Parent. MCL 712.7. The Safe Delivery Court made findings by the preponderance of the evidence that the child placing agency made "reasonable efforts to locate the nonsurrendering parent," the Non-Surrendering Parent properly received notice by publication, and no custody petition was filed under the Act. (09/28/18 Order). Based on these findings, the Safe Delivery Court can then terminate parental rights. MCL 712.17(5).

Third, in contrast to the above statutes, other statutory schemes relevant to children do allow prebirth petitions – as specifically identified by the Legislature. The Paternity Act explicitly permits the father to file a prebirth paternity petition. The Paternity Act lays out the following:

> An action under this act **may be commenced during the pregnancy** of the child's mother or at any time before the child reaches 18 years of age.

MCL 722.714(3) (emphasis added). Although the Safe Delivery of Newborns Law (2000), the Child Custody Act (1970), the Acknowledgment of Paternity Act (1996), and the Genetic Parentage Act (2015) all came after the Paternity Act (1956), these later Acts do not include any such language as the Paternity Act that would allow prebirth filings.

As in these other statutory schemes, in enacting the Safe Delivery of Newborns Law, the "Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). The Legislature is also presumed to act with knowledge of judicial statutory interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991).

Thus, in enacting the Safe Delivery of Newborn Laws in 2000, the Legislature was aware that other statutes related to children either did or

did not include prebirth provisions. Had the Legislature intended the Safe Delivery of Newborns Law to encompass newborns prebirth, it would have said so – and specifically, it would have so specified in MCL 712.10 when it allowed a nonsurrendering parent to file a petition for custody. The Legislature chose not to, and this Court should not disrupt the Legislature's choices here by allowing Non-Surrendering Parent's prebirth divorce case to overturn the legitimate decision of the Safe Delivery Court.

B. Even if a prebirth petition is allowed, the Non-Surrendering Parent's custody petition in the divorce case still does not qualify as being filed under the Safe Delivery of Newborns Law.

Yet even if his divorce case qualified as a petition for custody under the Safe Delivery of Newborns Law, it is undisputed that the Safe Delivery Court did not know about the divorce case. How can the Court of Appeals (or this Court) say the Safe Delivery Court erred and vacate its decision based on a filing it did not know about? Moreover, the only court that did know about both the divorce case and the safe delivery case was the Divorce Court in Ottawa County. And it was that Divorce Court who had the obligation to locate the Safe Delivery case and transfer the custody request to the Safe Delivery Court. MCL 712.10(2). The Legislature explicitly instructed that if the court where the custody petition is filed (here, the Divorce Court) is not the same court who issued the order placing the newborn (here, the Safe Delivery Court), then the former "**shall locate** and contact the court that issued the order and **shall transfer** the proceedings to that court." MCL 712.10(2) (emphasis added). The Divorce Court wholly failed to meet its obligations under the Safe Delivery of Newborns Law. The Court of Appeals was wrong to overturn the Safe Delivery Court's decision when the statutory violations occurred at the hands of the Divorce Court.

But what is worse is the inaction of the Non-Surrendering Parent. Although the Non-Surrendering Parent informed the Divorce Court about the safe surrender, he did not include a request for relief asking the Divorce Court to locate the safe delivery case and transfer the custody request to the Safe Delivery Court. Instead, his request for relief in the complaint and ex

parte motion included the following: that "the Court order that DNA testing be performed on the child upon its birth in order to establish paternity," and "that Plaintiff be granted sole physical custody and legal custody of the unborn child pending results of the DNA testing." (08/08/18 Complaint and Ex Parte Motion, p. 4). Nor did the Non-Surrendering Parent file a motion to request the Divorce Court to locate the safe delivery case and transfer his custody request to the Safe Delivery Court. Had he filed that motion, the issues could not have been ignored or overlooked by the Divorce Court. Instead, Non-Surrendering Parent focused on pursuing Surrendering Parent – by obtaining an ex parte order, by sending her a demand letter, and by filing a motion to show cause her. Nor did Non-Surrendering Parent file a separate action using the "NB" code, which also would have immediately alerted the judge of the need to locate the safe delivery case filed by the child placing agency and to transfer the custody request to that other court. SCAO even has created form called "Petition of Parent for Custody of Surrendered Newborn" for Non-Surrendering Parent to easily accomplish that task. (Form CCFD 03, attached in Appendix).

Had the Divorce Court done what it was supposed to do, it would have and could have started to locate the safe delivery case on any of the following dates:

- August 8, 2018, the day the divorce complaint was filed – which identified that Non-Surrendering Parent anticipated that Surrendering Parent would surrender the newborn under the Safe Delivery of Newborns Law;

- August 8, 2018, the day an ex parte motion was filed – which further requested DNA testing as the Non-Surrendering Parent was not confident that the child was biologically related to him and that he did not know where the mother was;

- August 10, 2018, the day the Divorce Court granted an ex parte order – which the Divorce Court signed after reviewing the divorce complaint and ex parte motion;

- September 11, 2018, the day the Non-Surrendering Parent filed a motion to show cause the Surrendering Parent because she had not complied with ex parte order that had been served on her on August

30, 2018 – where the Non-Surrendering Parent once again informed the Divorce Court that he believed the mother had surrendered the newborn;

- September, 21, 2018, the day the Divorce Court issued an ex parte temporary custody order after Surrendering Parent failed to appear in court, and also the day the Divorce Court issued a Uniform Child Support Order -- which plainly stated that the whereabout of the child was unknown, but that he had been born on August 9, 2018 and had been surrendered under the Safe Delivery of Newborns Law.

Even though the safe delivery case was not commenced until August 15, 2018, a communication from the Divorce Court would have put any other court on notice of an existing or anticipated safe delivery case, and enable the Safe Delivery Court to then inform the Divorce Court if a safe delivery case was filed. Of course, this prebirth search for a safe delivery case would not be an issue here had Non-Surrendering Parent waited for the child to be born before filing his divorce action.

Yet even though the Divorce Court reviewed pleadings and issued orders that demonstrated that the Divorce Court was aware of a safe delivery -- all before the Non-Surrendering Parent's rights were terminated on September 28, 2018 – the Divorce Court sat on its hands and did nothing. Instead, it was not until February 25, 2019 when the Divorce Court made an offhanded comment about how it needed to locate the Safe Delivery Court – which comment was made after the Non-Surrendering Parent's rights had been terminated and after the adoption had been finalized. The Divorce Court stated:

> The statute indicates that -- and actually **I've got court personnel already checking with other courts** to find out if they have a Safe Deliveries action pending in their court. So essentially**, we need to identify where that is, and then send the custody part of this case to that court**, and we may get it back later, but that's what the statute says to me. So I -- in terms of identifying where there is a Safe Delivery of Newborns Law action pending, what court that is

> in, I think that the legal father should be entitled to that information so he can pursue custody there.

(02/25/19 Hearing, pp. 6-7) (emphasis added).

Had the Divorce Court done what it was supposed to do and located the Safe Delivery case back in August or September 2018, then the Divorce Court would have transferred the case to the Safe Delivery Court in Kalamazoo County, and then the following MUST occur in the Safe Delivery case:

> - Obtain a DNA test from the nonsurrendering parent. If he is not the newborn's biological father. MCL 712.11(1).
>
> - If there is a 99.9% probability that the nonsurrendering parent is the biological father, then the Safe Delivery Court must "consider, evaluate, and make findings on each factor of the newborn's best interest with the goal of achieving permanence for the newborn at the earliest possible date." MCL 712.11(3), 712.14(1); *Miller*, 322 Mich App at 505-506.
>
> -But if the DNA testing established that the nonsurrendering parent "could not be the parent of the newborn, the court shall dismiss the petition for custody." MCL 712.11(5); *Miller*, 322 Mich App at 505-506.
>
> - the Safe Delivery Court may also appoint a lawyer-guardian ad litem to represent the child's interests (which may be necessary because at that point the child is only in temporary placement with a prospective adoptive family). MCL 712.2(1).

The Safe Delivery of Newborns Law itemizes the best interest factors "a parent claiming parenthood of the newborn" must satisfy:

> (a) The love, affection, and other emotional ties existing between the newborn and the parent.
>
> (b) The parent's capacity to give the newborn love, affection, and guidance.

> (c) The parent's capacity and disposition to provide the newborn with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The permanence, as a family unit, of the existing or proposed custodial home.
>
> (e) The parent's moral fitness.
>
> (f) The parent's mental and physical health.
>
> (g) Whether the parent has a history of domestic violence.
>
> (h) If the parent is not the parent who surrendered the newborn, the opportunity the parent had to provide appropriate care and custody of the newborn before the newborn's birth or surrender.
>
> (i) Any other factor considered by the court to be relevant to the determination of the newborn's best interest.

MCL 712.14.

Of course, none of these steps happened in this Safe Delivery case because the Non-Surrendering Parent's custody petition was never transferred to the Safe Delivery Court. The bottom line is that the custody petition in the Ottawa County divorce case did not qualify under the Safe Delivery of Newborns Law, and even if it did, this Court cannot allow the Court of Appeals to overturn the legally correct decision of the Safe Delivery Court, based on what the Divorce Court failed to do.

But before this Court bases its decision on sympathy for Non-Surrendering Parent being the victim of the Divorce Court's nonfeasance, it should be remembered that Non-Surrendering Parent was behind the wheel in the divorce case, and he could have done more:

> -Non-Surrendering Parent could have contacted more than one hospital and one agency to find out where the surrender occurred and where the safe delivery case was filed. Instead, he only contacted

the 2 places that Surrendering Parent had told him about (Holland Hospital and Bethany Christian Services). Yet Surrendering Parent was the victim of his domestic assaults. It is no surprise that a pregnant mother in distress, where her husband has been convicted of assaulting her and who has a PPO against him, would not give birth in the hospital near her home nor contact the adoption agency that her abuser knew about.

-Non-Surrendering Parent could have filed a motion or requested a status conference to ensure that the Divorce Court was looking for the Safe Delivery Court, particularly since he knew that his wife planned to surrender the newborn, and her further was aware of the provisions of the Safe Delivery of Newborn Laws and that the timeline moves fast in those cases.

-Non-Surrendering Parent could have requested in his relief in the divorce complaint and ex parte motion that the Divorce Court locate the safe delivery case and transfer his custody request to the Safe Delivery Court.

-Non-Surrendering Parent could have initiated an NB case, which would have triggered the judge to search for the other safe delivery case.

Instead, Non-Surrendering Parent focused his efforts on obtaining ex parte orders against his domestically abused wife, who once again was not understandably unwilling to participate in the divorce proceedings. He obtained an ex parte order, and filed a motion to show cause her, yet did not inquire of the Divorce Court a single time as to whether it was pursuing its obligation to locate the Safe Delivery Court under MCL 712.10(2). And the first time that the Divorce Court became meaningfully involved with the location of the Safe Delivery Court was not due to Non-Surrendering Parent's motion, but due to the Catholic Charities of West Michigan's motion to quash his January 2019 subpoena to release the adoption file – something the Child Placing Agency was not legally allowed to do; in fact, it is a crime! MCL 712.2a(3).

The Non-Surrendering Parent sat on his hands too long, as did the Divorce Court. Neither scenario justifies the Court of Appeals' decision in

this case. This Court should hold that a prebirth petition for custody does not satisfy the Safe Delivery of Newborns Law. In the alternative, this Court should hold that the petition for custody filed in another court does not satisfy the Safe Delivery of Newborns Law unless it is brought to the attention of the Safe Delivery Court before Non-Surrendering Parent's rights are terminated. Here, both the Non-Surrendering Parent and the Divorce Court had plenty of time to locate the Safe Delivery Court between August 9, 2018 and September 28, 2018. Neither of them acted promptly to bring the petition for custody to the attention of the Safe Delivery Court. Thus, Non-Surrendering Parent's rights were properly terminated by the Safe Delivery Court on September 28, 2018, and the Court of Appeals was wrong to disturb that order – an order which Non-Surrendering Parent did not appeal either timely (appeal by right within 21 days) or delayed (application for leave within 6 months). Nor did he file a timely motion for relief from that order (before the adoption was finalized on February 12, 2019, or even ironically within one year under MCR 2.612 which would have been no later than September 28, 2019). His very first motion in the Safe Delivery Court – on October 7, 2019 – was simply too late. The Adoptive Parents and this Child should not be made victims to Non-Surrendering Parent's failure to act. This Court should vacate the Court of Appeals' decision.

II. The Non-Surrendering Parent's constitutional rights in a Safe Delivery of Newborns case were not violated because the statute elevates the rights of others over his rights – the child's right to live and be safe and the surrendering parent's rights to privacy by not requiring disclosure.

This Court asked the parties to address the constitutional rights of the "undisclosed father," citing to *In re Sanders*, 495 Mich 394 (2014). (03/17/22 SCT order). There are five items that are troubling about this portion of the Court's order.

First, the Non-Surrendering Parent has never raised a constitutional issue in this case. He did not raise the issue of his constitutional rights in

any of his filings or arguments in the Safe Delivery Court, in the Court of Appeals, or in this Court. While this Court can raise issues not raised by the parties, this Court should give pause in doing so.[1]

Second, the language in this Court's order referring to an "undisclosed father" is inaccurate and is contrary to the Safe Delivery of Newborns Law. The Non-Surrendering Parent is not the "father" of the child at issue here. In fact, should this Court affirm the Court of Appeals' decision, the very first thing that must occur on remand to the Safe Delivery Court is for the Non-Surrendering Parent to submit to DNA testing. MCL 712.11; *In re Miller, Minors*, 322 Mich App 497, 505-06; 912 NW2d 872 (2018).

As noted in the section above, the Non-Surrendering Parent must establish with at least 99.9% probability that he is the biological father of this child to have any rights under the Safe Delivery of Newborns Law. MCL 712.11(3). If a DNA test does not at least show a 99.9% probability that he is the biological father, then the result of that paternity test "is admissible and establishes that the petition could not be the parent of the newborn" and "the court **shall dismiss** the petition for custody." MCL 712.11(5) (emphasis added). As the Court of Appeals explained in *Miller, Minors,* 322 Mich App 497, 505; 912 NW2d 872 (2018), the "Safe Delivery of Newborns Law tests this presumption [of fatherhood] through DNA testing of "each party claiming paternity" and attempting to gain custody of the child, leaving only one man as the legal father. *Id.*, citing MCL 712.11(1). There is no avenue for a non-biological parent – even the husband of the surrendering parent – to seek custody rights under the Safe Delivery of Newborns Law until that person has established his paternity under the Act.

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[1] For example, in the case of *People v Cameron* before this Court in 2018, a federal due process issue was raised for the first time in an amicus curiae brief filed by the Michigan District Judges Association. 504 Mich 927 (2019). The Supreme Court denied leave in that case. While Justice McCormack concurred in the denial, she explained the significance of that federal constitutional issue, but determined it was not the appropriate time to address it when the constitutional issue had not been developed in the record below. *Id.* at 928.

The Non-Surrendering Parent is not the "father" until a DNA test establishes him as the biological father of the child.

Third, the language of this Court's order referring to an "undisclosed father" is outside the bounds of the Safe Delivery of Newborns Law. The language employed in this Court's order about the "undisclosed father" is not the same as "nonsurrendering parent." The "father" is almost always undisclosed in the context of safe delivery cases. The reason for that lack of disclosure goes to the second purpose of the Safe Delivery of Newborns Law, which is to protect the privacy of the distressed mother. A critical feature of Michigan's Act – along with all 50 states in the Union – is that the surrendering parent (usually the mother) is not required to disclose any identifying information for either herself or the father. *See* MCL 712.3(1)(d)(vi) (the emergency service provider must tell the surrendering parent that any information the surrendering parent provides will not be made public); 712.3(1)(d)(iv) (the emergency service provider must inform the surrendering parent that the public notice of a hearing under the Act will not contain the parent's name); MCL 712.3(2)(a) (the emergency service provider shall "encourage the parent to provide any relevant family or medical information."); MCL 712.3(2)(d) (the emergency service provider must ask – not require -- the parent to identify herself); MCL 712.3(2)(e) (the emergency service provider shall ask – not require -- the parent to identify the other parent); MCL 712.7(b) (the child placing agency must meet with the surrendering parent, but only "if the parent is known and willing.").

Reviewing these many provisions of the Safe Delivery of Newborns Law about the privacy of the surrendering parent, is the noticeable absence of the Legislature distinguishing between a disclosed versus undisclosed nonsurrendering parent – except in a single significant provision. The Legislature stated that "If the identity and address of the nonsurrendering parent are unknown, the child placing agency shall provide notice of the surrender of the newborn by publication in a newspaper of general circulation in the county where the newborn was surrendered." MCL 712.7(f). The privacy of the surrendering parent and the limited relevance of the "unknown" identity of the nonsurrendering parent is an essential part of the fabric of this statutory scheme. The Legislature carefully chose to refer to a potential father as a "nonsurrendering parent." By referring to the

Non-Surrendering Parent here as an "undisclosed father," this Court gives his status more weight than the Michigan Legislature intended.

Fourth, it is concerning that this Court cited *In re Sanders*, 445 Mich 394 (2014), in its order raising the constitutional rights of the "undisclosed father." *Sanders* is inapplicable here both factually and legally. From a legal perspective, the *Sanders* case arose from abuse and neglect proceedings under the Juvenile Code. The father who appealed in *Sanders* was the non-respondent parent (that is, he was not the parent who abused or neglected his children). Instead, the children came into the child welfare system due to the conduct of their mother. *Sanders*, 495 Mich at 402. Unfortunately, during that period of Michigan legal history, non-respondent parents were being adjudicated as unfit based on the plea of adjudication by the other parent in what was being called the "one-parent doctrine." This doctrine emanated from a Court of Appeals' decision called *In re CR*, 250 Mich App 185 (2002), and quickly became the norm around the State of Michigan. Consistent with the process adopted in *In re CR,* when the mother plead to the jurisdiction of the court (meaning she admitted certain allegations in the petition, which admission authorized the trial court to take jurisdiction), the trial court then assumed jurisdiction over the father as well. *Sanders*, 495 Mich at 403. This meant that the trial court found both parents to be unfit under MCL 712A.2(b), and could then require both parents to engage in services or terminate their parental rights. The father in *Sanders* challenged the trial court's decision to take jurisdiction over him based on the mother's plea, and that case eventually made its way to this Court. *Id.* at 403. This Court overruled the "one-parent doctrine" because it violated the non-respondent's parent's constitutional rights to due process because he was sucked into the system and became subject to (and victim of) the trial court's orders even though his own conduct would not have satisfied the statutory grounds for adjudication under MCL 712A.2(b). *Id.* at 419-420.

Although this Court correctly decided the *Sanders* case and although it serves as an important protection to non-respondent parents in child protection proceedings, it is also inapplicable on its facts. First, the father in *Sanders* had an established custodial relationship with his children. DHS removed two young children (a newborn and a one-year-old) from their mother's home after the infant was born drug positive. *Id.* at 401. DHS

placed the children in their father's home, but then removed them a short while later, raising allegations against the father as well. *Id.* at 402. The father contested the allegations against him. *Id.* At a later proceeding, the mother "pleaded no contest to the allegations of neglect and abuse," while the father "declined to enter a plea and instead repeated his demand for an adjudication." *Id.* at 402. DHS eventually dismissed the allegations against the father and his adjudication trial was cancelled. *Id.* at 403. Nonetheless, at the review hearing two weeks later, the trial court ordered the father to engage in services, including parenting classes, substance-abuse assessment, counseling, and a psychological examination, and the father was permitted supervised parenting time with his children. *Id.* at 403. So not only did the father in *Sanders* have a custodial relationship and parenting time with his children, the State (DHS) sought to take away his rights to the care, custody and control of his children without a finding of unfitness – which finding is required under Section 712A.2(b) of the Juvenile Code.

As the Legislature made very clear in the Safe Delivery of Newborns Law, the "a provision of another chapter of this act does not apply to a proceeding under this chapter." MCL 712.2(3). This "act" is the Probate Code of 1939, which contains many chapters, including the Juvenile Code, MCL 712A.1 *et seq.*, the Adoption Code, MCL 710.21 *et seq.*, and the Safe Delivery of Newborns Law, MCL 712.1 *et seq*. By its plain language then, the case law analyzing the constitutional rights of parents in Juvenile Code proceedings do not apply to this safe delivery case. And this Court's holding that "due process requires a specific adjudication of a parent's unfitness before the state can infringe on the constitutionally protected parent-child relationship" is not applicable here at all. *Sanders*, 495 Mich at 422. In fact, in a safe delivery case, a potential father's fitness is not relevant at all because the Safe Delivery of Newborns Law elevates the rights of the newborn and the distressed mother above the rights of any potential father. As discussed below under Subheading D, there are many areas of Michigan law where a parent's rights, or a potential father's rights are subjugated to the rights of the child, and those statutes do not violate the Constitution. So this Court should hold that the Legislature's decision to protect the lives of newborn infants and ensure the privacy of distressed mothers does not amount to a constitutional violation.

Finally, this Court's question about the constitutional rights of the "undisclosed father" seems to overlook the constitutional rights of the other participants in this safe delivery case – the Child and the Adoptive Parents. What about the constitutional rights of this Child who has lived with his Adoptive Parents (read: his legal parents) since the day he left the hospital and knows no one else as his family? (discussed under Subheading A). And what about the constitutional rights of the Adoptive Parents who legally and finally adopted this Child over three years ago? (discussed under Subheading B). This Court cannot address the constitutional rights of a nonsurrendering parent (discussed under Subheading C) without first examining the superior rights of the child and adoptive parents. Finally, this Court should consider its question about constitutional rights through the lens of how Michigan's Safe Delivery of Newborns Law is the most restrictive statute in the entire country (that is, our statute protects the rights of nonsurrendering parents more than any other). Yet no court in this country has held that any of the 50 plus[2] legislative schemes is unconstitutional – even the 41 states who require zero notice to the nonsurrendering parent (discussed under Subheading E).

A. This Court's order fails to consider the constitutional rights of the Child.

A child's right is virtually coextensive with that of an adult. *Bellotti v Baird*, 443 US 622, 634 (1979) (regarding a pregnant minor's ability to obtain an abortion). To that end, a child has a right to security and permanency. *See Santosky v Kramer*, 455 U.S. 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *In re Trejo, Minors,* 462 Mich 341, 354; 612 NW2d 407 (2000).

Here, the Safe Delivery of Newborns Law seeks to protect that very interest of the child – in the newborn's permanency and stability. In fact, the speed with which a safe delivery case moves exemplifies the Legislature's goal of quickly achieving stability and permanency for the child, as described more fully in Adoptive Parents' Cross-Application, pp. 23-27 and

[2] District of Columbia, Puerto Rico, and Guam also have safe haven statutes.

29-31 and Reply, pp. 3-4. In addition, the Legislature has plainly expressed this goal in the statute, such that even when a DNA-proven biological parent requests custody, the court shall consider the newborn's best interests "with the goal of achieving permanence for the newborn at the earliest possible date." MCL 712.14(1).

How does Non-Surrendering Parent, or any court expect to achieve this important goal when the Non-Surrendering Parent filed his first motion in the Safe Delivery Court more than 14 months after the child's birth (and 13 months after his rights were terminated and 8 months after the adoption was finalized)? And how does that Non-Surrendering Parent expect a Safe Delivery Court to know that he filed a "petition for custody" in a Divorce Case when he did not move for the Divorce Court to follow the statute to locate and transfer to the Safe Delivery Court? And how does the Non-Surrendering Parent expect to achieve stability and permanence for *this* newborn when at every step of the way, the Non-Surrendering Parent delayed the process (waiting for over 4 months to file a subpoena that eventually led him to the safe delivery case number; waiting for 4 months after he learned of safe delivery case number to file a motion in the Safe Delivery court, waiting 4 months after the Safe Delivery Court denied his motion for reconsideration to file a delayed application)? Non-Surrendering Parent's case has been about delay and failure to promptly act – all of which actions should have occurred *before* his rights were terminated on September 28, 2018, but at a minimum at least before the adoption was finalized on February 12, 2019. Where in Non-Surrendering Parent's equation does the rights of this newborn to permanency and stability come into play? It certainly did not in the Court of Appeals opinion that granted an impossibly delayed reinstatement parental rights without the Adoptive Parent's even having any notice of the proceedings!

Moreover, a child also has a due process right in the procedures the court employs. *In re Gault*, 387 US 1, 33-34 (1967) (specifying a child's rights in juvenile delinquency proceedings). The procedures set forth in the Safe Delivery of Newborns Law serve to best protect the health, safety and welfare of a newborn who is born to a distressed mother, thus saving lives of newborns from abandonment or death. The Act's proceedings move fast to protect that newborn and to establish permanency as quickly as possible. The Act protects the newborn from having a person assert a claim for

custody who is not biologically the parent of the child. The Act protects the child by ensuring even the proven-biological parent who requests custody is in the best interests of the newborn. All of these protections in the Safe Delivery of Newborns Law represent the procedures in which the newborn has a constitutionally protected right. What the Court of Appeals has done is to throw the Act's protections out the window – literally throwing the baby out with the bath water. This Court should not allow this Non-Surrendering Parent's rights to take a higher seat than the rights of this child (who is now almost 4 years old and no longer a newborn as envisioned by the Legislature).

B. This Court's order fails to consider the constitutional rights of the Adoptive Parents.

It is undisputed that Adoptive Parents acquire all the rights and responsibilities of natural parents. This is plainly set out in Michigan Adoption Code, which states that:

> After the entry of an order of adoption, ... the person or persons adopting the adoptee then become the parent or parents of the adoptee under the law **as though the adopted person has been born to the adopting parents** and are liable for all the duties and **entitled to all the rights of parents**.

MCL 710.60 (emphasis added). An adoption order was entered on February 12, 2019, formalizing the Adoptive Parents' adoption of the newborn at issue here. Two-and-one half years later the Court of Appeals upset the balance of this family's life when it issued its published decision reinstating Non-Surrendering Parent's parental rights. In issuing this decision, the Court of Appeals violated the Adoptive Parents' constitutional rights on at least two fronts.

First, the Fourteenth Amendment's promise of due process is a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 117

S Ct 2302; 138 L Ed 2d 772 (1997). Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. *See Meyer v Nebraska*, 262 US 390, 399-400; 43 S Ct 625; 67 L Ed 1042 (1923). In the words of this Court, "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003), citing Brock, 442 Mich at 109.

Even this Court in *Sanders* said that all parents "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Sanders*, 495 Mich at 412, quoting *JK*, 468 Mich at 658. Yet unlike Non-Surrendering Parent who had all the process he was owed (and more) under the Safe Delivery of Newborns Law, the Adoptive Parents here were not offered any process at all after the adoption of their child was finalized.

Adoptive Parents have a constitutionally protected interest in their family unit – the moment the adoption was finalized on February 12, 2019, the Adoptive Parents not only became the legal parents of their child, but also the "natural parents" as though the child had been born to them, with all the rights and responsibilities attendant to that relationship. MCL 710.60; *In re Toth*, 227 Mich App 548, 553; 577 NW2d 111 (1998).

> The effect of MCL 710.60(1); MSA 27.3178(555.60)(1) is to make the adopted child, as much as possible, a natural child of the adopting parents, and to make the adopting parents, as much as possible, the natural parents of the child. *Bikos v Nobliski*, 88 Mich App 157, 162; 276 NW2d 541 (1979). The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and **creating a new and complete substitute relationship after adoption**. *Id.* at 162-163; *In re Adams*, 189 Mich App 540, 544-545; 473 NW2d 712 (1991). Once a child has a new, complete family as evidenced by adoption, [another statute] ceases to apply.

Toth, 227 Mich App at 553 (emphasis added); *Wilson v King*, 298 Mich App 378, 382; 827 NW2d 203 (2012).

That means the Adoptive Parents also hold a constitutionally-protected liberty interest in the care, custody and control of their child. *Troxel v Granville*, 530 US 57, 65 (2000). The Court of Appeals stripped the Adoptive Parents of their rights without any regard at all to their legal status as parents of this child.

That decision also leads to a significant legal problem that the Court of Appeals previously resolved in the *Miller, Minors* decision. A child can only have one legal father. *In re Miller, Minors*, 322 Mich App 497, 504; 912 NW2d 872 (2018), citing *Helton v Beaman*, 304 Mich App 97, 106; 850 NW2d 515 (2014), aff'd 497 Mich 1001; 861 NW2d 621 (2015). Yet the Court of Appeals' decision reinstating Non-Surrendering Parent's rights means that this Child has two legal fathers and one legal mother. The Court of Appeals in *Miller* explained why the husband (a presumed father of a child) cannot come into the picture to challenge the legal rights of the adoptive parents:

> If a presumed father later appeared to challenge the children's adoption, **either he would be precluded from asserting paternity because he was the biological father whose parental rights were terminated**, or he would have to **demonstrate that he was not the biological father whose parental rights were terminated, effectively defeating the presumption of legitimacy**. Accordingly, there are **no circumstances in which a party would later be able to challenge the adoption by claiming paternity and asserting his parental rights.**

Miller, 322 Mich App at 505 (emphasis added). The *Miller* Court correctly recognized the limitations placed on a husband who might also be a the nonsurrendering parent (as we will not know whether the husband is the biological father until the DNA testing occurs).

The Court of Appeals in this case distinguished *Miller* because the husband in *Miller* had not filed a petition for custody. (08/26/21 COA opinion, p. 10). Adoptive Parents have already laid out why Non-

Surrendering Parent's divorce case does not satisfy a petition for custody under the Safe Delivery of Newborns Law. (Supplemental Brief, *supra,* Section I; Cross Application, pp. 33-38; Reply, pp. 5-6). Yet even if this Court disagrees about the impact of a prebirth petition for custody that was never brought to the Safe Delivery Court's attention, let alone before termination of parental rights and a finalized adoption, the Court of Appeals wholly failed to address the rest of *Miller*, and instead issued an illegal decision that creates three parents for this one child.

Not only were the Adoptive Parents' rights to the care, custody and control of their child violated, but so were their due process rights to a notice and opportunity to be heard. *Lalli v Lalli*, 439 US 259, 270; 99 S Ct 518 (1978). The Adoptive Parents were given no notice that Non-Surrendering Parent had filed a motion to unseal the adoption records, no notice he requested the reinstatement of his parental rights in a motion for reconsideration, no notice that he filed a delayed application in the Court of Appeals, no notice that the Court of Appeals granted leave, and no notice that a case that could impact their family unit was being decided in the Court of Appeals. And perhaps most significantly, Adoptive Parents had no notice that Non-Surrendering Parent had filed a divorce complaint in Ottawa County requesting custody of a child that he was not even sure was biologically his, but while he knew that the mother had surrendered the newborn within three days of birth. In contrast, Non-Surrendering Parent did have notice of the Safe Delivery proceedings – not only because he mentioned the safe surrender to the Divorce Court multiple times before his rights were terminated (see supra), but also because the Child Placing Agency gave him notice by publication when they could not identify or locate him. MCL 712.7(f).

As discussed above in the first argument, and in Adoptive Parents' Cross Application for Leave (pp. 27-33) and Reply (pp. 2-3, 7-9), Non-Surrendering Parent should never have been permitted to make those arguments to the Court of Appeals because it was well beyond the time to challenge his termination of parental rights and the adoption had already been finalized. The Court of Appeals wrongly permitted Non-Surrendering Parent to pursue his stale claims and then bought into Non-Surrendering Parent's arguments in the complete absence of the most important people

in the case – the child who was surrendered and then adopted as a newborn and his Adoptive Parents.

C. The United Supreme Court decisions informs this Court about the rights of the Non-Surrendering Parent and demonstrates that his rights were not violated by the Safe Delivery of Newborns process.

The United States Supreme Court has addressed parental rights in four cases – all of which turned on the man's relationship with the children. In *Stanley v Illinois*, 405 US 645, 646, 650 (1972), the biological father of the children had lived with the mother intermittently for 18 years, and Illinois law allowed his parental rights to be terminated solely on the basis that he was not married to the mother. The United States Supreme Court specifically referred to the interest of the father "in the children he has **sired and raised**." *Id*. at 651 (emphasis added). The father in *Stanley* had raised the children for 18 years with the mother up until her death. *Id*. at 646. Thus, the Supreme Court reversed the Illinois Supreme Court for failing to provide the father with an opportunity to demonstrate his parental qualifications. *Id*. at 658-659.

In *Quilloin v Walcott*, 434 US 246, 247 (1978), on the other hand, the child had lived with his mother for his entire life, and the father had never established a home with the child. When the child was 11 years old, the mother's new husband sought to adopt the child, and the child's father opposed the adoption. *Id*. The father had only "irregularly" supported the child, and had visited him on "many occasions" but never had custody of the child. *Id*. at 250-251. The United States Supreme Court affirmed the lower court's decision to permit the adoption, concluding that **the effect of the adoption was not to disrupt a family unit but to give full recognition to a family unit already in existence**. *Id*. at 255 (emphasis added). The Court noted that the father had never "shouldered any significant responsibility" with respect to the care or custody of the child and was thus not entitled to the same rights as a married man, or an unwed man who had taken on such responsibility. *Id*. at 256.

In *Caban v Mohammed*, 441 US 380, 382 (1979), the father lived with the two children as their father for 4 and 2 years respectively and he and their mother represented themselves to be husband and wife, even though they were unwed. After the mother married another man, she and her husband attempted to have the husband adopt the children and terminate the biological father's parental rights. *Id*. 382-383. The United States Supreme Court held that because the father had established "a substantial relationship" with the children, he should be afforded the same right to veto an adoption as the mother. *Id*. at 392-393.

Finally, in *Lehr v Robertson*, 463 US 248 (1983), the United States Supreme Court was called upon to reconcile the above three cases and further refine the standard applicable regarding a father's parental rights. The Court held,

> When an unwed **father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause.** At that point it may be said that he "[acts] as a father toward his children." **But the mere existence of a biological link does not merit equivalent constitutional protection.** The actions of judges neither create nor sever genetic bonds. "[The] importance of the familial relationship, to the individuals involved and to the society, stems from the **emotional attachments that derive from the intimacy of daily association,** and from the role it plays in '[promoting] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."

Lehr, 463 US at 261 (emphasis added), quoting *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 841 (1977), and *Wisconsin v Yoder*, 426 US 205, 231-233 (1977).

The father in *Lehr* had never had any "significant custodial, personal, or financial relationship" with the child and the United States Supreme

Court affirmed the lower court's decision to permit an adoption of the child without even providing the father an opportunity to be heard. *Id.* at 267-268.

Two important points come out of this line of cases. One is that the family unit, the parent who has raised the child, the emotional attachments that derive from the intimacy of daily association are what the United States Supreme Court says merits protection. Second, biology is important, but not more important than the enduring relationship the child has in his family unit.

Here, the Non-Surrendering Parent does not have any relationship at all with this child. Instead, the Adoptive Parents who took the newborn into their home when he was two weeks old, and have been his constant companions and his only parents for nearly four years, and who legally adopted him over three years ago, are the parents who merit constitutional protection.

The Non-Surrendering Parent has even less going for him than the putative fathers addressed by the United States Supreme Court in the cases above -- we do not even know if Non-Surrendering Parent has a biological connection with the child. And why is that? Because he did not timely petition for custody in the Safe Delivery Court (or otherwise get the Divorce Court to locate the Safe Delivery case) so that the Safe Delivery Court could do its job of testing his DNA. It is critically important that under the Safe Delivery of Newborns law the Legislature has designed it so that only a biological parent can come to court and request custody. Not even a mother claiming to be the surrendering parent can avoid a DNA test unless the hospital witnessed that particularly woman giving birth to that specific child!

Even if we learn down the road that Non-Surrendering Parent is the biological father of this Child, then his constitutional rights are protected by the terms of the Safe Delivery of Newborns Law, which requires the Safe Delivery Court to "consider, evaluate, and make findings" on the child's best interests. MCL 712.14(1). Consistent with the United States Supreme Court authority, several of the best interest factors go right to the heart of the constitutional analysis that places emphasis on the familial relationships

that have been created with the child, such as (a) The love, affection, and other emotional ties existing between the newborn and the parent, (d) The permanence, as a family unit, of the existing or proposed custodial home, (h) If the parent is not the parent who surrendered the newborn, the opportunity the parent had to provide appropriate care and custody of the newborn before the newborn's birth or surrender. MCL 712.14.

1. Many other statutory contexts subjugate a person's constitutional rights without offending the Constitution.

The Safe Delivery of Newborns Law is not unique from a constitutional perspective in that there are many statutory schemes where a parent's rights are subjugated to the rights of another – most often the rights of the child.

- Adoption Code, MCL 710.39. The putative father who has failed to provide substantial and regular support during the pregnancy or who has failed to establish a custodial relationship with the child can have his parental rights terminated to make way for an adoption. This Court has held that process to be constitutional, and consistent with the United States Supreme Court authority, a putative father in such a position enjoys a lesser level of constitutional protection than a father who has substantially supported or developed a custodial relationship with a child. *Lehr,* 463 US at 260-261; *Baby Boy Barlow*, 404 Mich 216, 229 & n.8, 273 NW2d 35 (1978); *In re OES*, 246 Mich App 212, 222; 631 NW2d 353 (2001).

- Adoption Code, MCL 710.51(6), stepparent adoption. A legal and biological father can have his rights terminated to make way for an adoption if he has failed to provide substantial and regular support to his child for two years, and also has failed to maintain substantial and regular contact with this child. Once again, the Legislature has elevated the rights of the child in an existing family unit (mother, stepparent and child) over the rights of his legal and biological parent.

- Safe Delivery of Newborns Law, MCL 712.15(b), MCL 712.17(3). The rights of both the surrendering and nonsurrendering parents can be terminated unless she or he timely requests custody, proves that she or he is the biological parent of the newborn, and proves that it is in the newborn's best interest to have custody with her or him. The Legislature has elevated the life and safety of the newborn and the privacy of the mother, over the rights of the nonsurrendering parent, even if the mother did not disclose the identity of the nonsurrendering parent. The Legislature has also elevated the rights of the child over the mother who has surrendered her child unless she satisfies the statutory requirements to regain custody of her child.

- Juvenile Code. MCL 712A.19b. A parent's rights can be terminated for abuse and neglect. The Legislature has elevated the health, safety, and welfare of the child above the rights of the parents who abused or neglected the child, including failing to protect the child from another person's abuse.

- Juvenile Code. MCL 712A.19b A parent's rights can be terminated for failing to support a child in guardianship for two years and failing to substantially communicate with the child for two years. The Legislature has elevated the rights of the child in the family unit created with the guardian over the biological and legal parent who failed to provide support and contact for two years.

- Revocation of Paternity Act. MCL 722.1437 (revoking acknowledged father), MCL 722.1438 (revoking genetic father), MCL 722.1439 (revoking affiliated father), MCL 722.1441 (revoking presumed father). A husband or other legal father's rights can be terminated so that the biological father can assume parental rights in limited circumstances. The Legislature has chosen to elevate the rights of the child to a relationship with biological father over the rights of a man who was legally on a paper the father of a child. Of course, the Legislature made it difficult to revoke the father's rights in that situation, bearing in mind that the child's family unit (mother, supposed father, and child) is also an important legislative consideration.

These statutory examples demonstrate that one person's parental rights can be constitutionally subjugated to the rights of the child and to the rights of the Adoptive Parents. What is even more telling is that nowhere in the Revocation of Paternity Act does the Legislature proscribe a method to terminate the rights of an adoptive father. In fact, the Revocation of Paternity Act plainly states that it does not apply to adoptions:

> This act **does not establish a basis for termination of an adoption** and does **not affect any obligation of an adoptive parent to an adoptive child**.

MCL 722.1443(8) (emphasis added). Had the Legislature wanted to provide a man, such as the Non-Surrendering Parent in this case, a mechanism to revoke the parental rights of the adoptive father, it could have done so in the Revocation of Paternity Act. The Legislature's conscious decision to exclude adoptions and adoptive parents from its terms should have been the end of the Non-Surrendering Parent's stale claims to reinstate his parental rights!

2. The rest of the country agrees with the constitutionality of safe haven laws, and in fact Michigan's statute is far more restrictive than all other states.

Michigan Safe Delivery of Newborns Law is the most restrictive of all "Safe Haven" laws. This is to say that the Michigan statute does more to protect the rights of the nonsurrendering parent than anywhere else in the entire country. As discussed in more detail below, the vast majority of statutes do not require any notice whatsoever to the nonsurrendering parent; Michigan requires "reasonable efforts" to locate the nonsurrendering parent and notice by publication if the identity of the nonsurrendering parent is unknown. Because Michigan's statute contains a notice provision, it also includes an opportunity for the nonsurrendering parent to request custody, as long as he is proven to be the biological father and the court finds that it is in the best interests of the child; the vast majority of states have no such process for the nonsurrendering parent to come into court at all. Moreover, the surrender period in Michigan is the

shortest time period in the country – three days from birth; the vast majority of states permit a surrender beyond three days, and over half the states in the country allow a surrender to occur 30 days and beyond.

Even though all 50 states enacted safe haven laws between 1999 and 2008, the undersigned appellate counsel has not been able to uncover a single case striking down a safe haven statute on constitutional grounds in the 23 years that these safe haven laws have been on the books, including after conducting a nationwide search, contacting legal scholars in the field, and researching organizations familiar with safe haven laws.

Legislatures and courts around the country understand that there is a reason for safe haven laws and that reason is to save lives of newborns who are born to distressed mothers. Thus, the Legislature here in Michigan and all around the country, have elevated the interests of babies and distressed mothers above the interests of the nonsurrendering parent.

For example, Michigan's law requires that the surrendered newborn be no more than 72 hours old. MCL 712.1(k); MCL 712.3(1). If the newborn's birth was not at the hospital, the hospital "shall have the newborn examined by a physician" who is required to report to DHHS if the physician "comes to a reasonable belief that the child is not a newborn." MCL 712.5(2). Only 9 states in the entire country impose such a short three-day period on the surrendering parent, which is in sharp contrast with other states around the country. Most states allow a safe surrender up to 30 days. But some states allow a surrender at 60 or 90 days. And one state (North Dakota) allows the surrender up to one year!

The following is a quick summary of the various time periods in which a safe surrender is permitted around the country, how many states utilize each time period, and the names of those states:

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Length of time for surrender	**Number of States who use this time period**	**Names of states**
3 days	9	Alabama, California, Colorado, Hawaii, Michigan, Mississippi, Tennessee, Washington, Wisconsin
7 days	6	Florida, Massachusetts, Minnesota, New Hampshire, North Carolina, Oklahoma
10 days	1	Maryland
14 days	3	Delaware, Virginia, Wyoming
21 days	1	Alaska
28 days	2	Pennsylvania, Texas
30 days	20	Arizona, Arkansas, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Rhode Island, Utah, Vermont, West Virginia
31 days	1	Maine
45 days	2	Kansas, Missouri
60 days	3	Louisiana, South Carolina, South Dakota
90 days	1	New Mexico
1 year	1	North Dakota

In addition to the extremely short surrender window, Michigan law requires the child placing agency to provide notice to the nonsurrendering parent. MCL 712.7(f). If the identity of the nonsurrendering parent is unknown, the child placing agency shall provide notice by publication. MCL 712.7(f). The majority of States in the Union require no notice whatsoever to the nonsurrendering parent. The following chart summarizes the type of notice that is required around the country, how many states observe each kind of notice, and more notice details where appropriate:

How many states	**Type of Notice**	**More notice details**
41	No Notice	N/A
4	Notice by Publication Only	Publication in a newspaper of statewide circulation
2	Notice to any known parent and to the putative father registry	Search the putative father registry for the purpose of determining the identity and location of the father to provide notice
1	Discretionary efforts to identify and locate the non-relinquishing parent	Up to the discretion of the Department.
2	Reasonable Efforts	Michigan: Reasonable efforts were made to identify, locate, and provide notice to the non-surrendering parent. If identity is unknown, then notice by publication. Louisiana: Due diligence in attempting to identify and locate nonrelinquishing parent, including missing child search.

Among the nine states who require the safe surrender to occur within a short three-days from birth, Michigan is the only state that requires the child placing agency to make "reasonable efforts." MCL 712.7(f). One state (Tennessee) requires only notice by publication. Tenn. Ann. Code 68-11-255. And another state (Hawaii) states that "The department may search for relatives of the newborn child as a placement or permanency option or implement other placement requirements that give preference to relatives provided that the department has information as to the identity of the newborn child, the newborn child's mother, or the newborn child's father." Haw. Rev. Stat. 587D-2. The other states with the short three-day window do not require any kind of notice at all to the nonsurrendering parent.

In spite of Michigan being absolutely the strictest statute in the entire country, our Legislature still elevated the life and safety of the child over that of the child's biological parents. When the stakes are so high, the Constitution grants superior rights to the child than to the nonsurrendering parent.

CONCLUSION AND RELIEF REQUESTED

Non-Surrendering Parent's request for custody in his divorce case cannot qualify as a custody petition under the Safe Delivery of Newborns Law. Not only was his custody request filed prebirth (which was not permitted by the Legislature under either the Safe Delivery of Newborns Law or the Child Custody Act), but the Non-Surrendering Parent took no action to move the Divorce Court to do its job of locating the safe delivery case and transferring his custody request to the Safe Delivery Court. The Non-Surrendering Parent's inaction, even when he knew the mother was planning on surrendering the child under the Safe Delivery of Newborns Law, cannot be used as a basis to overturn the Safe Delivery Court's decision. Moreover, he obtained sufficient information about the date of birth and actual surrender before his rights were terminated, yet sat on his hands.

While Non-Surrendering Parent enjoyed some constitutional rights before the termination order was entered, his rights are lesser than the constitutional rights of the Child and the Adoptive Parents. Once the adoption was finalized the Child is treated completely as if he had been born

to the Adoptive Parents. The Adoptive Parents' constitutional rights attached upon the entry of the adoption order, and they are the parents who hold the liberty interest in the care, custody, and control of their Child. Moreover, the Child and Adoptive Parents have a vested constitutional interest in the relationship they have formed with each other – the Child has only ever lived with Adoptive Parents, he went to their home at two weeks of age, and the United States Supreme Court has protected the family unit thus created. Non-Surrendering Parent has absolutely zero relationship with this Child, and moreover, it is not even known whether he is the biological father. Non-Surrendering Parent's lesser constitutional rights cannot overturn the procedures that the Safe Delivery Court followed to a tee.

This Court should vacate the Court of Appeals' decision and close this case so that this Adoptive Parents can move on with their lives and this Child can remain safe in his current stable and satisfactory environment. If this Court at any level deems it appropriate to keep the Court of Appeals' decision intact, then this Court should remand to the Safe Delivery Court with instructions to apply the statute as written – requiring the trial judge to order DNA testing under MCL 712.11 and, only if the Non-Surrendering Parent is the biological father of the Child, to conducts its best interest analysis under MCL 712.14.

Respectfully submitted,

/s/*Liisa R. Speaker* (P65728)
Speaker Law firm, PLLC
819 N. Washington Ave.
Lansing, MI 48906
(517)482-8933
lspeaker@speakerlaw.com

Date: April 14, 2022

Counsel for Cross-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 12,103 countable words. The document is set in Georgia Pro, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

/s/*Liisa R. Speaker* (P65728)
Speaker Law firm, PLLC
819 N. Washington Ave.
Lansing, MI 48906
(517)482-8933
lspeaker@speakerlaw.com