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STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE BARBER/ESPINOZA,

minors.

Supreme Court No. 167745

Court of Appeals No. 369359

Lenawee County Circuit Court No. 23-000033NA.

_____/

BRIEF OF AMICUS CURIAE
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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Reasonable efforts are required in all child abuse and neglect cases unless an exception applies under MCL 722.638(1) and (2), and criminal sexual conduct involving penetration is included as an exception. Are reasonable efforts to reunify a child with the respondent parent required where the respondent parent was not the perpetrator of the criminal sexual conduct but facilitated, encouraged, or allowed the conduct in exchange for benefit to the respondent parent?

Appellant LGAL's answer:	No.
Appellant DHHS's answer:	No.
Appellee's answer:	Yes.
Trial court's answer:	No.
Court of Appeals' answer:	Yes.

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STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

As the chief law enforcement officer of the State of Michigan, the Attorney General seeks to ensure the safety of children across Michigan. In furtherance of that important goal, the Michigan Juvenile Code and Child Protection Law must be construed to protect children from unfit parents and allow for termination of parental rights at the initial disposition when reunification would place children at an unreasonable risk of harm. It is difficult to imagine a set of facts that more poignantly illustrates the harm to the child of working toward reunification with a dangerous parent than the egregious actions of the respondent mother here.

CB, the child at the center of the appeal in *Barber/Espinoza*[1] was sexually assaulted involving penetration by her mother's "friend".[2] Not only was Espinoza aware of the sexual abuse, but she facilitated it by sexually exploiting her daughter in exchange for drugs. But the Court of Appeals in its *Barber/Espinoza* opinion conflated the requirements of MCL 722.638(1) and (2) and failed to interpret child protection laws in line with its mandate—the protection of children.

Indeed, the Probate Code specifically identifies the circumstance in which a parent "abuse[s]" a child by engaging in "[c]riminal sexual conduct involving penetration", MCL 722.638(1)(a)(*ii*), and under Michigan criminal law, a parent who aids and abets another in the sexual abuse of a child is as guilty as the principal

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[1] Appendix A, *In re Barber/ Espinoza,* __ Mich App___ (2025).

[2] At trial, CB testified that was she present when Espinoza and Espinoza's "friend" Patrick shot heroin into their arms and smoked methamphetamine and cocaine. (12/8/23 Tr, p 43.) This friend was the same man that sexually assaulted her.

perpetrator of the sexual abuse, MCL 767.39. In other words, Espinoza was as guilty as her "friend" in the sexual penetration of her child and thus was subject to the Department's immediate petition for termination under section 18(1).

Not only is the opinion below legally incorrect, but it sets a dangerous precedent. Effectively, the decision in *Barber/Espinoza* entitles parents the opportunity to be reunited with their children even after sexually exploiting their children for drugs so long as the abuser never lived in the child's home and the parent merely facilitated the sexual abuse rather than directly participated in it. Under the same logic, a parent could pay for her child to be tortured, and yet be afforded the opportunity toward reunification, so long as the person they paid never resided in their home. The *Barber/Espinoza* decision endangers already vulnerable children by subjecting them to the ongoing possibility of reunification with their abuser/exploiter.

Proper interpretation of MCL 722.638(1) and (2) must be driven by the purpose of the Michigan Juvenile Code and Child Protection Laws—protection of children. The decision below failed to apply the plain meaning of the relevant statutes. If the opinion below is not overturned, children will continue to be placed at a grave risk of harm in contravention of that purpose.

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ARGUMENT

I. By facilitating and allowing sex trafficking of her daughter CB in exchange for drugs, Espinoza's actions met the requirements of aggravated circumstances under MCL 722.638(1) and (2), and reasonable efforts toward reunification were not required.

The design of the Michigan laws at issue are to protect children from neglect and abuse of their parents. The sexual exploitation of one's children represents the paradigm of abuse a child, and a parent who traffics a child meets the definition of aggravated circumstances as provided by MCL 722.638(1) and (2). The decision below misreads Michigan law in a critical way, leaving children unprotected from the gravest of injuries.

A. The purpose of child protection proceedings is to protect children.

The primary goal in interpreting statutes is to ascertain the intent of the Legislature. *People v Crigler,* 244 Mich App 420, 423 (2001). "'The first criterion in determining the Legislature's intent is the specific language of the statute. If the plain and ordinary meaning of the language is clear, judicial construction is normally neither permitted nor necessary.' " *Id.*, quoting *People v Fox* (After Remand), 232 Mich App 541, 553–554 (1998). When necessary, statutory language should be "construed reasonably, keeping in mind the purpose of the statute." *Draprop Corp. v City of Ann Arbor,* 247 Mich App 410, 415 (2001) (citations omitted.).

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Child protective proceedings are meant to center around "the protection of the child." *In re Brock*, 442 Mich 101, 107–108 (1993). With protection of children as the mandate, this Court has held that the Juvenile Code should be liberally construed "in order to provide each child coming within the juvenile division's jurisdiction with such care, guidance, and control as will be conducive to the child's welfare and the best interest of the state." *People v Dunbar,* 423 Mich 380, 386, (1985); See also, *In re Jagers*, 224 Mich App 359, 362 (1997).

B. Reasonable efforts are not required when the exceptions of MCL 722.638(1) or (2) are applicable.

When a court assumes jurisdiction of a parent for abuse or neglect their child, and the child is placed with the Department of Health and Human Services (DHHS), MCL 712A.19a(2) provides that " ' reasonable 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), quoting MCL 712A.10A(2) (emphasis added). Absent aggravating circumstances, DHHS "has 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). MCL 722.638(1) and (2) provide the exceptions for the reasonable efforts requirement, including which circumstances qualify as aggravated.

MCL 722.638(1) provides an exception to MCL 712A.19a(2) as it relates to a child who has been subjected to criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate. Specifically, it states

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that DHHS shall submit a petition for authorization by the court if "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: [. . .] (*ii*) [c]riminal [s]exual conduct involving penetration, attempted penetration, or assault with the intent to penetrate." MCL 722.638(1). Under MCL 722.638(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 . . . MCL 712A.19b." MCL 722.638(2)."

C. MCL 722.638(1) and (2) must be construed to protect children, and Espinoza's sexual exploitation of CB qualifies as an aggravated circumstance under MCL 722.638(1) because Espinoza is guilty of the sexual abuse of CB, and under MCL 722.638(2) because Espinoza failed to intervene.

The requirement for DHHS to provide reasonable efforts in cases absent aggravated circumstances has long been established. See *In re Rippy*, 330 Mich App 350, 355 (2019); *In re Sanborn*, 337 Mich App 252 (2021). But along with that requirement, appellate courts, including this Court, have recognized that aggravated circumstances are present both for a parent who is a perpetrator of the 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); *In re Smith/Taylor* 509 Mich 935 (2022) (holding that 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

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excused from making reasonable efforts). This Court has noted that aggravated circumstances are defined in MCL 722.638 to include "'[b]attering, torture, or other severe physical abuse' " of a child or sibling, *In re Smith/Taylor,* 971 N.W.2d at 657, quoting MCL 722.638(a)(iii), and that aggravated 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,'" *Id.*, quoting MCL 722.638(2).

This is the same rationale the Court of Appeals panel in used in *In re Boyce*, (unpublished per curiam opinion, Docket No. 348992, dated January 23, 2020, 2020 WL 402246.) (Appendix B)[3] In *Boyce*, 12-year-old BMB accused respondent mother of accepting money for a 34-year-old man to have sex with her. *Id.* at *1. Respondent mother admitted that she was aware of BMB having sex with older men and left her child in the hotel with the man to have sex. *Id.* Given the facts, the Court of Appeals panel opined that "[o]n this record, the court could easily determine that BMB was the victim of "[c]riminal sexual conduct involving penetration" and that respondent "plac[ed] the child at an unreasonable risk of

[3] Other Court of Appeals decisions have been affirmed without the abuser meeting the requirements under subsection (1). See *In re Kindle/Brown/Muhammad*, 305 Mich App 623, 636-637 (2014), where respondent mother allowed her children to live with a neighbor despite her children informing her that he had sexually abused them in the past. Rather than reversing the trial court's termination because the abuser did not live in the children's home, the Court of Appeals upheld the termination of respondent mother's parental rights due to her position to prevent the abuse and her failure to do so.

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harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk." *Id*. at *4. Further, the panel found no error in the trial court's findings that reasonable efforts were not required. *Id*.

However, after *Boyce*, the Court of Appeals' rulings have been inconsistent, with the court more narrowly interpreting MCL 722.638(2) to the detriment of children's safety and wellbeing. For example, both *In re Bergren,* (unpublished per curium opinion, Docket No. 354767, issued June 3, 2021, 2021 WL 2285224) (Appendix C), and *In re Barber/Espinoza* just three years later have conflated the requirements of MCL 722.638(1) and (2), narrowly construing the statute in such a way that children are left vulnerable, and unfit parents are guaranteed the opportunity to work toward reunification.

Bergen exemplifies the risk of such an interpretation. In *Bergren*, 11-year-old AB disclosed that her stepmother's 13-year-old son, LJ, sexually abused her while the families lived in the same home. *Bergren,* 2021 WL 2285224 at *1. After separating for some time, respondent father reconciled with LJ's mother and moved AB back into the home where LJ resided, knowingly allowing the abuse to continue. *Id*. at *2–3. However, in finding that aggravating circumstances did not exist, the Court of Appeals panels opined that for "criminal sexual conduct involving penetration to constitute an aggravating circumstance under MCL 722.638 (1), the perpetrator must be "a parent, guardian, or custodian, or person who is 18 years of age or older and who resides for any length of time in the child's home . . . ." and because LJ, the perpetrator, was less than 18 years old, the conduct at issue was

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not an "aggravated circumstance" under MCL 722.638(1). *Id.* at *4. Further, the Court of Appeals panel opined that because the petition was not mandated under subsection (1) of MCL 722.638, subsection (2) did not apply. *Id.* The interpretation of the statute in *Bergren* required DHHS to work toward reunification after respondent father *knowingly moved his child back into a home where the sexual abuser lived*. Even more significantly, that interpretation allowed for the possibility that AB would be reunified with respondent father after he knowingly allowed her to continue to be abused.

The Court of Appeals in *Barber/Espinoza* used the same interpretation of the statute to find that Espinoza, who had traded sex with her daughter for drugs, was entitled to reasonable efforts and the opportunity to reunify with CB. The court used the same clause of subsection (1) to suggest that because the sexual abuser never lived in the home, the aggravated circumstance of criminal sexual conduct including penetration did not apply and could not apply in these sorts of circumstances.

In both *Bergren* and *Barber/Espinoza*, the Court of Appeals' incorrectly interpreted subsections (1) and (2). When interpreting a statute, the primary goal is to discern and give effect to the intent of the Legislature. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312 (2002). In giving meaning to a statutory provision, this Court considers the provision within the context of the whole statute to "give effect to every word, phrase, and clause . . . [to] avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co*

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v Old Republic Ins Co, 466 Mich. 142, 146 (2002). The statutory provisions of the Juvenile Code and Child Protection Laws should be liberally construed "in order to provide each child coming within the juvenile division's jurisdiction with such care, guidance, and control as will be conducive to the child's welfare and the best interest of the state." *People v Dunbar,* 423 Mich 380, 386 (1985); see also, *In re Jagers*, 224 Mich App 359, 362 (1997).

MCL 722.638(1) and (2) are written as two separate provisions and should be considered in the context that they were written provisions directing when DHHS must file a petition for termination of parental rights. In formulating the list of aggravated circumstances listed under subsection (1), the Legislature included the most egregious cases of abuse or neglect, including criminal sexual conduct involving penetration. MCL 722.638(1). Further, under subsection (1) the inclusion of the language "a parent, guardian, or custodian, or person who is 18 years of age or older and who resides for any length of time in the child's home" incorporates those persons who, if responsible for the abuse, could be included as a respondent on the petition. Contrary to respondent's argument, (Espinoza Resp to Application, p 7), the statute's plain language does not identify or limit the types of individuals whose conduct can qualify as "abuse." Indeed, that CB suffered sexual abuse at the hands of Espinoza's "friend" does not render it something less than sexual abuse simply because the perpetrator did not reside in the child's home.

Subsection (2) then applies to a different group of individuals—not the parent who is the perpetrator, but instead to the parent who is "suspected of placing the

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child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk" of those aggravated circumstances listed under subsection (1). Subsection (2) should not be read to require only direct sexual abuse.

Rather, Espinoza's egregious actions meet the definition of "abuse" under MCL 722.638(1). MCL 722.638(1) requires that DHHS file petition for termination when it "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 children's home, has *abused* the child or a sibling of the child and the abuse included 1 or more of the following: [. . .] (*ii*) [c]riminal [s]exual conduct involving penetration, attempted penetration, or assault with the intent to penetrate." MCL 722.638(1) (emphasis added). The term child abuse as defined under MCL 722.622(g) includes ". . . 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, a legal guardian, any other person responsible for the child's health or welfare . . . ." MCL 722.622 (g) (emphasis added).

If the Michigan Juvenile Code and Child Protection Laws are meant to be interpreted to protect children (and they are intended for that purpose), then Espinoza's action of leaving her child in a motel room in exchange for drugs makes her as culpable as the principal offender who sexually abused the child under MCL 722.638(1). The principle of aiding and abetting is well-established in criminal law. Under MCL 767.39 "every person concerned in the commission of an offense,

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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." The Probate Code specifically lists "criminal sexual conduct involving penetration" an aggravated circumstance, see MCL 722.638(1)(a)(*ii*), which is a crime that is defined in Michigan's Penal Code. See, e.g., MCL 750.520b (defining elements of first-degree criminal sexual conduct involving penetration). Moreover, appellate courts have also recognized other areas where principles of criminal law apply by analogy to child protection proceedings. See *In re Martin*, 316 Mich App 73, 85 (2016) ("The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings.")

Consistent with Michigan law and in furtherance of Michigan Juvenile Code's and Child Protection Law's mandate to protect children, the principle of aiding and abetting applies to child abuse and neglect proceedings. The Probate Code does not provide for a definition of "criminal sexual conduct involving penetration," MCL 722.638(1)(a)(*ii*), which instead is defined in the Penal Code under MCL 750.520b (first-degree criminal sexual conduct) and MCL 750.520a(r) (definition of "sexual penetration"). And this Court has held that in order for there to be a finding of aiding and abetting, three elements must be met: "(1) *the crime charged was committed by the defendant or some other person*, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the

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principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 757–758 (1999). See also *People v Wilkens*, 267 Mich App 728, 740 (2005) (sufficient of first-degree criminal sexual conduct involving penetrating for a defendant where "defendant aided or abetted the male victim's penetration of the female victim"); *People v Wilson*, 196 Mich App 604, 607 (1992) ("Defendants [Carolyn Wilson and Annette Sanford] were also each found guilty of one count of aiding and abetting first-degree criminal sexual conduct, MCL 750.520b(1)(a) and one count of aiding and abetting third degree criminal sexual conduct, MCL 750.520d(1)(a), for allowing various men to engage in sexual penetration of Wilson's minor son and Sanford's minor daughter.").

At trial, CB testified that Espinoza sexually abused her by sexually exploiting her in exchange for drugs. (12/8/23 Tr, p 43.) CB testified that was she present when Espinoza and Espinoza's "friend" Patrick shot heroin into their arms and smoked methamphetamine and cocaine. (*Id.*) When Espinoza was done, she left CB in a motel room with Patrick, where he "stuck his penis in [her] butt." (*Id.* at 19, 43.) CB described being in pain and telling Espinoza what happened to her and that her "butt" was bleeding. (*Id.* at 19, 41.) In response, Espinoza handed her toilet paper, completely disregarding the trauma Espinoza inflicted on CB. (*Id.* at 19.) Espinoza's sexual exploitation of CB resulted in CB being sexually assaulted involving penetration, which is the type of sexual abuse that meets the aggravated circumstance requirement under MCL 722.638(1).

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As noted, the Court of Appeals has applied the principle of aiding and abetting in a criminal case similar to those facts of Barber/Espinoza. See *People v Wilson*, 196 Mich App at 611. In *Wilson,* the Court of Appeals explained that even though the children were unable to identify the perpetrators, Carolyn Wilson was nonetheless guilty of first-degree criminal sexual conduct involving penetration for her minor son:

> The evidence presented at trial reveals that the two children were penetrated on several different occasions by a series of different men ranging in number from four or five to ten or twelve. The medical evidence revealed that the male victim had been systematically anally penetrated, and that the female indicated signs of vaginal penetration. Both children testified that both defendant Wilson and defendant Sanford would meet in the bedroom with whatever man was visiting at the time. Each child described the sexual acts committed on them in defendants' presence. The evidence was clearly sufficient to support Wilson's conviction of aiding and abetting the sexual acts. [*Wilson*, 196 Mich App at 611 (emphasis added).]

Like Wilson, Espinoza is culpable for the sexual abuse of CB, as all three elements of aiding and abetting are met. Because child protection is the mandate, under Michigan law, Espinoza is as culpable for the sexual abuse as the principal.

Moreover, CB suffered sexual abuse involving penetration that was facilitated by Espinoza in exchange for drugs. On the record, it is clear that CB was the victim of criminal sexual conduct involving penetration and that Espinoza, who facilitated the sexual abuse, had "plac[ed] the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk" under MCL 722.638(2). By construing subsection (2) liberally, and within the context the Michigan Child Protection Laws, which was written for protection of

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children, the statute protects children like CB from a respondent mother who exchanged sex with her for drugs, and the child in *Wilson,* whose mother permitted sexual abusers to have continued access to him.

In contrast, failure to interpret subsection (2) in such a way will be to the detriment of children. Distinguishing Espinoza's behavior of facilitating or encouraging the sexual abuse of her child from the behavior a parent who does the same with someone who resides in the home is contrary to the mandate of child protection laws. Indeed, it is an arbitrary distinction that puts children at risk of grave harm.

Under either subsection (1) or subsection (2), Espinoza is an unfit parent. Accordingly, no reasonable efforts at reunification should be made.

D. Failing to follow the laws' mandate to protect children will leave children vulnerable to continued abuse.

The effect of the Court of Appeals' decision in *Barber/Espinoza* is that it affords parents such as Espinoza the opportunity to be reunited with their children even after they facilitate sex trafficking their children for drugs (or other types of abuse enumerated under MCL 722.638(1)) so long as the abuser never lived in the child's home. This an arbitrary distinction is unsupported by law. Further, the *Barber/Espinoza* decision prevents DHHS and trial courts from considering cases on a case-by-case basis. If left standing, *Barber/Espinoza* renders vulnerable, traumatized children even more vulnerable.

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The statutes do not define what reasonable efforts are necessary to reunify the children with their families. But MCL 722.638 (1) informs the courts that there are types of abuse so severe that any efforts should not be required. For those types of abuse, there are no services or programs at DHHS's disposal that could ensure a child's safety if they were reunited with their abusive parent. This Court should reverse.

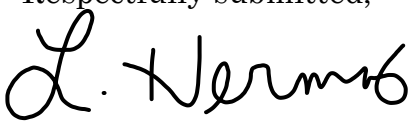
CONCLUSION AND RELIEF REQUESTED

The effect of the Court of Appeals' interpretation of MCL 722.638(1) and (2) in *Barber/Espinoza* is that it affords parents the opportunity to be reunited with their children even after they facilitate sex trafficking their children for drugs, so long as the principal sexual abuser never lived in the child's home. The opinion overlooks the purpose of the Michigan Juvenile Code and Child Protection Laws, fails to apply the plain meaning of the Probate Code (which incorporates definitions from the Penal Code), and jeopardizes children's safety and well-being.

Amicus respectfully requests that this Honorable Court reverse the Court of Appeals' opinion in *Barber/Espinoza*, thus ensuring that each child who comes before the court is afforded the intended protections of the Michigan Juvenile Code and Child Protection Laws.

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Respectfully submitted,



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