IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals

LETICA, P.J., and BORRELLO and RIORDAN, JJ.

IN RE D N DAILEY MINOR

Supreme Court Case No. 165889

Court of Appeals Case No. 363164

Wayne Circuit Court Family Division
Case No. 2019-000790-NA

APPELLANT-FATHER'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE BASIS OF JURISDICTION

This is an application for leave to appeal after a decision by the Michigan Court of Appeals.

This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.303(B)(1) to review by appeal a case after a decision by the Court of Appeals.

On May 18, 2023, the Court of Appeals affirmed the trial court's order terminating Mr. Dailey's parental rights. *In re Dailey,* unpublished per curiam opinion of the Court of Appeals, issued May 18, 2023 (Docket Nos. 363163 and 363164), Attach. A. Mr. Dailey filed a motion to reconsider, which was denied on June 20, 2023. *In re Dailey*, unpublished order of the Court of Appeals, issued June 20, 2023 (Docket No. 363164), Attach. B.

Mr. Dailey filed an application for leave to appeal within 42 days of the denial of the motion to reconsider. MCR 7.305(C)(2)(c). On January 31, 2024, this Court scheduled oral argument on the application.

STATEMENT OF QUESTIONS PRESENTED

1. Because terminating a parent's rights involves the permanent deprivation of a fundamental right, does the U.S. Constitution require trial courts to consider and eliminate available alternative remedies prior to doing so?

   Appellant says yes.
   Court of Appeals says no.
   Trial court says no.

2. Does the Juvenile Code require trial courts to consider a child's placement with relatives as a factor that weighs against termination because of the availability of alternative remedies, such as juvenile guardianships?

   Appellant says yes.
   Court of Appeals says no.
   Trial court says no.

3. Did the trial court and Court of Appeals err in terminating the rights of Mr. Dailey where alternative remedies could have preserved D.D.'s close relationship with his father, while also giving him stability with his maternal grandmother?

   Appellant says yes.
   Court of Appeals says no.
   Trial court says no.

INTRODUCTION

When the trial court terminated Mr. Dailey's rights to his son D.D., it described its decision as "extremely tragic," explaining that " these parents love [D.D.], that they want to do what they can for [D.D.] and I agree, that to some extent, they should have some, you know, they should be able to have some continued contact with [their son]." 57a. The decision to terminate Mr. Dailey's parental rights was not only extremely tragic, but it was also unconstitutional, in contravention of this Court's precedent interpreting the Juvenile Code, and entirely avoidable. This Court must step in to clarify that where safety and stability for a child can be achieved without terminating parental rights, constitutional and statutory law require Michigan courts to consider and rule out such alternatives.

As this Court and the U.S. Supreme Court have recognized, parents have a fundamental due process right to parent their children. See *Meyer v Nebraska,* 262 US 390, 399-400; 43 S Ct 625; 67 L Ed 1042 (1923); *In re JK,* 468 Mich 202, 210; 661 NW2d 216 (2003). Because termination of parental rights permanently deprives a parent of a fundamental liberty interest, the U.S. Constitution restricts the government from using it unless it can demonstrate the action is narrowly tailored to achieve a compelling state interest. *Washington v Glucksberg*, 521 US 702, 721; 117 S Ct 2258; 138 L Ed 2d 772 (1997) (quoting *Reno v Flores*, 507 US 292, 302; 113 S Ct 1439; 123 L Ed 2d 1 (1993)). For a state to demonstrate narrow tailoring, it must show that it used the "least restrictive means available" to achieve its

compelling interest. *Bernal v Fainter*, 467 US 216, 219; 104 S Ct 2312; 81 L Ed 2d 175 (1984).

As other states have properly held, termination of parental rights is unconstitutional where less-restrictive options for stability existed and were not pursued.[1] Mr. Dailey respectfully asks this Court to do nothing more than follow the lead of other states that apply the appropriate federal constitutional framework to termination decisions, requiring courts to consider available less-restrictive means, like juvenile guardianships, that can adequately safeguard a child's safety and stability.

Moreover, this Court's own case law interpreting the Juvenile Code highlights that the Legislature's goals of safety and stability are not always best served through termination of parental rights. The Legislature has expressly codified juvenile guardianships into the law to provide children with a "*permanent* and *self-sustaining*" option that allows them to live with relatives without terminating their parents' rights. MCL 722.875b (emphasis added). Consistent with the Legislature's creation of an alternative permanency option—juvenile guardianships—for children living with relatives, this Court has recognized that where children are living with relatives, it presumptively "weighs against termination." *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). This Court

[1] See, e.g., *TDK v LAW*, 78 So 3d 1006, 1011 (Ala Civ App, 2011); *PM v Lee Co Dep't of Human Resources*, 335 So 3d 1163 (Ala Civ App, 2021); *LM v Shelby Co Dep't of Human Resources*, 86 So 3d 377 (Ala Civ App, 2011); *SMM v RSM*, 83 So 3f 572 (Ala Civ App, 2011); *Ex parte AS*, 73 So 3d 1233 (Ala, 2011); *Fla Dep't of Children and Family Servs v Florida*, 880 So 2d 602 (Fla, 2004); *Interest of BTB*, 472 P3d 827; 2020 UT 60 (2020); *People ex rel AM v TM*, 480 P3d 682; 2021 CO 14 (Colo, 2021).

has also recognized that when children are living safely with family, state interference is unwarranted. *In re Sanders*, 495 Mich 394, 421-22; 852 NW2d 524 (2014) (noting that Michigan law "traditionally permits a parent to achieve proper care and custody through placement with a relative"); see also *In re Leach*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket Nos. 362618 and 362621) (finding that despite serious allegations of abuse, jurisdiction was unwarranted because child was safely living with his mother). Counsel simply asks this Court to clarify that under Michigan law, when children are placed with relatives, trial courts must rule out why alternative remedies cannot adequately protect a child's safety and stability prior to terminating a parent's rights.

Here, the trial court never ruled out such alternatives even though both parents argued that a juvenile guardianship could give D.D. stability, while also preserving their close bond with D.D. 40a-41a; 48a; 53a-54a; 55a. After all, from birth, D.D. has lived with his grandmother but received daily visits from his dad, which forged a strong, loving bond between them. 37a-38a; 30a-32a, 44a-47a, 49a; 36a; 37a-40a. Still, given Mr. Dailey's ongoing struggles with substance abuse that stem from a serious work-related injury, he and D.D.'s mother advocated for a guardianship arrangement to preserve D.D.'s status quo permanently. But the trial court, without analyzing why a juvenile guardianship could not provide D.D. with safety and stability, chose instead to terminate Mr. Dailey's parental rights.

Counsel respectfully asks this Court to reverse the trial court's decision terminating Mr. Dailey's parental rights and remand for consideration of a less-

restrictive means of achieving stability and safety for D.D.—a juvenile guardianship.

STATEMENT OF FACTS

In issuing its final termination of parental rights decision in this case, the trial court observed that the "[p]arents have been consistent in visiting, consisting in supporting the child." 56a. The court acknowledged that it considered "substance abuse to be an illness" and that its intent was not to "punish anybody." 57a. The court further noted that it had no doubt that these parents "love D.D., that they want to do what they can for D.D. and I agree, that to some extent, they should have some, you know, they should be able to have some continued contact with D.D." 57a.

Nevertheless, the court still permanently terminated the legal relationship between D.D. and his father, while also finding that it had "no objection to the parents continuing to have supervised contact with D.D." 58a. In fact, the court even hoped that "the parents [would] continue to be supportive of D.D, to have contact and have some support for the child." 58a. But of course, with parental rights permanently severed, there was no guarantee that D.D.'s father would ever see his son again.

D.D. lived with his maternal grandmother immediately after his birth, but his father visited him daily and provided him with financial and emotional support.

D.D. entered foster care at birth because his father, Eric Dailey, and his mother suffered from a substance abuse addiction. 4a-6a. According to Mr. Dailey, his addiction began when he fell off the top of a train while working, crushing both of his feet. 27a At the time of his accident, Mr. Dailey was working as a railcar

driver for NWC in Flat Rock, putting cars that were being shipped on the tops of trains. 27a. When he fell, he dropped twenty feet and was "lucky [he] didn't paralyze" himself. 27a. Doctors prescribed him Percocet to deal with the pain in his feet, and he soon started taking more than what was prescribed for him, beginning his abuse of drugs. 28a. But his pain never went away. 28a.

After the birth of his son, Mr. Dailey openly reported his addiction struggles to a CPS worker, which led the agency to file a petition in juvenile court in April 2019. The court authorized the petition and immediately placed D.D. with his maternal grandmother, in whose care he remained throughout the case. 3a, 6a, 9a. The CPS worker testified that the grandmother was meeting all of D.D.'s needs. 7a. Both the court and the CPS worker encouraged the parents to visit D.D. daily if possible. 8a.

A month later, Mr. Dailey made admissions to the petition confirming that his drug use impacted his personal ability to care for his son. 10a, 11a. At the hearing, the mother reported that she and Mr. Dailey saw D.D. every day at the grandmother's house, bringing formula and diapers and anything else the grandmother needed to care for the child. 12a.

The court held the dispositional hearing at the end of May 2019. DHHS created a treatment plan for Mr. Dailey to complete a substance abuse assessment, participate in weekly random drug screens, and attend parenting time, among other requirements. 13a-14a. The foster care worker reported that both parents were visiting "almost every day" and the grandmother stated that the parents were

assisting her and purchasing anything she needed. 15a, 17a. The worker stated that the parents were "helping grandma. They're cleaning. They're feeding. They're washing. Doing the things we want them to do." 16a.

Over the next six months, even while Mr. Dailey continued to struggle to overcome his addiction to drugs, he maintained a close relationship with his son. 18a. The foster care worker reported that the parents were "very attentive to D.D." and that visits were going "very well." 18a. She testified that the parents were "able to read his cues. He responds to them as well. He smiles and laughs with them." 18a. At a later hearing, the worker testified that the father's attachment and bond with D.D. were strong and described the visits as going well. 19a-21a.

Even though D.D. shared a close bond with his father, enjoyed visits, and was placed safely with his grandmother, DHHS still filed a petition to terminate his legal relationship with his father.

Despite the fact that visits were going well and the child was safe and stable in his grandmother's care, DHHS still filed a petition to terminate Mr. Dailey's parental rights, for which the court held a pretrial hearing in January 2020. 22a. A few months later, Mr. Dailey made admissions to statutory grounds to terminate conceding that he struggled to overcome his addiction while still participating in many programs. 23a-26a. The court continued the matter for a hearing to determine whether terminating parental rights was in D.D.'s best interests. 29a. Throughout the case, both parents argued that a juvenile guardianship could give D.D. stability, while also preserving the close bond between D.D. and his parents. 40a-41a; 48a; 53a-54a; 55a.

Even after the filing of the TPR petition, the evidence continued to show that Mr. Dailey maintained a close connection with D.D. According to the foster care worker, Mr. Dailey had a bond with his son, consistently visited him in the community, and saw him for one to three hours every day. 37a-38a; 30a-32a, 44a-47a, 49a; 36a; 37a-40a. The foster care worker further stated that D.D. looked forward to visits and would be harmed if visits were cut off. 48a.

The evidence also demonstrated that Mr. Dailey was gainfully employed, supported his son, and had a home. 33a; 34a; 35a; 43a. Nevertheless, the foster care worker insisted that a juvenile guardianship was not an appropriate stability outcome because it was "temporary" and because D.D. needed "stability." 41a, 42a.

Even though the trial court hoped Mr. Dailey would continue to visit and support his son, it still terminated Mr. Dailey's parental rights.

The case was prolonged due to the pandemic. Ultimately, the final hearing was held on July 20, 2022. Mr. Dailey was not present because, according to his lawyer, he had entered an in-patient treatment facility. 50a-51a.

At the TPR hearing, the mother testified that both she and the father were willing to consent to a guardianship with the grandmother. 52a. Mr. Dailey's attorney also asked the court to enter an order for a guardianship with the maternal grandmother, rather than terminate his client's parental rights. 53a-54a.

While the court acknowledged that Mr. Dailey was consistently visiting and supporting D.D., it remained concerned about his struggles to overcome his addiction and based its decision to terminate on those concerns, even though the child was living safely with his grandmother. 56a. But in issuing its final

termination of parental rights decision, the trial court still agreed that the parents "should have some, you know, they should be able to have some continued contact with D.D." 57a.

In its ruling, the court noted that the "[p]arents have been consistent in visiting, consisting in supporting the child." 56a. It further stated that it did "consider substance abuse to be an illness" and that its intent was not to "punish anybody." 56a, 57a. It viewed the circumstances as "extremely tragic" because "these parents love [D.D.], that they want to do what they can for [D.D.] and I agree, that to some extent, they should have some, you know, they should be able to have some continued contact with [him]." 57a.

The court, however, did not explain why alternative remedies — such as a juvenile guardianship — could not meet the State's interest in safety and stability while also preserving D.D.'s loving relationship with his father. The court only stated, "And I recognize that the child is placed with a relative. And that could mitigate towards not terminating rights, but I will note that, as I say, you know, we've been at this for three years. I don't expect that the picture is going to change." 59a. The court never addressed why permanently placing D.D. in a juvenile guardianship with his grandmother was not a viable option.

The Court of Appeals affirmed the trial court's decision, focusing on the fact that Mr. Dailey personally was unable to care for D.D. at the time of the TPR hearing.

Mr. Dailey appealed the trial court's decision to the Court of Appeals. *In re Dailey*, unpub op. Although Mr. Dailey only challenged the trial court's decision to

terminate his legal relationship with D.D., not arguing that he personally was able to care for his son, the Court of Appeals singularly focused on the fact that Mr. Dailey was unable to care for D.D. at the time of the TPR hearing. It noted that "a preponderance of the evidence supports the trial court's finding that termination of respondents' parental rights was in the child's best interests" because "[i]t is readily apparent that the child would be at risk in respondents' unsupervised care." *Id.* at 5. Similarly, it noted that "[w]hile a bond may have existed, there was sufficient evidence for the trial court to conclude that this factor did not outweigh the child's need for a safe and stable home that was free from drug abuse and individuals with unresolved substance abuse issues. Given the child's young age, it was critical that he be placed with someone who could provide adequate care and supervision." *Id.* at 5.

The Court of Appeals did note that "the evidence established that [the father] consistently visited the child, assisted in his care during parenting time, and contributed financially to his needs." *Id.* at 5. And it observed that the trial court found that the father "could have continued supervised contact with the child after the termination of [his] parental rights." *Id.* at 6.

Just like the trial court, the Court of Appeals never addressed why alternative remedies could not have satisfied the child's needs for safety and stability while preserving his relationship with his father. The panel simply concluded that "the trial court ultimately rejected the possibility of a guardianship because it found more compelling the child's needs for stability, permanence, and

finality . . . The trial court found that the child needed more stability than what a guardianship would offer." *Id.* at 6.

ARGUMENT

The trial court and the Court of Appeals erred in terminating Mr. Dailey's parental rights because it failed to rule out alternative remedies that could have kept the child safe and given him stability, while preserving his loving relationship with his father.

Standard of Review

Whether the U.S. Constitution and the Juvenile Code require a trial court to rule out alternative remedies prior to terminating a parent's rights is a question of law this Court reviews de novo. *In re Sanders*, 495 Mich at 403-04.

Argument

A. Because termination of parental rights permanently deprives a parent of a fundamental right, the U.S. Constitution requires trial courts to rule out alternative remedies prior to doing so.

The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. XIV, § 1.[2] Included in the Fourteenth Amendment's promise of due process is a substantive component that "provides heightened

[2] Michigan's Constitution also recognizes that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. This Court has held out the possibility that the Michigan Constitution's due process protections may in fact be broader than those in the U.S. Constitution. *AFT Mich v State*, 497 Mich 197, 245; 866 NW2d 782 (2015) ("Although these provisions are often interpreted coextensively, Const 1963, art 1, § 17 may, in particular circumstances, afford protections greater than or distinct from those offered by US Const, Am XIV, § 1"). Because the U.S. Constitution provides adequate due process protection as applied in this case, there is no need for the Court to decide whether the provisions are coextensive—or if Michigan's Constitution protects more—to decide the constitutional issue presented here.

protection against government interference with certain fundamental rights and liberty interests." *Glucksberg*, 521 US at 720.

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 at 399-400. The fundamental right to parent is "perhaps the oldest of the fundamental liberty interests." *Troxel v Granville,* 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). And it is a right embraced by this Court. In this Court's own words, "[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 at 210, citing *In re Brock,* 442 Mich 101, 109; 499 NW2d 752 (1993); see also *Lassiter v Dep't of Social Servs*, 452 US 18, 27; 101 S Ct 2153; 68 L Ed 2d 640 (1981) (declaring it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right").

Termination of parental rights (TPR) proceedings inflict a "unique kind of deprivation" of this fundamental right; when the State initiates such a proceeding, "it seeks not merely to infringe that fundamental liberty interest, but to end it." *Lassiter*, 452 US at 27; see also *In re NDO*, 121 Nev 379, 384; 115 P3d 223 (2005) ("courts have 'characterized parental rights termination as a "civil death penalty" because legal termination severs the parent-child relationship.'"). As the U.S. Supreme Court noted in *Santosky v Kramer*, "few consequences of judicial action are

so grave as the severance of natural family ties" and thus parents "faced with the forced dissolution of their parental rights have a more critical need for . . . protection than do those resisting state intervention into ongoing family affairs." 455 US 745, 753, 760, 787; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Applying this longstanding Supreme Court precedent, in *Hunter v Hunter*, this Court similarly observed that TPR cases "introduce a significantly heightened intrusion upon a parent's fundamental right to parent because they involve an all-or-nothing proposition: whether a parent's right to be a parent and make decisions regarding his or her child's upbringing is permanently severed." 484 Mich 247, 269; 771 NW2d 694 (2009).

Because terminating a parent's rights involves the complete deprivation of a fundamental constitutional right, the State cannot infringe upon that right—no matter what process is provided—"unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 US at 721 (quoting *Reno*, 507 US at 302). Stated differently, when the State is attempting to strip someone of a fundamental right, it must use "the least restrictive means available" to achieve whatever compelling interest is at stake. *Bernal*, 467 US at 219. That is, it can infringe upon that right "no more than the exact source of the evil it seeks to remedy." *Frisby v Schultz*, 487 US 474, 485; 108 S Ct 2495; 101 L Ed 2d 420 (1988).

If the government is to infringe upon a fundamental right *at all*, its burden is exacting. If the government cannot demonstrate its action is narrowly tailored, it has not met this burden. Where the State's action is broader than necessary to

achieve its goals, it is not narrowly tailored. *Zablocki v Redhail*, 434 US 374, 389-90; 98 S Ct 673; 54 L Ed 2d 618 (1978) (rejecting a statute because the state had "numerous other means" for achieving its purposes that were "at least as effective"). Put another way, to survive this scrutiny, the government must demonstrate it not only has a "constitutionally permissible and substantial purpose," but also that it is "*necessary* . . . to the accomplishment of its purpose." *Id.* (emphasis added). The State cannot burden "more persons than necessary to cure the problem." *Black's Law Dictionary* (10th ed), p 1278-79.

In TPR cases, the U.S. Supreme Court has made clear that the State's interests are to both protect children from harm and to provide them with a stable home. *Santosky,* 455 US at 766-67; see also *Sanders*, 495 Mich at 415 ("[T]he state has a legitimate and important interest in protecting the health and safety of minors."). To satisfy strict scrutiny in a TPR case, the State must demonstrate that permanently terminating a parent's rights is the least restrictive way to keep the child safe and provide the child with a stable home. And as the U.S. Supreme Court has noted, there will be cases in which "positive, nurturing parent-child relationships exist," meaning that the least restrictive way to serve a State's "*parens patriae* interest" would be "preservation, not severance, of natural familial bonds." *Santosky*, 455 US at 766-67.

B. State appellate courts have applied strict scrutiny to reverse TPR decisions where less restrictive alternatives existed.

Across the country, state appellate courts have properly applied strict scrutiny to reverse TPR decisions where less restrictive alternatives existed that

could have safeguarded the child's safety and stability. Most notably, for over four decades, Alabama appellate courts—relying on the federal court decision in *Roe v Conn*, 417 F Supp 769 (MD Ala, 1976)—have held that the U.S. Constitution requires trial courts to demonstrates that termination is the least restrictive means of accomplishing the State's goals.[3] In *Roe*, the federal court panel—in evaluating

[3] Early case law from Alabama appellate courts held that before termination, the U.S. Constitution required the State to present and the court to consider viable alternatives. See *Glover v Ala Dep't of Pensions & Security*, 401 So 2d 786, 788 (Ala Civ App, 1981); *Hamilton v State*; 410 So 2d 64, 66 (Ala Civ App, 1982); *Buckhalter v Dep't of Pensions & Security*, 484 So 2d 1119, 1121 (Ala Civ App, 1986); *Wishinsky v Ala Dep't of Human Resources*, 512 So 2d 122, 124 (Ala Civ App, 1987); *Wilson v State Dep't of Resources*, 527 So 2d 1322, 1323-1324 (Ala Civ App, 1988). In *Ex parte Beasley*, the Supreme Court of Alabama built upon these cases to establish a test requiring courts to "explore whether [an] alternative can be successfully employed instead of terminating parental rights" where "some less drastic alternative" exists to "simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship." 564 So 2d 950, 954 (Ala, 1990). Since *Beasley*, Alabama appellate courts have reversed TPR decisions in a variety of scenarios. First, the courts have reversed TPR decisions where a family member had the ability to care for the child. See, e.g., *LM v Shelby Co Dep't of Human Resources*, 86 So 3d 377 (Ala Civ App, 2011); *SMM*, 83 So 3d 572; *PM v Lee Co*, 335 So 3d 1163; *Ex parte AS*, 73 So 3d 1223. Second, Alabama courts have reversed TPR decisions where the State failed to investigate a child's placement with relatives adequately. See, e.g., *RP v State Dep't of Human Resources,* 937 So 2d 77, 81 (Ala Civ App, 2006); *AM v St Clair Co Dep't of Human Resources,* 146 So 3d 425, 436-37 (Ala Civ App, 2013). Third, Alabama courts have reversed TPR decisions where a child lives with a non-relative foster parent but maintains a close relationship with their parents. See, e.g., *RH v Madison Co Dep't of Human Resources*, unpublished opinion of the Alabama Civil Court of Appeals, issued March 24, 2023 (Docket Nos. CL-2022-0799, CL-2022-0800, CL-2022-0813, and CL-2022-0814), Attach. C; *AB v Montgomery Co Dep't of Human Resources*, 370 So 3d 822, 829 (Ala Civ App, 2022). Lastly, Alabama appellate courts have reversed termination decisions where the State failed to present evidence that adoption was a viable option. See, e.g., *CM v Tuscaloosa Co Dep't of Human Resources*, 81 So 3d 391 (Ala Civ App, 2011); *BAM v Cullman Co Dep't of Human Resources*, 150 So 3d 782, 784-86 (Ala Civ App, 2014); *TN v Covington Co Dep't of Human Resources*, 297 So 3d 1200 (Ala Civ App, 2019); *DSR v Lee Co Dep't of Human Resources*, 348 So 3d 1104 (Ala Civ App, 2021); *Talladega Co Dep't of Human Resources v JJ*, 187 So 3d 705, 709 (Ala Civ App, 2015).

Alabama's TPR statute—found that the U.S. Constitution permits the State "to abrogate [parental] rights only to advance a compelling state interest and pursuant to a narrowly drawn statute restricted to achieve only the legitimate objective." *Id.* at 779. The State's interest, the panel noted, would become compelling enough to justify TPR "only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing." *Id.*

Relying on *Roe*, Alabama courts have found that "parents and their children share a fundamental right to family integrity that does not dissolve simply because the parents have not been model parents. That due-process right requires states to use the most narrowly tailored means of achieving the state's goal of protecting children from parental harm." *TDK v LAW*, 78 So 3d at 1011. As such, "if some less drastic alternative to termination of parental rights can be used that will simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship, then a juvenile court must explore whether that alternative can be successfully employed instead of terminating parental rights." *Id.*

In particular, Alabama appellate courts have consistently applied this constitutional framework to reverse TPR decisions when children are safely living with family and viable alternatives to TPR exist. For example, in *PM v Lee County Dep't of Human Resources*, the Alabama Court of Civil Appeals reversed a TPR decision after finding that the child could live safely with relatives without terminating parental rights. 335 So 3d 1163. The record showed that while the

mother was unable to care for her child, she had maintained sobriety and had complied with some reunification efforts. *Id.* at 1167, 1170. The court found that the evidence "support[ed] a conclusion that continued placement with the relative foster parents would serve the child's best interest while also maintaining the mother's relationship with the child." *Id.* at 1172.

Similarly, in *LM v Shelby County Department of Human Resources*, the Alabama Court of Civil Appeals reversed a decision terminating the mother's rights where the child could have been placed safely in the father's custody. 86 So 3d at 390. The appellate court criticized the State for its "failure to recommend that the custody of the children be returned to the father with orders that he strictly supervise the mother's contact with the children." *Id.* at 389-90. The Court of Civil Appeals concluded that "returning custody of the children to the father while continuing [the State's] ability to supervise the family appears to be a viable alternative to termination of the mother's parental rights." *Id.* at 390.

In *SMM v RSM*, the Alabama Court of Civil Appeals reversed the trial court's TPR decision concerning a mother who had recently been released from jail. 83 So 3d 572. The court reasoned that because the child's father had sole custody and was able to ensure the child's safety during the mother's visitations, "[m]aintenance of the status quo and allowing the mother continued supervised visitation with the child adequately protects the welfare of the child while allowing for a beneficial relationship with both parents." *Id.* at 576-77. Thus, "a viable alternative to termination of the mother's parental rights exist[ed]." *Id.*

Finally, in *Ex parte AS*, the Alabama Supreme Court reversed a TPR petition because a child was living safely with her maternal grandmother. 73 So 3d 1233. The Alabama Supreme Court concluded that a "viable alternative to termination of the mother's parental rights" was "[t]he grandmother maintaining custody of the child and having the ability to determine and supervise the mother's visitation with the child." *Id.* at 1229-30. Therefore, the court concluded that the trial court had erred in terminating parental rights. *Id.* These cases are emblematic of the heightened scrutiny—based on federal constitutional law—Alabama appellate courts apply when reviewing TPR decisions where children are living with family.

State appellate courts from other jurisdictions have applied a similar constitutional test when adjudicating TPR cases. For example, the Florida Supreme Court has held that, for a termination of parental rights "to pass constitutional muster," the state must show "that the termination of parental rights is the least restrictive means of protecting the current child from harm." *Fla Dep't of Child & Fams v FL*, 880 So 2d at 608, 611. Similarly, the Utah Supreme Court has held that a court may terminate parental rights only when it concludes that termination is "strictly necessary" to promote the child's interests. It went on to explain that "[i]f the child can be equally protected and benefited by an option other than termination, termination is not strictly necessary. And the court cannot order the parent's rights terminated." *BTB*, 472 P 3d at 841.

The Colorado Supreme Court has likewise required "that the trial court consider and eliminate less drastic alternatives," before it terminates parental

rights. *AM v TM*, 480 P3d at 687. This approach, the court explained, not only protects parents' constitutional rights, but is also *mandated* by the "best interests of the child" standard that the state's courts must consider in termination cases. *Id.* at 687-90. The court explained that "best interests" was a "superlative," and "require[d] more than a mere assessment of adequacy." *Id.* 687-89. Thus, "if a trial court considers a less drastic alternative in connection with its overall evaluation of the statutory criteria for termination and finds that it is in the child's best interests, it should deny the termination request." *Id.* at 689.

This Court should apply these principles to adopt a constitutional test identical to the one embraced by Alabama appellate courts. This Court should hold that the U.S. Constitution requires trial courts to find that termination is the least restrictive option to safeguard the child's safety and stability. To make this finding, trial courts must consider the merits of alternative arrangements and pursue termination only after concluding that these alternatives could not meet the child's needs for safety and stability.

C. The Juvenile Code requires trial courts to consider a child's placement with relatives as a factor that weighs against termination because of the availability of alternative remedies.

Not only does the U.S. Constitution require trial courts to rule out alternative remedies prior to terminating parental rights, the Juvenile Code—as construed by this Court—requires trial courts to start with a presumption that "a child's placement with relatives weighs against termination." *In re Mason*, 486 Mich at 164. In identifying this presumption in *Mason*, this Court properly recognized that

when a child is with relatives, other options exist that could give a child stability while preserving the parent-child relationship, such as a juvenile guardianship. *Id.*

Several statutory provisions informed this Court's holding in *Mason*. MCL 712A.19a explicitly states that a court need not order the State to file a TPR petition—regardless of how long a child has been in foster care—if the child is living with relatives. MCL 712A.19a(8)(a).[4] To facilitate a child's stability when they are living with family, the Legislature included alternative stability goals in the statute including placing a child in a "legal guardianship" or "permanently" placing the child with a "fit and willing relative." MCL 712A.19a(4)(c)(d).

In fact, the Legislature created a specific permanency option for children—juvenile guardianships—so that they may permanently live with relatives while the rights of their parents are preserved. The Legislature intended for juvenile guardianships to be "permanent and self-sustaining." MCL 722.875b. In fact, the law explicitly describes juvenile guardianships as "permanent placements," MCL 722.875a, that transfers parental rights to third parties. MCL 722.875b. The DHHS foster care manual similarly notes that juvenile guardianships deliver the same stability benefits as adoptions: "Adoption and guardianship both offer the child legal stability, a sense of security and family attachment and allow the adoptive parent or guardian to make decisions on the child's behalf." DHHS Children's Foster Care Manual, FOM 722-07 at 3, Attach. D.

[4] This provision mirrors a similar provision in federal law instructing state agencies that they do not need to file TPR petitions when children are living with relatives. 42 USC 675(5)(E)(i).

This Court's precedent in *Mason*, requiring courts to start with a presumption against termination when a child is living with a relative, puts these legislatively recognized alternative permanence arrangements into practice. After all, workable alternatives to termination—like juvenile guardianships—only become a reality for Michigan families if courts consistently consider them in actual cases.

D. Empirical studies support the stability of juvenile guardianships, providing that they are no less stable than adoptions.

Empirical studies support the stability of juvenile guardianships, proving that they are no less stable than adoptions. Gupta-Kagan, *The New Permanency*, 19 UC Davis J Juv L & Pol'y 1, 36 (2015), Attach. E. ("Adoption's more legally binding nature has not made it more lasting or permanent in fact, as the guardianship studies . . . establish."). It is true that there is a difference between the way that adoptions and guardianships can be ended, as guardianships can be terminated by a motion by any party. *Id.* However, "[t]his difference is easily exaggerated. Guardianship modifications still require proof of some significant changed circumstance and that modifying the guardianships would serve the children's best interests." *Id.*; see also MCL 712A.19c(13) (only permitting modification or termination of a juvenile guardianship based on a finding that "that continuation of the guardianship is not in the child's best interests").

When empirical studies compare outcomes for children in guardianships with those of adopted children, juvenile guardianships prove to be no less permanent than adoption. Gupta-Kagan, *The New Permanency*, at 18; Testa, *The Quality of*

Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption, 12 Va J Soc Pol'y & L 499, 528 (2005), Attach. F. Mark Testa, a prominent scholar in the field of guardianship, followed 6,820 children in guardianships after their child protective cases had closed and found that only two percent of the children had their guardianship end or had their placement disrupted. *Id.* (citing Mark F. Testa et al, *Illinois Subsidized Guardianship Waiver Demonstration: Final Evaluation Report*, 50 (2003)).

Testa concluded that the data suggests "the particular type of legal permanence may be less consequential for lasting family relationships than some caseworkers and judges believe" and there were no significant differences "[w]ith respect to the stability qualities of intent, belongingness and continuity" in guardianships and adoptions. Mark Testa, *Disrupting The Foster Care To TPR Pipeline: Making A Case For Kinship Guardianship As The Next Best Alternative For Children Who Can't Be Reunified With Their Parents*, Fam Integrity & Justice Quarterly 74, 78 (Winter 2022), Attach. G.; Testa, *The Quality of Permanence*, at 528. Instead, factors such as "the degree of genealogical relatedness, sense of family duty, feelings of affection and length of acquaintance" are most consequential for achieving stability and avoiding legal disruption. Testa, *The Quality of Permanence*, at 525. What this research indicates is that when children are living with relatives, absent compelling reasons to protect a child's safety, there is no need to terminate a parent's rights to promote the State's interest in stability.

E. Michigan appellate courts have applied the legislative framework to find additional state interference as unwarranted when children are living safely with family.

Consistent with this research and the legislative framework, this Court and the Court of Appeals have found that state interference is unwarranted when children are living safely with family.[5] See *Sanders*, 495 Mich 394; *Leach*, slip op; *Mason*, 486 Mich 142. In each of these cases, there was overwhelming evidence that the parents were unfit and personally unable to care for their children. *Sanders*, 495 Mich at 402, 421-22 (father had tested positive for cocaine, had a domestic violence conviction, and was incarcerated for violating federal drug laws); *Leach*, slip op at 1 (father was incarcerated after shaking his baby, causing brain bleeding, fractured ribs, and retinal hemorrhaging); *Mason*, 486 Mich at 148, 152 (father was incarcerated, and had convictions for criminal sexual conduct, drunk driving, and larceny).

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[5] A long line of Michigan appellate cases have held that if children are living safely with relatives, the State has no interest in further intruding in the familial arrangements. *In re Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982) (opinion by WILLIAMS, J.) (equally divided decision) ("[I]f a mother gives custody to a sister, that can be 'proper custody'."); *In re Maria S Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) (opinion by LEVIN, J.) ("Some parents, . . . because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for."), overruled in part on other grounds by *Bowie v Arder*, 441 Mich 23, 47; 490 NW2d 568 (1992); *In re Curry*, 113 Mich App 821, 823-26; 318 NW2d 567 (1982) (observing that incarcerated parents may achieve proper custody by placing a child with relatives); *In re Carlene Ward*, 104 Mich App 354, 360; 304 NW2d 844 (1981) (holding that a child "who was placed by her natural mother in the custody of a relative who properly cared for her, is not a minor 'otherwise without proper custody or guardianship' and thus she was not subject to the jurisdiction of the probate court" under MCL 712A.2).

Despite evidence of the parent's unfitness, Michigan appellate courts nevertheless found that further state interference was unwarranted precisely because the children were living safely with their family. In *Sanders*, this Court wrote that when a parent—regardless of their own ability to care for their children—place a child with fit relatives, "state interference . . . is not warranted." *Id.* at 420. Similarly, in *Leach*, the Court of Appeals affirmed the trial court's dismissal of a child protective petition—even after allegations that the father had shaken his baby—because the children were living safely with their mother and did not face a substantial risk of harm. slip op at 1. The Court of Appeals noted, "Without any allegations about existing mental or emotional harm, or the substantial risk of that harm arising, we cannot conclude that the trial court erred by declining to authorize the petition." *Id.* at 5.

And in *Mason*, this Court held that even when DHHS places a child with relatives after the initiation of a child protective proceeding, that placement with family weighed against terminating a parent's rights because the child could live "both tomorrow and indefinitely" with the relatives in a juvenile guardianship while still maintaining a relationship with their parent. *Mason*, 486 Mich at 164, 169.

These rulings align with fundamental constitutional principles, emphasis placed on alternative permanency arrangements in the Juvenile Code, and case law from Michigan appellate courts mandating that the State not interfere unnecessarily in the lives of families. All counsel requests in this case is for this Court to apply existing law to clarify that for courts to put *Mason*'s holding—that a

child's placement with relatives weighs against termination—into practice *requires* trial courts to rule out alternative remedies that could safeguard a child's safety and stability prior to terminating a parent's rights when they are living with relatives. That is the only way to ensure that the *Mason* presumption—coupled with *Sander*s' bar on state interference when a child is living safely with family—is operationalized in all termination decisions.

F. Under both a constitutional analysis and under the holdings of *Mason* and *Sanders*, the trial court erred by terminating Mr. Dailey's parental rights without first ruling out alternative remedies that could have ensured the child's safety and stability.

In this case, the trial court erred by failing to rule out alternative remedies—such as a juvenile guardianship—that could have satisfied the State's interest in ensuring D.D.'s safety and stability. The trial court's omission is even more striking given both parents argued that a juvenile guardianship could give D.D. stability, while also preserving the close bond between D.D. and his parents. 40a-41a; 48a; 53a-54a; 55a. If the court had addressed the viability of a juvenile guardianship, it would have found that there was absolutely no reason to terminate Mr. Dailey's parental rights given that the child was safely living with his grandmother and had a strong relationship with his father.

Throughout the case, the uncontroverted evidence demonstrated that Mr. Dailey had a close bond with D.D., visiting him nearly daily and supporting him in many ways. 12a; 30a-32a; 33a; 34a; 35a; 44a-47a; 49a; 36a; 37a-40a. Even while Mr. Dailey continued to struggle to overcome his addiction to drugs, he maintained a close relationship with his son. 18a. For instance, a foster care worker described

Mr. Dailey as "very attentive to D.D." 18a. At a later hearing, she testified that D.D.'s attachment and bond with his father were strong and described the visits as going well. 19a-21a. The bond was so close that the foster care worker testified that cutting off contact between D.D. and his father would cause him harm. 48a.

At the final hearing, the trial court found that it did "consider substance abuse to be an illness" and that its intent was not to "punish anybody." 56a, 57a. It viewed the circumstances as "extremely tragic" because "these parents love [D.D.], that they want to do what they can for [D.D.] and I agree, that to some extent, they should have some, you know, they should be able to have some continued contact with [their son]." 57a. The court acknowledged that the "[p]arents have been consistent in visiting, consistent in supporting the child." 56a. But it still permanently destroyed D.D.'s legal relationship with his father.

In announcing its decision terminating Mr. Dailey's parental rights, the court spent no time explaining why less restrictive options—such as a juvenile guardianship—could not meet the State's interest in safety and stability while also preserving D.D.'s loving relationship with his father. The court only stated, "And I recognize that the child is placed with a relative. And that could mitigate towards not terminating rights, but I will note that, as I say, you know, we've been at this for three years. I don't expect that the picture is going to change." 59a. But the court did not address why *permanently* placing D.D. in a juvenile guardianship with his grandmother would not serve the State's interests. In fact, the stable, familiar, workable option for D.D. was *maintaining his status quo*—living with his

grandmother, and having regular, loving visits with his father. The court could have achieved the legislative goal of stability for D.D. by legally enshrining this arrangement through a juvenile guardianship but chose instead to burden Mr. Dailey's fundamental right to parent needlessly.

The Court of Appeals also failed to explain why less restrictive means could not satisfy the State's goals. *In re Dailey*, unpub op. It wrongly assumed—without any evidentiary basis—that terminating parental rights and pursuing adoption offered more stability for D.D. than a juvenile guardianship. And it wrongly focused on whether immediate reunification with the father was possible, rather than the actual question before the court—whether maintaining some form of relationship with him would serve D.D.'s interest. *In re Dailey*, unpub op at 5 ("It is readily apparent that the child would be at risk in respondents' unsupervised care.").

Both the trial court and the Court of Appeals were legally required to rule out alternative remedies—in this case a juvenile guardianship—prior to terminating Mr. Dailey's parental rights. They failed to do so. Given Mr. Dailey had a close, loving relationship with his son, who was living safely with his grandmother, actual analysis of the viability of a juvenile guardianship would have made clear that termination was unwarranted. For these reasons, this Court should reverse the order terminating Mr. Dailey's parental rights.

CONCLUSION

For these reasons, Mr. Dailey respectfully asks this Court to reverse the decision of the trial court and the Court of Appeals and remand the matter to the trial court for a determination as to why a juvenile guardianship could not protect D.D.'s safety and stability while also preserving his relationship with his father.

Respectfully submitted,

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Statement as to Length and Form of Brief

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