IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals

GLEICHER, C.J., and K. F. KELLY and LETICA, JJ.

IN RE BATES MINORS

Supreme Court Case No. 165815

Court of Appeals Case No. 361566

Grand Traverse Circuit Court Family Division Case No. 18-004645-NA

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STATEMENT OF JURISDICTION

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 March 23, 2023, the Court of Appeals—in a split decision—affirmed the trial court's order terminating Ms. Bates' parental rights. *In re Bates,* unpublished per curiam opinion of the Court of Appeals, issued March 23, 2023 (Docket No. 361566) (*Bates I*). Ms. Bates filed a motion to reconsider, which was denied on May 22, 2023.

Ms. Bates 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 October 20, 2023, this Court—while retaining jurisdiction—remanded the matter to the Court of Appeals to address whether the trial court erred in concluding that termination was in the children's best interest. *In re Bates*, ___ Mich ___; 996 NW2d 130 (2023) (*Bates II*). The Court of Appeals issued a decision on December 21, 2023, again affirming the trial court's decision in a split decision. *In re Bates*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2023 (Docket No. 361566) (*Bates III*).

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 custody orders?

   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 Ms. Bates where alternative remedies could have preserved the children's close relationship with their mother, while also safeguarding their safety and stability?

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

INTRODUCTION

After years of struggling with abusing alcohol, Catherine Bates[1] experienced a "wakeup call," realizing she needed to "get real help" or risk losing everything. 135a-136a. She answered her own call—beginning to take Vivitrol (a pharmaceutical injection that reduces cravings for alcohol), entering intensive inpatient treatment, and seeking therapy to address the underlying causes of her addiction. 136a-138a, 33a, 150a, 147a, 151a-152a. According to her peer recovery coach, Ms. Bates emerged from her treatment "a changed woman," showing up consistently to do the day-in-day-out work to protect her sobriety. 170a-171a.

Ms. Bates, a changed woman, provided her sons with love, support, and stability through frequent visits while they were living full-time with their father. At the time of the termination hearing, testimony from specialists observing visits between Ms. Bates and her children, the children's therapists, and their father all emphasized how positive and vital these visits were for the boys. They had a strong, loving bond with their mother, someone who had demonstrated an ability to care for them, even given the complexity of her son AAB's Type 1 diabetes. Ms. Bates is a mother who has made mistakes, atoned for them, and demonstrated not only personal growth, but her value in the lives of her children. By all accounts, the status quo for these children—living with dad, visits with mom—was *working*.

[1]After the trial court's decision in this matter, Ms. Bates changed her last name to Sleder. But for the purposes of this brief, counsel will continue to refer to her as Ms. Bates because that is the name appearing in the record in this matter.

And yet, the trial court terminated Ms. Bates parental rights without considering whether an alternative arrangement, such as a custody order, could have provided stability for her children without legally severing her legal relationship to them. 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.[2] Ms. Bates respectfully asks this Court to do nothing more than follow the lead of others states that apply the appropriate federal constitutional framework to termination decisions, requiring courts to consider available less-restrictive means, like a custody order, 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. Child custody orders allow courts to limit or restrict a parent's ability to see their child in any manner necessary to protect the child's best interest. MCL 722.27a. Such orders can only be altered under narrow circumstances, making them a stable (and potentially permanent) option for children when living with one relative, but receiving other kinds of support from another. MCL 722.27; *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009).

Consistent with the Legislature's creation of an alternative permanency option—child custody orders, 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 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

[2] 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'y 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).

"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.

In deciding whether to terminate her parental rights, the trial court and Court of Appeals majority treated the issue as a binary—full rights or no rights. The trial court never considered whether an alternative arrangement, like a custody order, could have given the boys stability while also preserving their close bond with Ms. Bates. As the facts of this case highlight, simply analyzing termination in a vacuum—without any engagement with possible alternatives—not only actively works against the interests of children, it is also unconstitutional, in contravention of this Court's precedent interpreting the Juvenile Code, and entirely avoidable. Counsel respectfully asks this Court to reverse the trial court's decision terminating Ms. Bates' parental rights and remand for consideration of a less-restrictive means of achieving safety and stability—a custody order.

STATEMENT OF FACTS

At the time of the final termination of parental rights hearing, Ms. Bates' therapist opined that Ms. Bates was "a changed woman" and was doing "incredible."

At the time of the final termination of parental rights hearing, Ms. Bates, the mother of AAB, age twelve, and AMB, age eight, had completely transformed her life, given her long history of abusing substances and her criminal record. She was employed as a medical technician at an assisted living facility, providing medical care for the residents and even working as a personal assistant for one of the residents. 142a, 143a. More importantly, she was sober and, in her words, dedicated to being the "safe, reliable mother that [her children] can depend on." 140a. She testified that recovery was her "biggest priority." 144a. And she had put that priority into practice, engaging with a plethora of services to ensure her continued sobriety, which included a recovery coach, mental health treatment, counseling, Vivitrol injections, and AA meetings. 199a. Professional after professional involved in her recovery testified about her remarkable progress.

Ms. Bates had also strengthened her relationship with her boys, who were living safely with their father. The specialist supervising parenting time testified that it would be "detrimental to both" AMB and AAB to not see Ms. Bates anymore. 110a. They "both look forward to [seeing] their mom, . . . and they've gotten used to seeing her every week." 110a. They "asked if they were going to have more visits or longer visits," and the specialist stated that they seemed to "enjoy" the longer four-

hour visits, compared to the usual two-hour visits. 110a-111a. Even the DHHS caseworker testified that Ms. Bates had a strong bond with her boys. 48a, 95a, 99a.

Yet, despite the overwhelming evidence of Ms. Bates' remarkable transformation and her strong bond with her boys, the trial court still terminated her parental rights, based entirely on the events that led to the filing of the petition. 177a-218a.

Ms. Bates' substance use started at a young age as a result of childhood trauma, and worsened after her divorce, leading to CPS involvement.

According to her therapist, Ms. Bates experienced "childhood trauma," which led her to start drinking at the age of twelve and to develop a binge drinking habit in her mid-twenties. 156a. Fortunately, Ms. Bates was able to manage her alcohol consumption for many years; however, in 2017, her marriage began to deteriorate, and her control began to slip. In August 2017, Ms. Bates' then-husband became concerned about her drinking and supervision of their two children, and he contacted a crisis counselor. 112a-113a, 86a. As a mandatory reporter, the crisis counselor contacted CPS, which, in turn, began an investigation; in the end, CPS declined to file a petition or initiate a case at that time. 112a-113a; 86a.

A few months later, in December 2017, Mr. Bates filed for divorce, which Ms. Bates later described as "contentious." 86a, 112a. She testified that the divorce triggered her excessive drinking, and she began relying on alcohol to "mask [her] emotional pain" to the point where her relationship with alcohol became "abusive." 112a. One of her friends similarly testified that he believed her divorce was a "big

part of" her alcohol abuse. 105a. During this time, she was also prescribed a benzodiazepine to treat her anxiety resulting from the divorce. 112a.

In September 2018, the court finalized her divorce, giving both parents roughly equal custody. 83a, 84a, 85a. But Ms. Bates' substance abuse continued to worsen. She grieved the loss of her family and became particularly upset during holidays without her children. 7a. Ms. Bates described her feelings during this time as "despondent," and her friend noticed her beginning to "downhill" spiral. 116a, 7a, 105a.

Now a single parent, Ms. Bates was also forced to learn how to care for two young boys on her own, and, admittedly, there were challenges along the way. For example, one Friday when AMB's preschool was not in session, the then-three-year-old snuck out of the house while Ms. Bates was taking a quick shower. 114a-116a. Having propped open the bathroom door, she heard the garage door slam closed and "race[d] [outside] in a towel" to find AMB crossing the yard to pick up AAB from the school bus stop. 115a. Fortunately, AMB was unharmed, and neither the police nor CPS were called. 115a.

After attempting to commit suicide, Ms. Bates cooperated with services offered by CPS.

In April 2018, Ms. Bates, still reeling from the "emotional pain from the divorce," hit her "lowest point," and attempted to commit suicide. 116a. She had been struggling with insomnia and unable to sleep for several days when she began drinking and taking Benadryl. 4a. Although the boys were in her care, they were asleep, and she called a friend to watch them while she slept. 4a, 116a. When he

arrived, the friend sensed that something was wrong and called emergency services, who transported Ms. Bates to a local hospital. 4a, 116a. There, Ms. Bates detoxed overnight and was discharged the following morning with a safety plan in place prohibiting unsupervised contact with the children. 4a.

Soon after, CPS was contacted and Ms. Bates, understanding that she needed to get professional help, cooperated with the agency. 116a-117a. CPS created a plan and provided Ms. Bates with drug screens, behavioral services at a local hospital, a psychological evaluation, family support services, and a local community resource list. 5a. Ms. Bates completed the evaluation, after which the doctor diagnosed Ms. Bates with alcohol abuse, a generalized anxiety disorder, and a personality disorder not otherwise specified. 5a. He recommended that Ms. Bates continue psychotherapy, avoid alcohol, review her medications, and explore the sources of her anxiety and sleep issues. 5a. Ms. Bates attended counseling for about a year, which she found "helpful," and began taking prescription antidepressant and antianxiety medications as needed. 117a-118a. Later, a CPS caseworker testified that Ms. Bates "benefit[ed]" from these services and was cooperative with the agency. 76a, 77a.

CPS filed a petition, but it was dismissed after Ms. Bates cooperated with the agency and the parties reached a stipulated agreement regarding custody.

Unfortunately, Ms. Bates continued to struggle throughout 2018. She later admitted that she "drank to excess at various points," particularly when she became upset about her divorce. 119a. She violated her safety plan by having unsupervised

contact with the boys, missed several mental health appointments, and had poor home visit reviews. 5a-6a. Then, in November 2018, she tripped and fell down her basement stairs while doing laundry. 118a, 157a. She hit her head "very hard" and was unable to call 911 for several hours. 118a, 157a. When she was finally taken to the hospital, she reportedly told the emergency room staff that she had been drinking and taking her prescribed benzodiazepine in excess. 157a.

Shortly thereafter, CPS began an investigation due to concerns regarding Ms. Bates' "mental health and substance abuse." 74a. The agency filed a petition and removed the boys from her care, placing them with Mr. Bates. 75a. Ms. Bates cooperated with the agency, attending every meeting and drug screen requested of her. 75a, 64a. She agreed to refrain from unsupervised contact with her children throughout the investigation. 7a.

A few months later, in March 2019, the parties resolved the case with a stipulated agreement. 13a-14a. They agreed that Mr. Bates would temporarily have full physical custody of the boys while Ms. Bates completed her services. 13a-14a; 87a. After two months of her complying, the arrangement reverted to the pre-existing custody arrangement granting both parents roughly equal custody. 75a. The following month, DHHS withdrew its petition. 178a, 185a, 207a. The case was never adjudicated. 75a.

While Ms. Bates attended education sessions to address her son's Type 1 diabetes, she struggled at times to address his medical needs.

AAB was first diagnosed with Type 1 diabetes in September 2018 when he presented with his first diabetic ketoacidosis (DKA). 56a. Unlike Type 2 diabetics

who are insulin-resistant, those who have Type 1 diabetes are completely unable to produce insulin. 71a. DKA is a serious, potentially life-threatening complication of diabetes in which the body's cells do not receive enough insulin to function properly. AAB's pediatric endocrinologist noted that DKA can have multiple "cause[s]," including illness, higher running blood sugars, and omission of insulin. 70a-71a, 73a. Symptoms include ketones in the urine, abdominal pain, rapid respiration, high blood sugar, fruity or vinegar breath, altered mental status, brain swelling, inability to breathe, kidney failure, dehydration, and excessive thirst, hunger, or urination. 57a-58a.

The hospital where AAB was diagnosed used an outpatient education model to teach children and parents the basics of diabetes management and treatment, including how to check blood sugar levels, draw and give insulin, and address both high and low blood sugar levels. 59a. Specifically, the hospital generally instructed parents to test at least four times a day when the child was feeling well and up to ten times per day when they were ill. 72a. Even the doctor noted, however, that this process could be overwhelming and placed "a lot on the family." 68a-69a.

After AAB's diagnosis, both parents attended the initial training to learn about managing his disease. 158a. They learned how to use AAB's glucometer to take blood sugar readings and administer insulin. 88a. Ms. Bates also read the pamphlets provided by the hospital and various pieces of literature regarding the glycemic index, the effects of food on blood sugar, and insulin corrections. 158a-

159a. Believing that AAB's care was being managed sufficiently, Ms. Bates did not attend any other formal trainings. 158a-159a, 161a.

From the start, AAB's diabetes was challenging to manage. For the first few years after his diagnosis, including at the time of his second DKA, AAB relied on insulin shots. 60a. Then, in early 2022, he transitioned to using a continuous glucose monitor and insulin pump. 60a. Regardless of his regimen, AAB's blood sugars consistently had high variability, with more extreme high and low readings than normal. 65a. This rendered managing his condition more difficult because he was very susceptible to low blood sugar, which limited the amount of insulin he could receive; consequently, he tended to run high. 67a.

For example, his endocrinologist testified that at an appointment in October 2019, his blood sugar was 366 (normal is below 120). 61a. Additionally, his glucometer had registered over 200 blood sugar readings during the previous month, and the levels ranged from 39 to HI (i.e., over 600), had an average reading of 191 (again, normal is below 120), and had an average blood sugar level (A1C) of 8.5 (normal is between 7 and 7.5). 61a, 62a-63a. At another appointment in early 2022—at which point he had been primarily under Mr. Bates' care for years—AAB still presented with a blood sugar level of 221 and an A1C of 8.6. 60a, 61a, 66a. As recently as March 2022, Mr. Bates noted that AAB's blood sugars tended to run high, with an average of about 280. 93a.

In December 2019, CPS received a complaint regarding Ms. Bates' management of AAB's diabetes. 8a-9a. Shortly before Christmas, she took the boys

to Florida. 120a. During the trip, the first thing Ms. Bates did was check AAB's blood sugar levels and she continued to check them after every meal; then, at night, he would take a long-lasting insulin shot. 120a-121a. Instructed by hospital nurses to involve AAB in his own care, Ms. Bates had been allowing AAB to check his own blood sugar levels and report the numbers back to her. 123a. Mr. Bates also testified that he too frequently allowed AAB to conduct his own tests. 92a. Ms. Bates would then calculate and administer his insulin dosage—a challenging process requiring her to predict what kind of food, and how much, AAB expected to eat. 120a, 123a. But, because they were on vacation and there were special treats, like theme park foods, Ms. Bates was very careful with AAB's diabetes, testing more than normal. 122a. She managed AAB's diabetes herself, and there was only one out of range reading. 122a. Mr. Bates also testified that for the bulk of the trip, AAB's blood sugar readings were okay. 89a-90a, 187a.

Upon their return, the boys went back to their father's house. Mr. Bates testified that when the boys arrived, AAB presented with high blood sugar and ketones in his urine. 89a-90a, 187a. He then worked all weekend to lower AAB's levels, and when he returned the boys to Ms. Bates' care on December 24, there were no ketones in his urine. 89a-90a, 187a.

Mr. Bates, however, had failed to notify Ms. Bates of any of this information, and so Ms. Bates was unaware that AAB had been running high blood sugar levels for several days and had had ketones in his urine. 123a. Instead, she went along as normal. Upon his arrival, Ms. Bates checked his blood sugar around 9 PM, and

administered a corrective dose of insulin. 123a-124a. AAB was in range when he went to bed around 10 PM. 123a-124a.

A few days later, as one of their Christmas gifts, Ms. Bates took AAB and AMB to stay at a local hotel so that they could go swimming. 124a. On their way to the hotel, they stopped at a store, where AAB vomited. 123a. When Ms. Bates asked him how he was feeling, he told her he was "fine" and that he had "just drank too much water." 125a. Ms. Bates believed him, although later realized he was likely downplaying his illness so that he could still go swimming at the hotel. 125a.

They spent all day at the pool and everything was normal. 125a. The boys skipped lunch, electing to keep swimming instead, and Ms. Bates—who was in the habit of checking AAB's blood sugar at mealtimes—did not do a mid-afternoon test. 125a. That night, they went out for dinner. Before AAB began eating, Ms. Bates gave him a full dose of insulin calculated based on the contents of his entire meal. 125a. But almost immediately, AAB started vomiting and failed to consume his food. 125a. Ms. Bates was "very concerned" that she had given him a dose calculated for a meal he didn't actually consume and thus that he had excess insulin in his system. 126a.

Back at the hotel, AAB continued to vomit. 126a. In the morning, AAB told Ms. Bates that his levels were in the 130 range. 126a. But, trained as a certified nursing assistant, Ms. Bates was still concerned about her son and wanted to do "everything in [her] power," to "get him the treatment he needed," so she took him to a nearby walk-in clinic. 18a-19a, 126a. She explained his symptoms to the

medical staff and informed them that he had Type 1 diabetes and she was concerned about low blood sugar. 19a, 126a. The staff examined AAB, tested his vitals (including his blood sugar), and diagnosed him with a virus; they prescribed him with an anti-nausea medication and told Ms. Bates to take him home and let him rest. 126a, 102a (similar testimony from Ms. Bates' friend). The doctor did not mention testing for ketones in AAB's urine. 127a.

Ms. Bates let AAB sleep all day, and, in conjunction with the fact that AAB was not eating and continuing to vomit, she was out of her "usual routine" of testing his blood sugar and providing insulin doses at mealtimes. 127a. She continued to monitor her sick son and keep him hydrated, but AAB got "progressively sicker." 17a. He still hadn't ingested any food, and his symptoms were similar to his previous low blood sugar episodes; thus, Ms. Bates attributed his illness to low blood sugar, which she later testified was an erroneous assumption. 17a. Unfortunately, the backpack of educational materials from the hospital was with Mr. Bates, who failed to answer or respond to any of Ms. Bates' calls. 159a.

The following day, AAB continued to vomit and become increasingly weak, but Ms. Bates reminded herself that she had just taken him to the walk-in clinic the day prior. 17a. Ms. Bates became worried that AAB would fall out of bed as he leaned over the edge to vomit, so she moved him to the padded floor and nested blankets around him to create a safer space. 127a, 103a. AAB became unresponsive, and Ms. Bates later told EMS that she began giving him honey, as she had previously done when he had low blood sugar. 13a, 8a-9a. Initially, Ms.

Bates thought the honey was helping but AAB's condition continued to deteriorate. 9a-10a, 12a. She called a friend over for a second opinion, and they soon called 911. 128a.

Ms. Bates went with AAB to the hospital, where he was quickly diagnosed with DKA. 8a. He had a blood sugar level of 1600, and his condition was very serious. 8a-9a. The medical staff feared he would not make it through the first night or may have long-term organ damage. 9a, 11a, 15a.

After AAB's blood sugar levels had dropped to 900, he, accompanied by Mr. Bates, was airlifted to a larger hospital. 11a. Ms. Bates returned home to talk to law enforcement and care for AMB, who was being watched by her friend and "very scared and distressed." 129a, 103a. She cooperated with the law enforcement officers' requests, allowing them to look around the house and interview her. 129a. She told them that AAB had been sick and throwing up, and so she hadn't administered insulin to him for three days. 9a, 12a.

CPS removed both children from Ms. Bates' custody after the medical emergency with AAB and requested the immediate termination of her parental rights.

The following morning, CPS arrived to remove AMB from Ms. Bates' care. 130a. When asked to sign a safety plan, Ms. Bates refused because she was scared that her kids would be removed from her care again; however, she agreed to let AMB stay with his paternal grandparents while she and Mr. Bates were at the hospital with AAB. 10a, 130a. Ms. Bates later admitted that when she returned to the hospital that day, she was "still processing" and "in shock" about the situation.

130a. She remarked that she "didn't understand that he was in deep DKA. It took her a bit." 130a. Fortunately, AAB turned around in a couple of days and was discharged about two weeks later. 106a.

As a result of AAB's DKA, CPS filed a petition seeking immediate removal of the boys from Ms. Bates' care as well as termination of her parental rights, alleging that Ms. Bates was "unable to provide proper care and custody" for AAB. 3a, 11a. The court placed the children with their father but granted supervised visits to Ms. Bates. 16a, 20a-21a. Soon thereafter, the court authorized the petition based on Ms. Bates' stipulation to waive probable cause. 24a. While the case ended up being delayed for several years due to scheduling conflicts and the COVID-19 pandemic, Ms. Bates was allowed supervised parenting time which the court ordered to be "as frequent as possible." 42a, 23a.

At the same time, Ms. Bates was also facing criminal charges based on her failure to meet AAB's medical needs. In November 2020, Ms. Bates pled guilty to third degree child abuse, a felony. 27a-28a. She decided to plead because she felt that, as AAB's mother, it was her "responsibil[ity] to have complete knowledge of how to care for [AAB] medically," and she "did not have that knowledge." 131a. She admitted that she "made mistakes" that caused AAB to become "very ill," and she felt "tremendous amounts of guilt about it and . . . wanted to be honest in criminal court" about her role in it. 131a. The following January, she was sentenced to five months of prison time and continuous probation. 25a.

Even while incarcerated, Ms. Bates did her best to maintain a relationship with her boys.

But even while she was in prison, Ms. Bates did her best to sustain her bond with her sons. Although in-person visitation was suspended during her incarceration, a CPS caseworker testified that Ms. Bates had been "writ[ing] [the boys] letters and postcards," and had phone contact with them on a "pretty solid schedule." 26a. Similarly, Ms. Bates testified that she made "every single phone call that [she] was granted by the Court," about three to four times a week, while incarcerated. 168a-169a, 134a.

With good time, Ms. Bates was released early in April 2021, and her supervised parenting time resumed. 78a, 133a. But after her release, she became "completely despondent"; she hadn't seen her boys in months and quickly learned that they never received the letters she sent them from prison. 134a. Additionally, on top of her residual guilt about AAB's DKA, she now felt even more guilt about her separation from them. 134a. She still hadn't developed the necessary coping mechanisms to handle her stressors and began drinking, even though the terms of her probation forbade alcohol. 134a-135a, 104a. Ms. Bates admitted that when she began "drink[ing] again" after her release, she "relapsed very, very hard." 134a. She began "craving" alcohol and when she "had that first drink, it didn't stop." 134a.

Unfortunately, Ms. Bates kept drinking, which caused her to end up back in jail. 135a. Shortly after her wedding anniversary, Ms. Bates was "mourning . . . the loss of [her] family" and began drinking with a friend. 135a. Under the

influence, she attempted to shoplift alcohol from two stores, and, in early July 2021, she was arrested on bond and probation violations for retail fraud and drinking. 79a, 30a. In mid-September 2021, Ms. Bates was sentenced to eleven months in jail, although she was released early to attend an in-patient substance abuse treatment program. 136a-137a, 196a.

While incarcerated for her violations in her criminal case, Ms. Bates entered a plea to jurisdiction in her child protective case. 27a. In her plea, she admitted to "fail[ing] to provide insulin to [AAB]," which "caused him to go into [DKA]" in December 2019, and to entering a guilty plea to child abuse in the third degree. 27a-29a. She further admitted to "continu[ing] to suffer from substance abuse" and being currently "incarcerated . . . [d]ue to continued use of alcohol while on probation." 28a.

After her second incarceration, Ms. Bates turned her life around, addressed her substance abuse issues, and strengthened her bond with her children.

Ms. Bates' second incarceration was, in her words, her "wakeup call," during which she realized that if she "didn't stop drinking" and "get real help," she was "going to lose everything." 135a-136a. So, even without the help of DHHS—which never provided her with any services—Ms. Bates turned her life around.

During her second incarceration, Ms. Bates obtained Vivitrol for herself. 138a. Vivitrol is a monthly injection that greatly reduces cravings for alcohol and other substances and prevents feeling any effects from consuming these substances. 138a. She asked her counselor for a referral and received her first injection while

still in jail. 138a. The court noted that it was "really glad" to see this and commended Ms. Bates for this "very good choice." 31a. Even though Ms. Bates was still incarcerated, the court lauded her efforts, noting, "I'm very proud of you that you have taken the step with respect to medication, and I hope that you'll move forward with respect to your sobriety." 32a.

Ms. Bates also took the initiative to line up inpatient and intensive outpatient treatment for herself after her release from prison, which she successfully advocated to be eight months early. 136a-137a, 196a. Upon her release at the end of October 2021, she checked herself into a thirty-day inpatient treatment for substance abuse that focused on PTSD and addiction. 33a, 150a. There, she participated in both group and individual counseling meetings two to three times per week. 33a, 36a. She was screened every day and tested negative each time. 38a. She also sought to understand and address her PTSD. 150a.

Ms. Bates' clinical therapist testified that she was "very forthcoming" and presented the therapist with the information regarding her mental health, substance abuse, and parental supervision concerns that began the case. 147a, 151a-152a. Ms. Bates informed her therapist about AAB's DKA, the prior and current CPS cases, her guilty pleas, and the child abuse conviction, and she also provided her with copies of the CPS reports and petitions. 147a-178a, 151a-153a. Her therapist noted that she was aware that this was the second time the boys were removed due to substance abuse. 39a.

The therapist concluded that Ms. Bates' substance use prior to the first removal was likely due to her "living situation[] and marital stress," and since the case began, her substance abuse was likely "attributable to her separation from her sons and that guilt." 37a, 40a. The therapist noted that after the first removal, Ms. Bates was assigned services related to her substance abuse, which Ms. Bates completed; however, "no direct service was offered such as residential treatment." 40a-41a.

Once in residential treatment, Ms. Bates and her therapist were able to strengthen a variety of coping skills, and Ms. Bates continued to practice them so that they became her fallback. 37a. The therapist explained that without these resources and skills, individuals often internalize guilt, which leads them to "inappropriate coping skills," like using drugs and alcohol. 37a.

Her therapist testified that Ms. Bates "really put forth a lot of the work" and was "willing to do anything" asked of her. 147a. Ms. Bates was "very involved and very much participating," completing all the assignments provided to her. 35a-36a. Her therapist believed that Ms. Bates also "assum[ed] responsibility for her actions" and her role in AAB's DKA and "never put blame on anybody" else, including AAB or Mr. Bates. 149a-150a; see also 154a (Ms. Bates admitting to her therapist that AAB almost died "because of [her] actions"). She expressed remorse and "tremendous guilt" for not checking AAB's blood sugar, because she now understood that administering insulin was the proper course of treatment. 148a-149a.

Ms. Bates successfully completed the program and was released in early December 2021. 33a, 49a. Her counselor provided certificates of completion for her work addressing her substance abuse issues. 33a, 48a, 54a.

While her therapist acknowledged the many strides Ms. Bates made in treatment, she was also candid about Ms. Bates' remaining work. She explained that although Ms. Bates' recovery was going "really well," Ms. Bates still had work to do. 155a. To continue her progress, Ms. Bates' therapist created an aftercare program for her that included her Vivitrol shots, weekly therapy, peer recovery meetings, outpatient therapy, and psychoeducational groups. 38a.

Ms. Bates continued to make progress after leaving the treatment facility.

After leaving in-patient treatment, Ms. Bates continued to make strides toward recovery. After four months of working together weekly, Ms. Bates' peer recovery coach[3] noted that Ms. Bates was a "changed woman." 170a-171a. Importantly, Ms. Bates' recovery coach testified that "part of recovery [is] to have lapses and relapses." 172a. But successful sobriety required people to "show up" and "listen to those hard truths and do some work around that," looking at the underlying stressors and triggers. 172a. She noted that Ms. Bates was "consistent and engaged" both during and outside of their sessions and was focused on "personal growth." 171a. Ms. Bates was forthcoming about the length and history

[3] Peer recovery coaches help individuals with substance use disorders and co-occurring mental health disorders find resources to start and continue their recovery journeys, such as getting them into treatment and providing coping techniques and other strategies for living sober.

of her substance abuse, her children's removals, the court case, and her triggers. 173a.

In the end, Ms. Bates' coach noted that she was "one of [her] best coaching clients" as far as showing up and doing the work. 172a. The coach was inspired by Ms. Bates' ability to look deeply at her stressors and triggers and to try and remedy them as they arose. 173a. And, given the number of stressors in her life—such as her children's removals and the pending TPR case—the recovery coach noted that Ms. Bates was doing "incredible." 173a. Even considering Ms. Bates' long history of substance abuse, the recovery coach did not have any concerns about Ms. Bates seriously relapsing moving forward. 175a. She argued that Ms. Bates had the coping skills to move forward appropriately. 174a-176a. And, while outside the official scope of her job, the recovery coach noted that she had no reason to believe Ms. Bates would be unsafe around the boys or herself. 174a.

Ms. Bates embraced this recovery plan and continued to progress. She described her residential rehabilitation program as the "absolute best thing" to happen to her. 137a. It allowed her the time and support to explore her "reasons," [and] "stressors," that "trigger[ed]" her drinking. 137a. The DHHS caseworker testified that Ms. Bates was continuing in "intensive" outpatient services, including individual counseling, and her therapist noted that she was headed "in the right direction" and she had earned increased parenting time. 47a, 151a.

Even the prosecution and the court recognized her success. Immediately after her release, the prosecuting attorney noted that "substance abuse seems to be

going well at this point." 34a. Similarly, the court credited Ms. Bates for her hard work, noting that "progress has been made this reporting period" and commending her enrollment in the inpatient rehabilitation program as "very good by all accounts." 44a-46a. The court even "recommend[ed] that reasonable efforts for reunification be continued." 45a.

To address her alcohol addiction, Ms. Bates remained focused on learning and practicing her various coping mechanisms. She continued to attend her weekly therapy and recovery coach sessions. 139a. Additionally, she meditated, did breathing exercises, journaled, exercised, and practiced being honest and open about her feelings and asked for help when needed. 139a. She also received weekly alcohol screens, which were all negative. 139a. She continued to foster the many friendships she made in her residential rehabilitation program, noting that they were doing well, remaining sober, and supporting her in their "incredible and beautiful" journeys of recovery. 138a.

The DHHS caseworker testified that she had several email communications with Ms. Bates' parole officers, who indicated no concerns regarding Ms. Bates' compliance with the terms of her parole. 53a. Additionally, the caseworker confirmed that "[e]very single screen has been zero," and that there were no other substances of concern besides alcohol. 98a-99a.

Ms. Bates admittedly had a minor setback in her recovery in early February 2022. During a home visit, she admitted her setback to her interim parole officer. 96a. The parole officer then contacted the caseworker, who in turn spoke to Ms.

Bates. 97a. The caseworker testified that Ms. Bates admitted to buying a "small bottle of wine" and taking a couple sips before "realiz[ing] that it was not worth it and . . . dump[ing] the rest down the sink." 50a. Yet neither Ms. Bates' regular parole officer nor the interim officer decided to file a violation. 52a.

Although the worker voiced concerns about this setback, she never even reached out to either parole officer about Ms. Bates compliance in the weeks following this incident. 53a. As Ms. Bates' attorney argued, if the parole officer thought Ms. Bates truly violated her terms of release, she likely would have been charged and promptly incarcerated; but she did not. 55a. The caseworker was also concerned that Ms. Bates did not notify her of the relapse. 96a-97a. But as Ms. Bates explained, although she did not "immediately jump" to tell her caseworker about her relapse, she "did not hide" it from her either, even though it likely never would have been discovered on a screen. 167a, 98a. Instead, Ms. Bates voluntarily notified her parole officer, stating that CPS had never been part of her support system, and she "never really received any actual recovery services through DH[H]S." 167a.

While Ms. Bates recognized that this incident was a "mistake," she also deemed it a "learning experience." 163a. She practiced self-control and honesty, both of which supported her journey towards recovery. 55a. And, in the weeks that followed, including during all of the stresses of the termination of parental rights hearing, Ms. Bates did not have a "single urge to drink." 164a. In fact, she never tested positive for alcohol once.

Ms. Bates also strengthened her close bond with her children who looked forward to seeing their mother every week.

In addition to making significant strides in her sobriety, Ms. Bates continued to strengthen her relationship with her children during parenting time. The visitation specialist testified that it would be "detrimental to both" AMB and AAB to not see Ms. Bates anymore. 110a. They "both look forward to [seeing] their mom, . . . and they've gotten used to seeing her every week." 110a. They "asked if they were going to have more visits or longer visits," and the specialist stated that they seemed to "enjoy" the longer four-hour visits, compared to the usual two-hour visits. 111a.

The visitation specialist detailed a number of aspects as to why visits went so well. She commented that Ms. Bates was "always on time or early" and usually planned the evening with dinner or activities, such as bowling or games. 107a. The boys were "always anxious to plan their next visit and know when they're going to see her, what they're going to do." 107a.

She continued, noting that Ms. Bates and the boys "interact great together." 107a. The boys are "always happy to see her," and they "run to her, jump into her arms, hugs, kisses." 107a. The conversation "flows naturally," and they tell her about their school, friends, and recent activities, such as books they've read and television they have watched. 107a. They took pictures together in the photo booth to hang in their lockers at school, and both boys liked to involve Ms. Bates in their activities; for example, AMB would bring a book and "read a[] little bit to [Ms. Bates]," and AAB would bring some of his drawings to show her. 108a.

The specialist also testified that Ms. Bates' behavior was always appropriate, including with regards to AAB's diabetes. 108a-109a. When the boys arrived, Ms. Bates would immediately ask AAB what his blood sugar levels were and what he ate for lunch and then would look at his device. 109a. After AAB decided what he would eat for dinner, Ms. Bates would calculate and administer the necessary insulin dosage and would "check[] it again later on after he's eaten to see where he's at." 109a. If AAB decided to eat more or have dessert, she would reevaluate his insulin needs and dose him accordingly. 109a.

Ms. Bates' ability to manage AAB's diabetes was enhanced by the fact that she herself was diagnosed with Type 1 diabetes and had been testing her own blood sugars and administering her own insulin. 140a-141a. She was diagnosed during her incarceration, when she experienced DKA, albeit a much milder version than AAB's experience. 145a-146a.

Consequently, Ms. Bates was far more educated about diabetes. 165a. She took additional classes on diabetes, nutrition, and insulin pumps, and the educators added in additional lessons regarding pediatric diabetes after Ms. Bates shared that she had a diabetic son. 141a; 160a-161a. At the termination hearing, she testified that she would no longer rely on AAB to read out his blood sugar levels, which was corroborated by her actions during parenting time in which she insisted on "physically . . . see[ing] the readings." 166a. She also purchased the ketone testing strips. 162a. Ms. Bates was even well-prepared to manage AAB's new pump as she

was scheduled to get her own pump and continuous glucose monitor in April 2022, and she took the requisite classes to prepare herself. 141a.

In the end, when asked whether she had any concerns about Ms. Bates' ability to care for the boys, the visitation specialist responded, "[n]ot at all, no." 111a. And with regard to potential concerns regarding Ms. Bates' management of AAB's diabetes, she said, "[n]o. She's been really on top of it." 111a.

Similarly, the ongoing caseworker testified that weekly parenting time was "going well," and there were "no noted concerns." 94a. Due to staffing shortages at the supervising agency, the caseworker personally supervised several parenting time visits, which she stated were "going as well as can be expected." 48a. She testified that there were "no noted concerns in behavior or during the conversation." 95a. Ms. Bates even brought gifts for the boys for the missed holidays. 49a. The caseworker testified that she never had "any reason to suspect that [Ms. Bates] was intoxicated during parenting time." 99a. The caseworker also explained that the boys missed two visits in early 2022, one because Ms. Bates was ill and another due to inclement weather. 51a. She testified that when AAB hadn't seen Ms. Bates in two weeks, he expressed "concern[]." 101a.

Even the boys' counselors agreed parenting time was going well. AAB's therapist testified that he enjoyed going to the arcade with Ms. Bates, and AMB's therapist testified that she did not remember ever telling the caseworker that she was concerned about AMB regressing if parenting time resumed. 80a. Furthermore, since parenting time resumed after Ms. Bates' second incarceration,

AMB's therapist did not notice any behavioral issues with AMB, nor did she believe there were any safety concerns at visitation. 81a. He commented that he "want[s] to visit mom." 82a. Even Mr. Bates commented that visits "seem to go well." 91a.

In addition to making the most out of her parenting time with her children, Ms. Bates also accepted full responsibility for her past transgressions. She pled guilty in two different courts to her handling of AAB's DKA. 55a. As noted by Ms. Bates' attorney, Ms. Bates pled guilty to criminal charges as well as to jurisdiction in the child protective proceeding for her failure to provide AAB with proper care. 43a. She also repeatedly admitted that she "should have done things differently," and had to "live with the knowledge that [she] could have done things differently." 132a. Specifically, she stated that she should have contacted AAB's endocrinologist and checked his blood sugars continuously, despite the fact that he was not consuming any food. 133a.

Even the DHHS caseworker testified that she had never heard Ms. Bates blame anybody else for AAB's DKA and had not minimized, deflected, or failed to accept responsibility. 100a-101a. In fact, the caseworker testified that Ms. Bates admitted that she "made a huge mistake." 101a.

Despite Ms. Bates' remarkable progress, the court still terminated her parental rights, stripping her children of the right to see her.

Despite the uncontroverted evidence of Ms. Bates' strong relationship with her children and her remarkable recovery, the court still terminated her parental rights. It found statutory grounds for termination under MCL 712A.19b(3)(c)(i) and (j) noting that Ms. Bates' substance abuse and mental health issues continued to

exist. 204a-206a, 211a. In so holding, the court cited the fact that Ms. Bates not only failed to treat AAB, but her actions "exacerbated and increased the severity of his DKA." 207a. It faulted Ms. Bates for failing to educate herself, address her substance abuse issues, and take responsibility, despite her pleas in both the criminal and child protective cases. 207a-208a. It dismissed Ms. Bates' residential treatment, stating that her "benefit from treatment is questionable" and said that the positive testimony was only "privy to information provided by [Ms. Bates]." 206a, 208a. The court found that although Ms. Bates was "now actively participating in substance abuse treatment" and had seen "recent benefit[s]," it was "too little too late." 208a.

The court also ruled that terminating Ms. Bates' parental rights served the children's best interests. 213a. Despite the fact that 1) the children were living safely with their father, 2) they deeply loved their mother and wanted to spend time with her, and, 3) Ms. Bates was making incredible progress—all uncontested facts—the court also found that it would be in the children's best interest to permanently deprive them of their legal right to see their mom. 214a.

Nowhere in the trial court's lengthy opinion did it explain why alternative remedies, like a specific custody order granting the father sole legal and physical custody of the children while giving Ms. Bates supervised parenting time with the children, would not satisfy the State's interest in keeping the children safe and stable.

The Court of Appeals—in a split decision—affirmed the trial court's decision to terminate Ms. Bates' parental rights.

Ms. Bates appealed the decision to the Court of Appeals, which affirmed the trial court's decision in a split decision. *Bates I*, unpub op (Gleicher, J, dissenting). The majority concluded that the trial court correctly found that Ms. Bates "struggled with mental health and substance abuse issues which had a negative effect on the children" and that therefore unable to care for her children. *Id.* at 3.

While the majority opinion focused on Ms. Bates' past mistakes, Judge Gleicher found that the "termination of mother's parental rights based on her past conduct was mostly punitive rather than advancing anyone's best interests" and the law required "judges to consider the present and future as well as the past." *Id.* at 1, 6. She concluded that the "permanent termination of [the children's] relationship with their mother punishes them as well as mother and conflicts with their short-term and long-term best interests." *Id.*

Additionally, Judge Gleicher found that termination of parental rights was unnecessary "because the children were safely and securely placed in the custody of their father and mother's visits with the children were uniformly positive." *Id.* at 3. Judge Gleicher further noted that "[t]he facts are no different than those of routine custody matters in which one parent may not be in a present position to provide custody in his or her home." *Id.* at 5. She concluded that "[u]nlike the termination of parental rights, which forever severs a child's relationship with a parent and the parent's family, less onerous and adversarial proceedings offer both parent and child the possibility of a positive relationship and the opportunity to repair the damage a parent has caused." *Id.* at 5. Finally, she wrote that the "permanent

termination of [the children's] relationship with their mother punishes them as well as mother and conflicts with their short-term and long-term best interest." *Id.* at 6.

Ms. Bates filed an Application for Leave to Appeal with this Court, and on October 20, 2023, this Court remanded the matter back to the Court of Appeals to specifically address whether the trial court erred in concluding that termination served the best interests of the children.

On remand, the Court of Appeals again issued a split decision, again with Judge Gleicher dissenting. *Bates III*, unpub op. In its opinion, the majority quoted the trial court's best interest determination at length, *id.* at 4-6, and concluded that the trial court did not clearly err in its decision and in fact, considered less restrictive alternatives because "DHHS made a good faith effort to achieve reunification." *Id.* at 6. Even though the question before the Court of Appeals was whether preserving a *legal relationship* between Ms. Bates and the children was in their best interest, throughout the opinion, the majority instead focused on a completely different question—whether *immediate reunification* of the children was in their best interest. See *Bates III*, unpub op at 6 (Gleicher, J., dissenting) (noting that "at this point in her recovery, [Ms. Bates] seeks a *relationship* with her children, not custody").

For instance, the majority wrote that "the appropriate focus at this stage is not necessarily on the success of respondent's recovery, but on whether the children will have their best interest served by *remaining with respondent* while she undergoes recovery." *Bates III*, unpub op at 7 (opinion of the Court) (emphasis

added). Ultimately, the Court of Appeals concluded that the trial court was correct in terminating Ms. Bates' rights because the "respondent's demonstrated inability to consistently maintain sobriety or care for her children compelled termination, even though the children were living with their father." *Id.* at 7.

Judge Gleicher disagreed with this analysis. She criticized the majority opinion because it "belabors the mother's past, barely mentions the children, and avoids confronting powerful evidence that mother and her children were strongly bonded." *Bates III*, unpub op at 1 (Gleicher, J, dissenting). The majority opinion also failed to "explain why a less drastic and restrictive alternative to termination should have been reflexively disregarded." *Id.*

Judge Gleicher found that the Juvenile Code "embodies a recognition that children should not lose their connections even to imperfect parents so long as the children are safe and well cared for by a relative, including another parent" because "[p]lacement with relatives can suffice to provide permanency and to keep children safe, while also allowing them to maintain critically important emotional relationships." *Id.* at 9. The majority and the trial court erred, in Judge Gleicher's estimation, by finding that "positive life changes simply cannot overcome past mistakes, regardless of a strong parent-child bond, solid parenting skills, joyful visits, compliance with a case service plan, mental health progress, voluntarily rehabilitation efforts, and obvious love and affection shared by parent and child." *Id.* at 8.

Following the Court of Appeals decision to affirm termination on remand, this Court—which retained jurisdiction—scheduled an Oral Argument on the Application.

ARGUMENT

I. The trial court and the Court of Appeals erred in terminating Ms. Bates' parental rights because it failed to rule out alternative remedies that could have kept the children safe and given them stability while preserving their close relationship with their mother.

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.[4] Included in the Fourteenth Amendment's promise of due process is a substantive component that "provides heightened

[4] 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 demonstrate that termination is the least restrictive means of accomplishing the State's goals.[5] In *Roe*, the federal court panel—in evaluating

[5] 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 decision 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, 436-437 (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); *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, 784-786 (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,[6] other options exist that could give a child stability while preserving the parent-child relationship. *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).[7] To facilitate a child's stability when they are living with family, the Legislature included alternative permanency goals in the statute including placing a child with a parent or a legal custodian, or "permanently" placing the child with a "fit and willing relative." MCL 712A.19a(4)(a)(d).

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. Afterall, workable alternatives to termination—such as a child custody order—only become a reality for Michigan families if courts consistently consider them in actual cases.

D. Child custody orders allow courts to protect a child's safety and stability while also preserving a child's relationship with their parent.

[6] The Juvenile Code defines relatives to include anyone "related to the child within the fifth degree by blood, marriage, or adoption." MCL 712A.13(a)(1)(j). So under the Code, parents fall within the definition of relatives.

[7] 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).

When a child is living safely with the other parent, child custody arrangements satisfy the State's interest in giving children a safe and stable home while allowing them to maintain their relationship with their parent. The Legislature enacted the Child Custody Act to establish, when necessary, a parent's duty to care for and support a child. See MCL 722.21 *et seq*. A parent's duty is established through a child custody order that lays out a parent's rights and responsibilities to the child with regards to legal custody, physical custody, or visitation. See MCL 722.2; MCL 722.3. Importantly, in enacting this scheme, the Legislature created a presumption that it would be in "the best interests of a child for the child to have a strong relationship with *both* of his or her parents." MCL 722.27a(1) (emphasis added).

When entering a child custody order, a court may restrict or limit a parent's ability to see their child in any manner the court believes is necessary to protect the child's best interest. MCL 722.27a. For example, a court may order that one parent have sole legal and physical custody of a child, require parenting time to be supervised, or can even suspend parenting time. *Id.*

Once entered, a child custody order is not easy to alter, because the Child Custody Act is designed to minimize disruptions. See MCL 722.27 ("The court shall not modify . . . its previous . . . so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."); *Corporan v Henton*, 282 Mich App at 603 (The goal of the Act is "to minimize unwarranted and disruptive changes of custody

orders, except under the most compelling circumstances"). A trial court can only modify a custody order if the moving party establishes proper cause or a change of circumstances and shows that the child's custodial environment should be changed. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). If the movant fails to meet this burden, the court cannot revisit the custody order. *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994) ("where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision.").

Case law from the Court of Appeals interpreting the "proper cause or change in circumstances" language in MCL 722.27(1)(c) makes clear that it is not an easy burden to meet. Because of the high burden to change a custody order, once an order is in place, it provides stability for children. In *Vodvarka*, the Court of Appeals explained that to establish proper cause, the movant must show that there is "one or more appropriate grounds that have or could have a *significant effect* on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka*, 259 Mich App at 511 (emphasis added). Proper cause, therefore, requires demonstrating by preponderance of the evidence that: 1) there is appropriate ground for legal action based on one of the twelve statutory best interest factors and 2) that the ground raised has a significant effect on the child's well-being. *Id.* at 512.

The *Vodvarka* panel also analyzed the "change of circumstances" requirement, explaining that "a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (quotations and emphasis in original).

This 'change of circumstances' standard does not include the child's normal changes in needs and desires while growing up. *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657-58; 808 NW2d 811 (2011). Rather, there must be a showing that any changes that take place will almost certainly have or has already had an effect on the child. See *Vodvarka*, 259 Mich App at 513-14. Additionally, movants whose custody case arose incidentally by way of another action must show that the cause of the underlying case has been resolved or has changed. MCL 722.27(1).

In addition to showing that there is either proper cause or a change of circumstance, to alter a custody order, the parent would have to show that the child does not have an established custodial environment. A child has a custodial environment "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). In making the determination to change the custodial environment, the court must consider "the age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship." *Id.*

Taken together, this statutory scheme—designed to prevent unnecessary disruption in the living arrangements of children—gives courts handling child protective cases an important tool to protect the stability and safety of children while also preserving parental relationships. Moreover, to ensure that courts are fully informed when making child custody decisions, the Legislature also required—whenever practicable—that the child protective court preside over all subsequent custody proceedings involving the same family. MCL 600.1023 ("When 2 or more matters within the jurisdiction of the family division of circuit court involving members of the same family are pending in the same judicial circuit, those matters, whenever practicable, shall be assigned to the judge to whom the first such case was assigned.").

By enacting a statutory scheme in which trial courts have the authority to tailor custody orders between parents to protect the safety and stability of children, the Legislature gave child protective courts an important tool to avoid the unnecessary termination of a parent's rights.

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 legislative framework, this Court and the Court of Appeals have found that state interference is unwarranted when children are living safely with family.[8] See *Sanders*, 495 Mich 394; *Leach*, slip op; *Mason*, 486 Mich

[8] 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) (equally divided decision) ("[I]f a mother gives custody to a sister, that can be 'proper

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).

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,

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custody.'"); *In re Maria S Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) ("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).

"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 guardianship while still maintaining a relationship with their parent. *Id.* at 164, 169.

These rulings align with fundamental constitutional principles and emphasis placed on alternative permanency arrangements in the Juvenile Code. All counsel requests in this case is for this Court to apply existing law and 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. The trial court erred—under both the constitutional and statutory framework—by terminating Ms. Bates' parental rights without first ruling out alternative remedies that could have ensured the children's safety and stability.

In this case, the trial court erred by failing to rule out alternative remedies—such as a custody order—that could have satisfied the State's interest in ensuring the children's safety and stability while preserving their relationship with their

mother. If it had done so, it would have found that there was absolutely no reason to terminate Ms. Bates' parental rights given that the children were safely living with their father and had a strong relationship with their mother.

While making significant strides in her sobriety, Ms. Bates continued to strengthen her relationship with her children during parenting time. Visits between Ms. Bates and her sons were positive for all. In fact, the specialist supervising the visits testified that it would be "detrimental to both" AMB and AAB to not see Ms. Bates anymore. 110a. Ms. Bates' sons "both look forward to [seeing] their mom, . . . and they've gotten used to seeing her every week." 110a. Visits with their mom made the boys happy—they would "run to her, jump into her arms," according to the supervising specialist. 107a. They included Ms. Bates in their lives, chatting about school, friends, activities, the books they were reading, the television they watched. 107a.

The specialist also testified that Ms. Bates' behavior was always appropriate, including with regards to AAB's diabetes. 108a-109a. When the boys arrived, Ms. Bates would immediately ask AAB what his blood sugar levels were and what he ate for lunch and then would look at his device. 109a. After AAB decided what he would eat for dinner, Ms. Bates would calculate and administer the necessary insulin dosage and would "check[] it again later on after he's eaten to see where he's at." 109a. If AAB decided to eat more or have dessert, she would reevaluate his insulin needs and dose him accordingly. 109a.

Ultimately, when asked whether she had any concerns about Ms. Bates' ability to care for the boys, the visitation specialist responded, "[n]ot at all, no." 111a. With regards to potential concerns regarding Ms. Bates' management of AAB's diabetes, she said, "[n]o. She's been really on top of it." 111a.

Others agreed that visits between Ms. Bates and her sons were positive, safe, and loving. The ongoing caseworker testified similarly that visits were "going well." 94a. Even the boys' therapists agreed parenting time was going well. AAB's therapist testified that he enjoyed going to the arcade with Ms. Bates, and AMB's therapist testified since parenting time resumed after Ms. Bates' second incarceration, AMB's therapist did not notice any behavioral issues with AMB, nor did she believe there were any safety concerns at visitation. 81a. He commented that he "want[s] to visit mom." 82a. Even Mr. Bates commented that visits "seem to go well." 91a.

The children enjoyed seeing their mother, had a close bond with her and wanted to continue having a relationship with her. And they were living safely with their father. Given these facts, there was absolutely no reason to permanently end their relationship with their mother. Instead, the trial court could have tailored a specific child custody order that could have protected the children's safety and stability while also allowing them to continue to have a relationship with their mother.

Both the trial court and the Court of Appeals were legally required to rule out alternative remedies—in this case a child custody order—prior to terminating Ms.

Bates' parental rights. They failed to do so, and in fact, if they had addressed a custody arrangement, would have found that it was an appropriate choice for this family, given that Ms. Bates had a close, loving relationship with her children, who were living safely with their father. For these reasons, this Court should reverse the order terminating Ms. Bates' parental rights.

CONCLUSION

For these reasons, Ms. Bates 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 child custody order could not protect her children's safety and stability while also preserving their relationship with their mother.

Respectfully submitted,

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Date: March 13, 2024

Statement as to Length and Form of Brief

The foregoing brief contains 14,078 countable words, MCR 7.212(B)(1-3), and meets the formatting standards as directed by MCR 7.212(B)(5) and MCR 7.212(C). MCR 7.312(A),(B).