No. 22-281

In The Supreme Court of the United States

IN RE BABY BOY DOE, MINOR

PETER KRUITHOFF,

Petitioner,

v.

CATHOLIC CHARITIES WEST MICHIGAN, and ADOPTIVE PARENTS 1 & 2,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

ADOPTIVE PARENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioner, Peter Kruithoff, challenges the constitutionality of Michigan's Safe Delivery of Newborns Law. No Court in this country has weighed in on the constitutionality of their state's "safe haven" laws, including the Michigan Supreme Court order at issue here.

Michigan's Safe Delivery of Newborns Law adequately protects the rights of a Petitioner who has received notice by publication, which notice was the only option to notify Petitioner of the surrender because the mother, Surrendering Parent, provided no identifying information for herself, for her husband, or for the child's father, whomever that might be.

The Michigan Supreme Court correctly declined to address the constitutional issue that was raised by that Court *sua sponte* in its order granting oral argument. Petitioner's constitutional rights to due process and equal protection were not violated, and any decision opining on the constitutionality of Michigan's Safe Delivery of Newborns Law would merely be a hypothetical.

Should this Court deny the Petition when Petitioner failed to raise a constitutional issue in the lower courts and when the Michigan Supreme Court declined to address the constitutional issue, but instead decided this case solely on the basis of state law statutory interpretation?

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The Michigan Supreme Court did not issue an opinion, but rather, only an order vacating in part the Michigan Court of Appeals' opinion that reinstated Petitioner's parental rights. The Michigan Supreme Court's order, *In re Baby Boy Doe*, ___ N.W.2d ___ (2022) (Petitioner's App. 43a), interpreting Michigan's Safe Delivery of Newborns Law under state law, vacated the Court of Appeals' decision (Petitioner's App. 8a), where the Court of Appeals reversed the Trial Court and then reinstated parental rights of Petitioner. The appeal arose from the Trial Court's decision denying a motion to unseal adoption records filed more than 13 months after Petitioner's rights had been terminated and more than 8 months after the adoption had been finalized. (Petitioner's App. 4a and 6a).

JURISDICTION

Respondent Adoptive Parents do not dispute this Court's jurisdiction over this case pursuant to 28 U.S.C. § 1257(a), but denies that this matter satisfies the standard set forth in Supreme Court Rule 10. Petitioner filed his Petition for Writ of Certiorari on September 22, 2022.

COUNTERSTATEMENT OF THE CASE

Background and Parties

This appeal arises out of a late challenge under Michigan's Safe Delivery of Newborns Law, when Petitioner filed a motion in the Kalamazoo County Circuit Court to unseal adoption files. Surrendering Parent is Karen Kruithoff, who disappeared after she surrendered the newborn at the hospital on August 12, 2018. The child placing agency is Catholic Charities of West Michigan. Petitioner is Peter Kruithoff who has plead guilty for three separate incidents of assaulting his wife, including when she was seven months pregnant. Adoptive Parents finalized their adoption of the surrendered newborn on February 12, 2019, eight months before Petitioner's motion to unseal. The Child is now over 4 years old and has lived in the adoptive home his entire life.

The Petition is rife with omissions of significant factual details too numerous to recount here. Instead, Adoptive Parents set forth their own factual recitation, which supports their request that this Court deny the Petition.

The Surrender of Baby Boy Doe

This story starts with a distressed mother who wanted to safely surrender her newborn at the hospital. Her cause for distress has been documented in court records: her husband plead guilty to three separate incidents of domestic violence against her – in Las Vegas, Nevada, Ottawa County, Michigan, and

Jacksonville, Florida. In the October 29, 2016 Nevada incident, he chased down his wife in his car, strangled her until she passed out, undressed her, handcuffed her, and put her in his truck. (10/02/18 Hearing, pp. 9-10, Respondent's App. 27). He plead guilty. (Nevada ROA). In the June 3, 2018 Michigan incident, after the parties separated, his wife moved in with her sister. He broke into her home, assaulted her, smashed her phone when she tried to call the police, and slashed her tires so she could not escape. (10/02/18 Hearing, p. 9, Respondent's App. 27). She was seven months pregnant with the child at issue in this appeal. Once again, he plead guilty. He also plead guilty to an April 13, 2019 incident in Florida.

Surrendering Parent gave birth at a hospital in Grand Rapids, Michigan on August 9, 2018. She notified the hospital workers that she planned to surrender the newborn. (09/13/18 Safe Delivery Report). The mother declined to share any identifying information, except her date of birth, her height and weight, that she was married, and that the father "was very abusive." (09/13/18 Safe Delivery Report). She refused to fill out the Voluntary Medical Background Form. (09/13/18 Safe Delivery Report). She declined to sign the Voluntary Release for Adoption. (09/13/18 Safe Delivery Report). Instead, she indicated to the hospital worker that she did not want her name in any of the documents; nor did she indicate who the father of the child was. (09/13/18 Safe Delivery Report). The baby and mother both tested positive for methadone. (09/13/18 Safe Delivery Report). She surrendered the

newborn on August 12, 2018. (09/13/18 Safe Delivery Report).

The hospital contacted the child placing agency, Catholic Charities of West Michigan, to place the child. The Surrendering Parent called the agency the next day to check on the baby, but she did not provide any additional information. (09/13/18 Safe Delivery Report). Catholic Charities filed a petition on August 15, 2018 to place the newborn, and on August 16, 2018, the Kalamazoo County Circuit Court signed an order placing the child with the prospective adoptive family. (09/13/18 Safe Delivery Report). Due to the drugs in the newborn's system, he was not discharged until August 26, 2018, when he went home with his prospective adoptive family. (09/13/18 Safe Delivery Report).

Catholic Charities sought to locate Petitioner by submitting the Safe Delivery Tracking form, reviewing all the paperwork from the hospital to determine if there was identifying information, and requesting Verification of Notice of Intent to Claim Paternity. (09/13/18 Safe Delivery Report).

Without any identifying information, Catholic Charities had no choice but to publish notice in the Grand Rapids Press (the County where the child was surrendered) on August 16, 2018. (09/13/18 Safe Delivery Report). The 28-day notice period expired on September 13, 2018. Catholic Charities did not receive any response and scheduled a hearing to terminate parental rights. The Kalamazoo Court terminated the rights of both the Surrendering Parent and Petitioner on

September 28, 2018, as neither parent came to Court to object to the child's placement under the Safe Delivery of Newborns Law. (09/28/18 Order Terminating Rights, Petitioner's App. 1a).

The Divorce Case

Meanwhile, in another County, Petitioner filed a complaint for divorce on August 8, 2018 – the day before the child was born. (08/08/18 Divorce Complaint, Respondent's App. 1). In his complaint, Petitioner informed the Ottawa County Circuit Court of several crucial facts:

> 10. **That Plaintiff is currently facing criminal charges with Defendant as the alleged victim.**
>
> 11. That Plaintiff is currently under a no contact order regarding Defendant.
>
> 12. That **Plaintiff is not certain if he is the biological father of Defendant's baby due to a period of physical separation around the time of conception**.
>
> 13. That DNA testing of the child and Plaintiff would allow Plaintiff to confirm or rebut paternity.
>
> 14. That **Defendant intends to give the unborn child up for adoption or to exercise the Safe Delivery option** pursuant to MCL 712.3.

(08/08/18 Divorce Complaint, Respondent's App. 3) (emphasis added).

On August 10, 2018, the Divorce Court signed an ex parte order requiring the mother to submit the child to DNA testing and prohibiting either party from taking any action "pertaining to the permanent placement or adoption" of the unborn child. (08/10/18 Ex Parte Order). That order was not served on the Surrendering Parent until August 30, 2018. (09/11/2018 Motion for Order to Show Cause, ¶4). When the Surrendering Parent did not comply, Petitioner filed a motion to show cause. (09/11/2018 Motion for Order to Show Cause).

At some point after September 13, Petitioner found the notice by publication. (10/02/18 Hearing, pp. 4-5, 11, Respondent's App. 23-24, 29). When the Divorce Court entered the Uniform Child Support Order on September 21, 2018, the following information was included:

> There is no current birth record for the minor child in this case, although it is suspected that the child was born on August 9, 2018, and surrendered for adoption on August 12, 2018 though the Safe Delivery of Newborns Law.

(09/21/18 Uniform Child Support Order, ¶13a, Respondent's App. 19).

On January 16, 2019 – 4 months after Petitioner's rights were terminated – Petitioner subpoenaed Catholic Charities in the Divorce Case to obtain confidential adoption records. Catholic Charities sought to quash

that subpoena. (02/01/19 Motion to Quash). Catholic Charities informed the Divorce Court that complying with the subpoena would simultaneously result in the agency violating the Safe Delivery of Newborns Law and committing a crime. (02/01/19 Motion to Quash, p. 3).

At the motion to quash hearing, the Divorce Court acknowledged the requirements of the Safe Delivery of Newborns Law:

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

(02/25/19 Hearing, pp. 6-7, emphasis added). The Divorce Court required Catholic Charities to turn over redacted copies of the adoption records; Catholic Charities complied on July 12, 2019. (06/10/19 Order). The Divorce Court entered a default judgment of divorce on July 30, 2019, and awarded custody of an unidentified child to Petitioner.

Petitioner's late motion in the Safe Delivery Court

After receiving the adoption case information from Catholic Charities, Petitioner delayed another four months before he filed his first motion in the

Kalamazoo Safe Delivery Case – a motion unseal the adoption records – 13 months after his parental rights had been terminated and 8 months after the adoption had been finalized. (10/07/19 Motion to Unseal). He informed the Kalamazoo Court that he needed the adoption records to help him assert claims in a civil suit against Catholic Charities (he has sued the agency for $50 million). (10/07/19 Motion to Unseal, p. 4).

Petitioner insisted that Catholic Charities should have hunted him down, but when asked by the Kalamazoo Court how the agency was supposed to do that without having any names, Petitioner did not offer a single suggestion. (12/10/19 Hearing, pp. 18-19). The Attorney for Petitioner also falsely told the Kalamazoo Court that he did not know the mother was going to surrender the newborn, even though the divorce complaint shows the opposite. (12/10/19 Hearing, p. 19). The Kalamazoo Court told Petitioner that it did not have authority to disregard the terms of the Safe Delivery of Newborns Law. (12/10/19 Hearing, pp. 19, 22, 24). The Kalamazoo Court denied the request to unseal the adoption file. (01/02/20 Order, Petitioner's App. 4a).

Petitioner filed a motion for reconsideration – 16 months after his parental rights had been terminated and 11 months after the adoption had been finalized. (1/22/20 Motion for Reconsideration). He argued for the first time that the divorce complaint in Ottawa County should qualify as a petition for custody under the Safe Delivery of Newborns Law and requested that his parental rights be reinstated. (01/22/20 Motion for

Reconsideration, pp. 3-4). The Kalamazoo Court denied the motion. (02/19/20 Order, Petitioner's App. 6a).

Petitioner waited another four months to file a delayed application for leave to the Court of Appeals – 20 months after his parental rights had been terminated and 16 months after the adoption had been finalized. (06/10/20 COA Application). He did not raise a constitutional issue. (06/10/20 COA Application). The Court of Appeals granted leave. (08/31/20 COA Order).

On August 26, 2021, the Court of Appeals issued a published opinion – 3 years after Petitioner's rights had been terminated and 2½ years after the adoption had been finalized. (08/26/21 COA Opinion, Petitioner App. 8a). Judge Amy Ronayne Krause dissented. The Court of Appeals determined that Catholic Charities did not make reasonable efforts to locate Petitioner and notify him of the Safe Delivery Case, and reinstated his parental rights. (08/26/21 COA Opinion, Petitioner's App. 8a). It was not until the published opinion that Adoptive Parents learned of Petitioner's trial court motions and appeal.

The Adoptive Parents and Catholic Charities filed a motion for reconsideration in the Court of Appeals, and later filed their Applications to the Michigan Supreme Court. The Michigan Supreme Court granted oral argument on March 17, 2022 and requested additional briefing. (03/17/22 MSC Order). The Michigan Supreme Court issued an order reversing the Court of Appeals' decision as to the reinstatement of parental rights because Petitioner failed to avail himself of the

procedures in the Safe Delivery of Newborns Law and failed to take action so that the Divorce Court would locate the Safe Delivery Case and transfer his contingent custody request to the Safe Delivery Court. (06/29/22 MSC Order, Petitioner's App, 43a).

ARGUMENT

I. This case does not present the Court with an appropriate vehicle to examine Michigan's Safe Delivery of Newborns Law and this Court should deny the Petition.

Petitioner seeks to have this Court declare Michigan's Safe Delivery of Newborns Law unconstitutional under the Due Process and Equal Protection Clauses. While these are issues of first impression, this case does not provide this Court with an appropriate vehicle to examine the constitutionality of Michigan's Safe Delivery of Newborns Law.

First, Petitioner did not raise the constitutionality of the statute in the proceedings below, despite numerous filings in the Safe Delivery Case, the Michigan Court of Appeals, and the Michigan Supreme Court. Instead, the Michigan Supreme Court, in its order granting oral argument, *sua sponte* asked the parties to address the constitutionality of the statute. This Court should not grant a petition that challenges the constitutionality of a statutory scheme that has not been properly raised by the parties nor developed in the lower court record.

Second, the Michigan Supreme Court did not reach the constitutionality of the Safe Delivery of Newborns Law. The Michigan Supreme Court applied the facts to Michigan's Safe Delivery of Newborns Law and determined that Petitioner – by his actions and lack of actions – had not satisfied the statute, even when he had an opportunity to do so. Moreover, no other state has weighed in on the constitutionality of their own safe haven laws. Thus, this Court does not have the benefit of seeing how any other court analyzed the constitutional issues raised in this Petition. This Court should not grant the petition when the constitutional issues have not been evaluated by any court in this country.

Third, Petitioner seeks to strike down the entire Michigan statutory scheme. The Michigan Legislature knew the purpose of allowing a safe surrender was to the save the lives of newborns who would otherwise be at risk of an unsafe abandonment or death. The Michigan Legislature also knew that a parent who contemplates a surrender is not doing it on a whim – they are facing a crisis pregnancy, such that the only viable path is to leave their newborn in the protective hands of an emergency service provider. Surrendering Parent was experiencing a crisis pregnancy due to extreme domestic abuse at the hands of Petitioner, her husband, along with her drug use. Surrendering Parent's crisis situation is the reason the Michigan Legislature enacted the Safe Delivery of Newborns Law – because it determined that saving the life of a newborn merited higher protection than the rights of nonsurrendering

parents. This Court should not grant a petition whose goal is to strike down an entire statute designed to save the lives of newborns.

Fourth, Michigan's Safe Delivery of Newborns Law is the most restrictive of all the statutes in the Nation – meaning that it does more to protect the rights of a nonsurrendering parent than any other state's safe haven laws. Overturning any part of the Michigan statute on constitutional grounds places every single state's safe haven statute at risk, in spite of the fact that safe haven laws have saved thousands of babies around this country (4,653 according to the National Safe Haven Alliance), and 298 newborns in the State of Michigan. Saving the lives of newborns is a greater government objective than protecting nonsurrendering parents' rights. This Court should not address the constitutionality of Michigan's Safe Delivery of Newborns Law when a decision regarding Michigan's law could have disastrous nationwide impact on the safety of at-risk newborns.

Fifth, Petitioner sat on his hands when it came to actually locating the surrendered newborn and the Safe Delivery Case; instead, he focused his efforts on pursing his battered wife in the Divorce Case, and ignored one opportunity after another to have the Divorce Court locate the Safe Delivery Court and transfer the Divorce Case to the Safe Delivery Court, as required under Michigan's Safe Delivery of Newborns Law. He even located the notice by publication before his parental rights were terminated, yet he did nothing to ensure he could participate in the Safe

Delivery Case. Instead, he waited until 13 months after his rights were terminated and 8 months after the newborn's adoption was finalized before he filed his first motion in the Safe Delivery Case, and that motion merely asked the Safe Delivery Court to unseal the adoption records (primarily so he could pursue his $50 million lawsuit against Catholic Charities of West Michigan).

Sixth, Petitioner conceals a great number of relevant facts as to the circumstances the Surrendering Parent faced when she made the difficult decision to safely surrender her newborn at the hospital, the lack of identifying information so that Catholic Charities could locate and notify Petitioner, the fact that Petitioner actually found the notice by publication before his rights were terminated, the lack of diligence Petitioner displayed in the Divorce Case so that the Divorce Court would locate the Safe Delivery Case and transfer his custody request to the Safe Delivery Court, his obsessive pursuit of his battered wife, his multiple times of pleading guilty to domestically assaulting his wife, and his complete lack of concern for the best interests and safety of the child at issue here.

Seventh, Petitioner's constitutional rights to this child have not only long-since passed, but his rights are subservient to the constitutional rights of the Child and the Adoptive Parents. Petitioner only had constitutional rights up until the time had passed to appeal the termination of his parental rights. He did not appeal. But even before the appeal period had passed, his

rights were lesser than the constitutional rights these Adoptive Parents and Child held in their established custodial relationship with each other. As this Court has stated on multiple occasions, the constitutional right of a biological father stems from his relationship with his children and not biology alone. Not only is it unknown whether Petitioner is the biological father (as he questioned his paternity when he filed for divorce, and then he did not file a request for custody under the Safe Delivery of Newborns Law, which would have required DNA testing), but the Adoptive Parents' constitutional rights fully attached the moment their adoption was finalized over 3½ years ago. The Adoptive Parents are the child's parents; they are the only parents with the established relationship with this child and to whom the liberty interest in *Troxel v. Granville* apply.

Finally, in attempting to throw out Michigan's entire Safe Delivery of Newborns Law, Petitioner makes many arguments based on hypothetical facts that do not exist in this case (such as how the Act does not require a surrendering parent to demonstrate they are in crisis, the person surrendering is the parent, or that the birth was witnessed by an emergency service provider – all of which existed here). This Court cannot make decisions about the constitutionality of a statute based on a hypothetical. Once this Court learns of the many facts that Petitioner omits from his Petition, it will be persuaded that this is not the case in which to analyze the constitutionality of Michigan's Safe Delivery of Newborns Law, or any other state's safe haven statute.

II. The Safe Delivery of Newborns Law did not violate Petitioner's constitutional rights.

To save more newborns' lives, Michigan's Safe Delivery of Newborns Law contains two critical elements. First, the surrendering parent (often the mother) is not required to disclose any identifying information for either herself or the father. *See* Mich. Comp. Laws §§ 712.3, 712.7(b). Second, the proceedings move quickly to provide permanency and stability to the surrendered newborn. Mich. Comp. Laws §§ 712.7, 712.10, 712.17.

Michigan's Safe Delivery of Newborns Law is the most restrictive of all "Safe Haven" laws in the country. That is to say that the Michigan statute does more to protect the rights of the nonsurrendering parent than anywhere else in the entire country.

First, the surrender period in Michigan is the shortest time period in the country – three days from birth. Mich. Comp. Laws §§ 712.1(k), 712.3(1). Only 9 states impose this short three-day period on the surrendering parent. Over half the states allow a safe surrender up to 30 days. Some states allow a surrender at 60 or 90 days. And one state allows the surrender up to one year!

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

Second, Michigan is the only state that requires "reasonable efforts" to locate the nonsurrendering parent and notice by publication if the identity of the

nonsurrendering parent is unknown. Mich. Comp. Laws § 712.7(f). One state requires "diligent efforts" (Louisiana). According to Louisiana statute, "The department shall exercise due diligence in attempting to identify and locate any nonrelinquishing parent, including, but not limited to, performing a missing-children search." La. Child. Code Ann. art. 1154. Notice is not even required under the Louisiana law, only that the department has discretion to provide notice. *Id.* Louisiana also permits a surrender to occur up to 30 days. La. Child. Code Ann. art. 1156.

Third, Michigan requires notice to both the surrendering and nonsurrendering parents. Mich. Comp. Laws § 712.7(f). If the identity of the nonsurrendering parent is unknown, the child placing agency shall provide notice by publication. Mich. Comp. Laws § 712.7(f). The majority of states require *no notice whatsoever* to the nonsurrendering parent. The following chart summarizes the type of notice that is required around the country, how many states observe each type of notice, and more notice details where appropriate:

How many states	**Type of Notice**	**More notice details**
41	No Notice	N/A
4	Notice by Publication Only	Publication in a newspaper of statewide circulation

2	Notice to any known parent and to the putative father registry	Search the putative father registry for the purpose of determining the identity and location of the father to provide notice
1	Discretionary efforts to identify and locate the nonrelinquishing parent	Up to the discretion of the Department.
1	Reasonable Efforts	Michigan: Reasonable efforts were made to identify, locate, and provide notice to Petitioner. If identity is unknown, then notice by publication.
1	Due Diligence	Louisiana: Due diligence in attempting to identify and locate nonrelinquishing parent, including missing child search.

Among the nine states who require the safe surrender to occur within a short three-days from birth, Michigan is the *only* state that requires the child placing agency to make "reasonable efforts." Tennessee requires only notice by publication. Tenn. Ann. Code 68-11-255. Hawaii states that "The department may search for relatives of the newborn child as a

placement or permanency option or implement other placement requirements that give preference to relatives *provided that the department has information as to the identity of the newborn child, the newborn child's mother, or the newborn child's father*." Haw. Rev. Stat. 587D-2 (emphasis added). The other six states do not require any kind of notice at all to the nonsurrendering parent.

Fourth, Michigan law provides an opportunity for the nonsurrendering parent to request custody, as long as that person is proven to be the biological parent and the court finds that it is in the best interests of the child. Mich. Comp. Laws § 712.14. The vast majority of states have no such process for the nonsurrendering parent to come into court at all.

Even though all 50 states enacted safe haven laws between 1999 and 2008, there is not a single case striking down a safe haven statute on constitutional grounds in the 23 years that these laws have been on the books. Legislatures and courts around the country understand the purpose of safe haven laws: to save lives of babies born to distressed parents. Thus, the Michigan Legislature elevated the interests of newborns above the interests of the nonsurrendering parent. Moreover, a potential father's fitness is subservient to the rights of the newborn. In Michigan, his fitness is embedded in the best interest analysis, should he request custody under the Act. Mich. Comp. Laws § 712.14. The Legislature's decision to protect the lives of newborns does not amount to a constitutional violation of a nonsurrendering parent's rights.

A. The Petition fails to consider the constitutional rights of the Child.

A child has a right to security and permanency. *See Santosky v. Kramer*, 455 U.S. 745, 753; 102 S. Ct. 1388; 71 L. Ed. 2d 599 (1982); *In re Trejo, Minors*, 612 N.W.2d 407 (Mich. 2000). A child also has a due process right in the procedures the court employs. *In re Gault*, 387 U.S. 1, 33-34; 87 S. Ct. 1428; 18 L. Ed. 2d 527 (1967).

The procedures set forth in the Safe Delivery of Newborns Law serve to best protect the health, safety and welfare of a newborn who is born to a distressed parent, thus saving lives of newborns from abandonment or death. The Act's proceedings move fast to protect that newborn and to establish permanency as quickly as possible. Mich. Comp. Laws § 712.7 (agency must immediately assume care of child and place newborn with adoptive family and file petition within 48 hours of placement); Mich. Comp. Laws § 712.7(e) (agency has 28 days to locate nonsurrendering parent or notify by publication); Mich. Comp. Laws § 712.10(1) (surrendering parent has 28 days from surrender to request custody and nonsurrendering parent has 28 days from notice to request custody); Mich. Comp. Laws §§ 712.10(3), 712.11(1) (if petition is filed, court must conduct hearing within 7 days); Mich. Comp. Laws § 712.17 (if no custody request filed, agency must immediately file petition to terminate rights).

The Act further protects the newborn from having a person request custody who is not biologically the

parent of the child. Mich. Comp. Laws § 712.11. Even the proven-biological parent who requests custody must demonstrate that it is in the best interests of the newborn. Mich. Comp. Laws § 712.14(1). All of these protections in Michigan's Safe Delivery of Newborns Law represent the procedures in which the newborn has a constitutionally protected right.

How does any court expect to achieve this important goal when Petitioner filed his first motion in the Safe Delivery Court more than 14 months after the child's birth, 13 months after Petitioner's rights were terminated, and 8 months after the finalized adoption? How does Petitioner expect the Safe Delivery Court to know that he filed a "petition for custody" in a Divorce Case when he did not ask the Divorce Court to follow the statute to locate and transfer to the Safe Delivery Court? How does Petitioner expect to achieve stability and permanence for *this* newborn when, at every step of the way, Petitioner delayed the process (waiting for over 4 months to file a subpoena that eventually led him to the Safe Delivery Case number; waiting for 4 months after he learned of Safe Delivery Case number to file a motion in the Safe Delivery Court, and waiting 4 months after the Safe Delivery Court denied his motion for reconsideration to file a delayed application)? Petitioner's case has been about delay and failure to promptly act – all of which actions should have occurred *before* his rights were terminated on September 28, 2018, but at a minimum at least before the adoption was finalized on February 12, 2019. Where in Petitioner's equation does the rights of this newborn

come into play? He does not once consider what is best for this child.

Petitioner gives no consideration to the newborns who will be a risk of death or abandonment if this Court overturns the Safe Delivery of Newborns Law. So far, Michigan's Safe Delivery of Newborns Law has saved the lives of 298 babies. With this Court's issuance of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), those numbers will certainly increase. Those future newborns have the right to live. This Court cannot contemplate the constitutional rights of a nonsurrendering parent without weighing it against the rights of those newborn babies who might otherwise die. This Court should deny the Petition.

B. The Petition fails to consider the constitutional rights of the Adoptive Parents.

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

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

Mich. Comp. Laws § 710.60 (emphasis added). An adoption order was entered on February 12, 2019. (02/12/19 Order of Adoption, Petitioner App. 3a). We are now more than 3½ years post-adoption.

The Fourteenth Amendment's promise of due process is a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720; 117 S. Ct. 2258, 2302; 138 L. Ed. 2d 772 (1997). Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400; 43 S. Ct. 625; 67 L. Ed. 1042 (1923). The Adoptive Parents hold a constitutionally protected liberty interest in the care, custody, and control of their child. *Troxel v. Granville*, 530 U.S. 57, 65; 120 S. Ct. 2054; 147 L. Ed. 2d 49 (2000).

Adoptive Parents also have a constitutionally protected interest in their family unit. From the moment the adoption was finalized on February 12, 2019, the Adoptive Parents not only became the legal parents of this child, but also the "natural parents" as though the child had been born to them, with all the rights and responsibilities attendant to that relationship. Mich. Comp. Laws § 710.60.

> The Michigan adoption scheme expresses a policy of severing, at law, the prior, natural family relationship and **creating a new and complete substitute relationship after adoption**.

In re Toth, 577 N.W.2d 111, 114-115 (Mich. App. 1998) (emphasis added); *Wilson v. King*, 827 N.W.2d 203, 205 (Mich. App. 2012).

These Adoptive Parents are endowed with a liberty interest in their relationship with the child they adopted over 3½ years ago.

C. This Court's precedent demonstrates that Petitioner's rights were not violated by Michigan's Safe Delivery of Newborns Law.

This Court has addressed parental rights in four cases – all of which turned on the biological father's *relationship* with the children. In *Stanley v. Illinois*, 405 U.S. 645, 646, 650; 92 S. Ct. 1208; 31 L. Ed. 2d 55 (1972), the biological father of the children had lived with the mother intermittently for 18 years, and Illinois law allowed his parental rights to be terminated solely on the basis that he was not married to the mother. This Court specifically referred to the interest of the father "in the children he has ***sired and raised***." *Id.* at 651 (emphasis added). The father in *Stanley* had raised the children for 18 years with the mother up until her death. *Id.* at 646. Thus, this Court reversed the Illinois Supreme Court for failing to provide the biological father with an opportunity to demonstrate his parental qualifications. *Id.* at 658-659.

In *Quilloin v. Walcott*, 434 U.S. 246, 247; 98 S. Ct. 549; 54 L. Ed. 2d 511 (1978), on the other hand, the

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

In *Caban v. Mohammed*, 441 U.S. 380, 382; 99 S. Ct. 1720; 60 L. Ed. 2d 297 (1979), the biological father lived with the two children as their father for 4 and 2 years respectively and he and their mother represented themselves to be husband and wife, even though they were unwed. After the mother married another man, she and her husband attempted to terminate the father's parental rights for a stepparent adoption. *Id.* 382-383. This Court held that because the father had established "a substantial relationship" with the children, he should be afforded the same right to veto an adoption as the mother. *Id*. at 392-393.

Finally, in *Lehr v. Robertson*, 463 U.S. 248; 103 S. Ct. 2985; 77 L. Ed. 2d 614 (1983), this Court reconciled the

above cases and refined the standard regarding a biological father's parental rights. This Court held:

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

Lehr, 463 U.S. at 261 (emphasis added), quoting *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 841; 97 S. Ct. 2094; 53 L. Ed. 2d 14 (1977), and *Wisconsin v. Yoder*, 406 U.S. 205, 231-233; 92 S. Ct. 1526; 32 L. Ed. 2d 15 (1977). The father in *Lehr* had never had any "significant custodial, personal, or financial relationship" with the child and this Court affirmed the lower court's decision to permit an adoption of the child without providing the father an opportunity to be heard. *Id.* at 267-268.

Two important points come out of this line of cases. First, the family unit merits protection – the parents who raised the child and who hold the emotional attachments that derive from the intimacy of daily association. Second, biology is important, but not more important than the enduring relationship the child has in his family unit.

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

Petitioner makes much of the fact that he was married to the child's mother. Michigan's Safe Delivery of Newborns Law does not distinguish between married and unwed parents. *Any man* that comes to court requesting custody of a surrendered newborn must first prove with DNA testing that he is the biological father of the surrendered newborn. Mich. Comp. Laws § 712.11(1). Even a mother must prove her DNA if an emergency service provider did not witness her giving birth to the child. Mich. Comp. Laws § 712.11(2). We do not even know if Petitioner has a biological connection with the child because he did not timely petition for custody in the Safe Delivery Case. Instead, he filed a motion to unseal adoption records 13 months after his rights were terminated and 8 months after the adoption was finalized. More significantly, **he does not even believe he is the biological father**, as he so

stated in his divorce complaint: "That Plaintiff is not certain if he is the biological father of Defendant's baby due to a period of physical separation around the time of conception." (08/08/18 Divorce Complaint, ¶12, Respondent's App. 3). Surrendering Parent even testified at her deposition in the Divorce Case that Petitioner is "not the father" and that the "baby is black" – as revealed by the attorney for Petitioner at oral argument before the Michigan Court of Appeals.

Even if we had learned that Petitioner is the biological father of this Child, his constitutional rights are protected by the terms of the Safe Delivery of Newborns Law, which requires the Safe Delivery Court to "consider, evaluate, and make findings" on the child's best interests. Mich. Comp. Laws § 712.14(1). Consistent with this Court's decisions, several of the best interest factors go right to the heart of the constitutional analysis that places emphasis on the familial relationships that have been created with the child, such as: (a) The love, affection, and other emotional ties existing between the newborn and the parent; (d) The permanence, as a family unit, of the existing or proposed custodial home; (h) If the parent is not the parent who surrendered the newborn, the opportunity the parent had to provide appropriate care and custody of the newborn before the newborn's birth or surrender. Mich. Comp. Laws § 712.14. Thus, the Safe Delivery of Newborns Law adequately protects Petitioner's constitutional rights. Petitioner would surely fail under the best interest test based on the facts of this case.

1. Petitioner received adequate notice of the proceedings.

Petitioner complains that the notice by publication provision is too non-specific to be constitutionally sound. We disagree.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314; 70 S. Ct. 652; 94 L. Ed. 865 (1950). This Court has long held **that publication notice is sufficient in the case of persons missing or unknown**, "whose interests or whereabouts could not with due diligence be ascertained," as it is all that the situation permits. *Id.* at 317. In contrast, "Notice by publication is not constitutionally adequate with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Dow v. State of Michigan*, 240 N.W.2d 450, 458 (Mich. 1976).

Here, Surrendering Parent provided no information identifying herself or her husband (other than her birthdate). It was impossible for Catholic Charities to do more than what it did in identifying and locating Petitioner. Catholic Charities was left with no choice but to publish the notice of surrender. Mich. Comp. Laws § 712.7(f). Based on the law from this Court,

notice by publication is constitutionally sound when the nonsurrendering parent is unknown and unidentified.

Catholic Charities published notice in the record paper of the county where the child was surrendered: Kent County. Catholic Charities did not know where the Surrendering Parent or Petitioner lived. The notice apprised Petitioner of the date of birth, the date of surrender, and the hospital where the newborn was born. It also notified Petitioner that his rights would be terminated if he did not contact Catholic Charities within 28 days of the notice of surrender, and provided him a telephone number to contact.

Moreover, Petitioner admitted to having found the notice by publication sometime after September 13 and likely before the child support order was entered on September 21, 2018. (10/02/18 Hearing, pp. 4-5, 11, Respondent's App. 23-24, 29; 09/21/18 Uniform Child Support Order, ¶13a, Respondent's App. 18). He also knew that the mother planned a safe surrender, and even cited the Safe Delivery of Newborns Law. (08/08/18 Divorce Complaint, ¶14, Respondent's App. 3). Instead of looking for the notice, he focused on pursuing his domestically abused wife in the Divorce Case – with an ex parte motion for DNA testing, followed by a motion to compel when she did not comply, a demand letter, a motion to show cause her (including asking that she be jailed for 10 days and fined for her noncompliance), and bench warrants. (10/02/18 Hearing, p. 5, Respondent's App. 24). Yet now he complains in his Petition that 28 days was not sufficient time to find the notice!

2. The Adoption and Juvenile Codes are not adequate substitutes for the Safe Delivery of Newborns Law.

Petitioner argues that the procedures in Michigan's Adoption Code and Michigan Juvenile Code would adequately protect the life of at an-risk newborn and better protect a parent's rights. The Safe Delivery of Newborns Law provides immediate relief to the distressed parent, while allowing the surrendering parent to avoid engagement with the other parent, prospective adopters, agencies, and the State. The Act also ensures privacy, which is a paramount concern for a distressed parent who contemplates surrendering a newborn. None of these benefits can be replicated in the Adoption or Juvenile Codes.

While Petitioner asserts that using those other codes would provide the same protections (they do not), even the Adoption and Juvenile Codes allow termination of rights when the identity of a parent cannot be determined or the whereabouts are unknown. Mich. Comp. Laws § 710.37(2) (termination allowed under Adoption Code if mother made reasonable efforts to identify and locate father); Mich. Comp. Laws § 712A.13 (under Juvenile Code, court can use substitute service by publication where the respondent's whereabouts are unknown).

3. Communication between courts when Petitioner files in his own County does not make the statute unconstitutional.

Petitioner believes the Safe Delivery of Newborns Law violates his constitutional rights because it requires courts in two counties to communicate with each other. While it is true that Michigan does not have a statewide case management system, the Ottawa Divorce Court could have found the Safe Delivery Court in a timely fashion had he made any effort at all to do so.

As the Divorce Court stated on the record, it had directed its staff to call various other clerks to find out if there was a Safe Delivery Case pending before them. (02/25/2019 Hearing, pp. 6-7). The problem is that the judge did not start the process until five months after Petitioner's rights had been terminated. The Divorce Court could have acted more swiftly, and would have, if Petitioner had taken *any* steps to prompt the Divorce Court to take action.

Petitioner was behind the wheel in the Divorce Case, and he could have done more:

> – He did not include a request for relief asking the Divorce Court to locate the Safe Delivery Case and transfer the custody request to the Safe Delivery Court. (08/08/18 Complaint and Ex Parte Motion, p. 4, Respondent's App. 4-5).

– He did not file a Safe Delivery action or use the state-approved court form, "Petition of Parent for Custody of Surrendered Newborn," which would have immediately alerted the judge of the need to locate the Safe Delivery Case and to transfer the custody request to the other court. Mich. Comp. Laws § 712.10. (Mich. S. Ct. Admin. Office Form CCFD 03, Petitioner App. 151a(II) and 152a(II)).

– He did not file a motion or request a status conference to ensure that the Divorce Court was looking for the Safe Delivery Case, particularly since he knew that his wife planned to surrender the newborn and he was aware of the Safe Delivery of Newborns Law.

– He did not appeal the termination order either timely (appeal by right within 21 days) or delayed (application for leave within 6 months). Nor did he file a timely motion for relief from that order (before the adoption was finalized on February 12, 2019, or even ironically within one year – by September 28, 2019). Mich. Ct. R. 2.612. His very first motion in the Safe Delivery Court – on October 7, 2019 – was simply too late by any measure.

Instead, Petitioner focused his efforts in pursuing his domestically abused wife, who was understandably unwilling to participate in the divorce proceedings. He obtained an ex parte order, and filed a motion to show cause, yet did not inquire of the Divorce Court a single time as to whether it was attempting to locate the Safe Delivery Court under Mich. Comp. Law § 712.10(2). The first time that the Divorce Court became meaningfully

involved with the location of the Safe Delivery Court was not due to Petitioner's motion, but due to the Catholic Charities' motion to quash subpoena of the adoption file. (02/25/2019 Hearing, pp. 6-7).

Petitioner had plenty of time to locate the Safe Delivery Court between August 9, 2018 and September 28, 2018. He did not act promptly. Petitioner's rights were properly terminated by the Safe Delivery Court on September 28, 2018, and Petitioner received all the due process he was owed. The Adoptive Parents and this Child should not be made victims to Petitioner's failures to act.

4. Michigan's Safe Delivery of Newborns Law passes constitutional muster under *Mathews v. Eldridge*.

Petitioner claims that Michigan's Safe Delivery of Newborns Law must fail constitutional review under *Mathews v. Eldridge*, 424 U.S. 319, 334-335; 96 S. Ct. 893; 47 L. Ed. 2d 18 (1976). But the Act passes the *Mathews* test.

First, the private interest at stake is Petitioner's ability to form a relationship with the surrendered newborn. But he must still first prove that he is the biological father to avail himself of that chance. We don't know whether Petitioner is the biological father because he came to the Safe Delivery Court long after the proceedings were done; and he does not even think he is the biological father.

Petitioner is not the only person with private interests at stake. The newborn has the most compelling interest: his life. The Surrendering Parent has an interest in safely placing the newborn despite being a victim of extreme domestic violence at the hands of her husband. The Adoptive Parents have an interest in maintaining the relationship and bonds they have formed with the child they adopted over three years prior.

Second, the risk of erroneous deprivation is low when nonsurrendering parents actually employ the statutory procedures designed to protect them. Petitioner knew of the Act's existence, yet did nothing to prompt the Divorce Court to locate the Safe Delivery Case. The risk of erroneous deprivation under Michigan's Safe Delivery of Newborns Law is reduced dramatically by the Michigan-specific protections, including the three-day surrender period, the requirement of notice to the nonsurrendering parent, the requirement that the agency make reasonable efforts to locate the nonsurrendering parent, and the opportunity for the parents to request custody of the surrendered newborn. While there may be some probable value to additional safeguards (such a statewide case management system), that feature is outside the realm of the Safe Delivery of Newborns Law and the lack of such a statewide system does not invalidate the Act.

Third, the Government interest and the administrative burdens that additional or substitute procedural requirements would entail weigh in favor of the Act's constitutionality. The Government has a very

high interest in saving the lives of newborns born to distressed mothers. Michigan is also in the process of funding a statewide case management system, but the lack of such a system did not prevent Petitioner from locating the Safe Delivery Case. The Divorce Court did not locate the case because Petitioner did not request it. The Divorce Court on its own decided to call other courts to find the case, it was just too late to make a difference.

5. Safe Delivery of Newborns Law treats all fathers equally.

Petitioner assets a violation of the Equal Protection Clause, but not based on anything contained in the Safe Delivery of Newborns Law. In fact, the Act treats all men equally. Any man who requests custody must demonstrate with DNA evidence that there is a 99.9% chance that he is the biological father. Mich. Comp. Laws § 712.11(3). Married and unwed fathers are treated exactly the same.

What Petitioner complains about are features outside of the Safe Delivery of Newborns Law, such as the so-called putative father registry. A man can file notice of intent to claim paternity under the Adoption Code, which will place him on the Putative Father Registry and entitle him to notice of an adoption proceeding. Though Petitioner was married, he could still have placed himself on the registry, since he knew that his wife had disappeared and planned to surrender the newborn. Indeed, had he done so, Catholic Charities

would have found him because they checked the registry as part of their reasonable efforts before they gave notice by publication. (09/13/18 TPR Petition, ¶8).

CONCLUSION AND RELIEF REQUESTED

This Court should not review this case for a myriad of reasons. While the case is academically interesting because it is the first to reach the high Court, this case is not the launchpad to review Michigan or any other state's safe haven laws. Petitioner did not raise the constitutional issues he presented to this Court. Neither the Michigan Supreme, nor any court below, decide those constitutional issues. Indeed, Petitioner did not appeal the order terminating his parental rights, and he merely used a legally unsupported motion to unseal confidential adoption records as a vehicle to present an extremely late challenge to the termination order. Instead, this case simply presents an issue of statutory interpretation under Michigan law. This Court should deny the Petition.

While Petitioner enjoyed some constitutional rights before the termination order was entered, his rights are lesser than the constitutional rights of the Child and the Adoptive Parents. Petitioner does not even know if he is the biological father, and it seems doubtful that he is. But even if DNA testing demonstrated that he is the biological father, the child's best interests, as reflected in Mich. Comp. Laws § 712.15, must prevail over any rights he claims to have. Moreover, the Michigan Legislature chose to treat all men equally

when it required any man requesting custody to submit to DNA testing. Petitioner does not have any greater rights from his marriage to the mother. This marriage was not sacrosanct, as proven by Petitioner's extreme violence against her – strangling her, kidnapping her, and physically assaulting her while she was pregnant. He plead guilty to three separate violent incidents against her in three different states.

A holding that the statute is unconstitutional would be devastating and deathly. It would be devastating to the family unit created over four years ago between this Child and the only parents he has ever known. It would be deathly for all the newborn children who will be subject to dangerous abandonment or death if the Safe Delivery of Newborns Law is not allowed to stand. The statute has proven to save the lives of 298 newborn babies in Michigan. The rights of this child and other newborns in this Nation are more important than the rights of any potential father, even one who is married to the mother.

Respectfully submitted,

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