No. 22-281

IN THE

Supreme Court of the United States

PETER KRUITHOFF,

Petitioner,

v.

CATHOLIC CHARITIES WEST MICHIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

BRIEF OF AMICI CURIAE NONPROFIT ADOPTION ADVOCACY ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are non-profit organizations that help children and families navigate the adoption process and advocate for ethical adoption laws and policies to improve outcomes. Each amici organization is identified in the Appendix to this brief.

Amici submit this brief to highlight why the issues raised in the petition are exceptionally important and merit this Court's review. Although amici have no interest in the dispute that gave rise to the underlying lawsuit here, they have substantial experience with "safe haven" adoption laws like those at issue in the petition. While adoption of children whose parents are in distress has been a societal fixture for millennia, see, *e.g.*, *Exodus* 2:1-10, safe haven laws that regulate the process are a relatively recent development, having been enacted in all 50 states and the District of Columbia over just the last two decades, see *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2259 n.45 (2022); Adam Pertman, *Adoption Nation*, 274–75 (2d ed. 2011). Amici are concerned about how such safe haven laws comport with the Constitution's due process requirements, especially given the likelihood that safe haven surrenders will become more common in the near future.

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[1] Under Supreme Court Rule 37.2(a), all parties received timely notice of amici's intent to file the brief on October 14, 2022, and consented to this filing. Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation and submission of this brief.

The ostensible and laudable intent behind safe haven laws was to mitigate child endangerment by creating a way to safely surrender a child without civil or criminal liability for parents who, because of perceived difficulties posed by a formal adoption process, might otherwise abandon the child in an unsafe manner (or keep the child in an abusive situation). Pertman, *Adoption Nation*, *supra*, at 274–75. That purpose, however, sits in tension with the due process rights of the biological parents of such children, who necessarily have a protectible interest in their care and custody, and also with the due process rights that the children may have in eventually finding information about their own identity and history as well as information about their birth families. This Court's guidance is needed as states navigate between the poles of seamless ethical adoptions, on the one hand, and robust due process protections for parents and children, on the other.

SUMMARY OF ARGUMENT

The Michigan Supreme Court's decision raises significant questions about the fundamental and procedural rights of biological and adoptive parents and the children involved in safe haven adoption proceedings. While such proceedings may appear to offer an easy, one-size-fits-all solution for surrendering a child, the reality is far more nuanced, and implicates a host of considerations about parenting, childcare, healthcare, and reconciliation with the child's birth family, which safe haven laws are not well-suited to address. The salience of these issues is likely only to grow in the wake of this Court's ruling in *Dobbs*, which observed the role that safe haven laws are contemplated to play in minimizing the burdens attendant to unwanted pregnancies, 142 S. Ct. at 2259, and has led to the enactment of restrictions on abortion that will likely increase the

utilization of such safe haven proceedings going forward.

Amici urge the Court to grant the petition to provide much-needed clarity about how states that rely on safe haven laws can apply them in a manner consistent with the due process rights of the families and children involved.

ARGUMENT

I. THE MICHIGAN SUPREME COURT'S DECISION RAISES EXCEPTIONALLY IMPORTANT QUESTIONS ABOUT DUE PROCESS RIGHTS ATTENDANT TO SAFE HAVEN ADOPTION PROCEEDINGS.

This Court should grant review because the Michigan Supreme Court's decision implicates exceptionally important questions about due process rights for parents and adopted children.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "[T]he processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). This Court has recognized a parent's fundamental right to make decision concerning the "care, custody, and control of their children." *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

States enacted safe haven laws beginning in 1999 as an effort to curb a perceived problem of biological parents surrendering children in unsafe ways because, for

a variety of reasons, they did not choose to place their babies through sometimes-complex traditional adoption processes that were then available. See Andrea Carroll, *Breaking Forever Families*, 76 Ohio St. L.J. 259, 280 (2015); see also *Dobbs*, 142 S. Ct. at 2259 n.45; *id.* at 2339 n.16 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("Safe haven laws, which allow parents to leave newborn babies in designated safe spaces without threat of prosecution, were not enacted as an alternative to abortion, but in response to rare situations in which birthing mothers in crisis would kill their newborns or leave them to die.").

Statistically, incidents of dangerous child abandonment or neonaticide were, and are, relatively rare,[2] and the empirical support for the notion that onerous adoption laws were to blame for those tragedies is thin.[3] Nonetheless, all 50 states and the District of Columbia quickly enacted similar laws. *Dobbs*, 142 S. Ct. at 2259 n.45. Despite the widespread existence of these laws, they are still used relatively infrequently—there are an average of four safe haven surrenders per state, per year[4]—and any impact on abortion or child abandonment is difficult if not impossible to discern given the small data set.

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[2] *See* Evan B. Donaldson Adoption Inst., *Unintended Consequences: 'Safe Haven' Laws Are Causing Problems, Not Solving Them* 2–3 (2003), https://bit.ly/3TdbbVz

[3] *See* R. Wilson, J. Klevens, D. Williams, & L. Xu, *Infant Homicides Within the Context of Safe Haven Laws—United States, 2008–2017*, 69 Morbidity & Mortality Wkly. Rep. (MMWR) 1385 (Oct. 2, 2020), https://bit.ly/3EVCW0r.

[4] *Id.*

The ostensible purpose of such laws is, of course, unimpeachable. But the same can be said for a variety of laws that, while enacted with the stated intent of protecting a particularly vulnerable population, trigger a host of negative consequences for that population. See, *e.g.*, Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 Yale L.J. 1940, 1958 (2016) ("[M]andatory minimum sentences can have a number of negative consequences that serve to decrease, rather than increase, public safety."); Dylan S. Campbell & Anna-Kaisa Newheiser, *Must the Show Go On? The (In)Ability of Counterevidence to Change Attitudes Toward Crime Control Theater Policies*, 43 Law & Human Behavior 568, 568 (2019) ("Despite their popularity, sex offender registration and residence restriction laws have failed to reduce crime and carry a number of negative consequences for offenders and the general public."); Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It's Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 Pace L. Rev. 326, 350 (2016) ("Distinguishing hate crimes from other types of crimes is not effective because these laws do not fulfill their intended purposes and they result in unintended, negative consequences."); Petition for a Writ of Certiorari, *Louisiana* v. *Hill*, (U.S. May 10, 2021) (No. 20-1587).

In the context of safe haven laws, expedience often comes at the cost of due process, both for parents and for the children who may have an interest in one day knowing their genetic origins, medical history, or information about their birth family. In particular, "[s]tates have generally chosen not to specifically address the due process rights of fathers under safe haven legislation, or to expressly articulate any notice requirements at all. As a result, a number of scholars

have argued that safe haven legislation unconstitutionally deprives fathers of their due process rights." Carroll, *supra*, at 283–84; see also Lucinda Cornett, *Remembering the Endangered "Child": Limiting the Definition of "Safe Haven" and Looking Beyond the Safe Haven Law Framework*, 98 Ky. L.J. 833, 838 (2009) (Safe haven laws "may produce real legal issues involving those unidentified fathers whose parental rights are jeopardized under safe haven laws after the mother abandons the child").

The instant case highlights these concerns. Petitioner was married to the mother of Baby Boy Doe, and had filed for divorce the day before the child's birth. At the time of birth, the mother surrendered Doe under Michigan's Safe Delivery of Newborns Law ("SDNL") at a hospital in Kent County, apparently without notifying petitioner. Mich. Comp. Laws Ann. § 712.1 *et seq.* While one Michigan court system adjudicated the divorce proceedings, construing the petition for divorce as a pre-birth petition for custody and awarding temporary custody to petitioner, another court system adjudicated the SDNL placement on a separate track, unbeknownst to petitioner. The Michigan Supreme Court ultimately concluded that the SDNL proceedings trumped the divorce proceedings, on the ground that a petition for custody under the SDNL laws can only be filed after birth, rendering petitioner's pre-birth custody filing unripe. Thus, in a Kafkaesque twist, petitioner's attempt to exercise his custodial rights over his child was defeated by his failure to appear in a safe haven proceeding, of which he had no knowledge.

The Michigan Supreme Court's decision, and the legal regime on which that decision rests, raises exceptionally important and widespread issues relating to

the due process rights of families involved in safe haven adoption proceedings. Without clarity from this Court, such safe haven laws will have far-reaching consequences for parents and children in at least three troubling ways.

First, safe haven laws, like those in Michigan, run the risk of unconstitutionally infringing on parental due process rights. The classic *Mathews* v. *Eldridge* test requires some kind of process that accounts for (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the state's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews* v. *Eldridge,* 424 U.S. 319, 321, 335 (1976); *Turner* v. *Rogers*, 564 U.S. 431, 444–45 (2011).

But it is not clear that Michigan's laws comport with those requirements. Under the rule upheld below, a biological father in Michigan can be entirely excluded from the process of surrendering his biological child. That is true in most states, few of which require a non-surrendering father to be identified or notified that their infant was surrendered—indeed, for many, parental anonymity is a feature rather than a bug. *See* Dayna Cooper, *Fathers Are Parents Too: Challenging Safe Haven Laws with Procedural Due Process*, 31 Hofstra L. Rev. 877, 882 (2003) ("Virtually every safe haven law either expressly guarantees or otherwise provides for the anonymity of the parents or person leaving the child.").

Some states go so far as to prohibit asking the surrendering individual certain questions. *See* Fla. Stat. Ann. 383.50(5) (2002) (anyone surrendering a child "has the absolute right to remain anonymous and to

leave at any time and may not be pursued or followed"); Wis. Stat. Ann. 48.195(2) (2002) (prohibiting the coercion of anyone into revealing his or her name); Minn. Stat. Ann. 145.902 (2002) ("[T]he hospital must not inquire as to the identity of the mother or the person leaving the newborn"). Such features of safe haven laws often make it impractical or impossible to gather information regarding the father's (or mother's) identity in order to provide them with *notice* that their parental rights may be subject to termination, let alone a meaningful *process* to object. Jeffrey Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 Wayne L. Rev. 641, 656 (2008) ("[W]hen . . . mothers place their newborns for adoption, biological fathers frequently receive no notice and thus no practical chance for fatherhood."). Ethical adoption best practices are always to seek out the father and get his consent, unless there is a safety issue.

Safe haven laws do not have to operate this way. Indeed, as the dissent in the case below recognized, the state's interests in the protection and welfare of minors could be satisfied through far less constitutionally intrusive means, such as temporarily placing an abandoned child in foster care instead of terminating a biological father's parental rights through a process that does not even require the father's awareness or a meaningful ability to be heard. See *In re Baby Boy Doe*, 975 N.W.2d 486, 496 (Mich. 2022) (Zahra, J., concurring in part and dissenting in part) ("[F]oster care provides an adequate substitute procedural safeguard that does not impose a significant burden on the states interest in protecting the health and safety of minors."), *reconsideration denied*, 979 N.W.2d 324 (Mich. 2022). This Court should grant review to clarify the amount of process required and to establish what

showing a state must make to justify abrogating that process.

Second, the increasing resort to the shortcut of safe haven surrenders threatens to upend the carefully calibrated processes, which is intended to make the process fair and protect the interest of all parties to the adoption, that otherwise govern the over-100,000 adoptions that occur in the United States each year. Court Appointed Special Advocates, *Celebrating National Adoption Month* (Oct. 25, 2021), https://tinyurl.com/ycksnm96. Safe haven laws were intended to deter neonaticide and unsafe abandonments; they were not meant to serve as an expedient substitute for typical adoption procedures for a parent whose child is otherwise safe but who would rather undertake a process of legal abandonment that entails less paperwork. See Adam Pertman, *Rethinking 'Safe Havens' For Legal Desertion of Babies*, Christian Science Monitor (Apr. 4, 2003) https://www.csmonitor.com/2003/0404/p11s01-coop.html.

Unfortunately, in amici's experience, that is exactly what safe haven adoptions have become. Jennifer R. Racine, *A Dangerous Place for Society and its Troubled Young Women: A Call for an End to Newborn Safe Haven Laws in Wis. and Beyond*, 20 Wis. Women's L.J. 243, 251 (2005) ("[C]areful analysis shows that those taking advantage of safe haven laws tend to be parents who would have otherwise chosen another more responsible option such as traditional adoption procedures or parenting."); see Pertman, *supra*, *Rethinking 'Safe Havens' For Legal Desertion of Babies* (indicating that women who hurt or unsafely abandon their babies tend to suffer from severe trauma or mental disabilities, whereas those who would consider safe haven surrenders would likely already consider typical adoptions).

For instance, a typical adoption usually requires consent by both parents, regardless of whether the parents are married, and the documentation process may take several weeks. In comparison, most safe haven laws permit a person to surrender the infant within three days, and the person is often not required to submit their own name, let alone documentation about the child's medical history, parentage or consent of the other parent. Safe haven laws likewise do not have a mandatory waiting period after birth, nor do they require a person to take parenting counseling classes or make an "adoption plan" prior to the adoption. Safe haven laws are presented as a seamless process that is more simple than the traditional adoption process and are thus utilized by parents who would otherwise place their child for adoption. For instance, in November 2000, a birth mother, who was unaware of South Carolina's new safe haven law, gave birth at a hospital and considered relinquishing her rights through adoption. Tanya Amber Gee, *S.C.'s Safe Haven for Abandoned Infants Act: A "Band-Aid" Remedy for the Baby-Dumping "Epidemic"*, 53 S.C. L. Rev. 151, 160 (2001). After she was informed about the new law, the mother decided to anonymously abandon the newborn, "rather than fill out the necessary paperwork for relinquishment." *Id.* Petitioner's case is also illustrative of this problem—a birth father who would ordinarily have received notice and contested the surrender of his biological son in a normal adoption procedure was instead shut out of that process and deprived of his parental rights through the expedience of Michigan's safe haven process.

Third, from the child's perspective, the ability to terminate a biological parent's right—often without any record of that biological parent's identity or background—creates a host of problems for the child later

in life, including but not limited to impairing the child's efforts at knowing their identity and medical history (thus potentially putting their health at risk), as well as any efforts to meet members of their families in the future. See Pertman, *Adoption Nation*, *supra*, at 59–60; see also Adam Pertman, *Adoptees Deserve Access to Family Health Histories*, The Tampa Bay Times (Aug. 24, 2005), https://www.tampabay.com/archive/2005/03/06/adoptees-deserve-access-to-family-health-histories/. It also affects the extended family's interests in meeting and knowing the child. See, *e.g.*, Cornett, *supra*, at 834 (Safe haven laws also "creat[e] great difficulties for other members of the infant's family who seek to establish a connection [or desire reconciliation] with the child");

Those laws work real harms against the children. For one thing, adopted children very often express an interest later in life at reconnecting with their birth families. Bryn Baffer, *Closed Adoption: An Illusory Promise to Birth Parents and the Changing Landscape of Sealed Adoption Records*, 28 Cath. U. J. L. & Tech. 147, 161 (2020) ("72 percent of adopted adolescents wanted to know why they were adopted, 65 percent wanted to meet their birth parents, and 94 percent wanted to know which birth parent they looked like."); Graham Shelby, *When Adopted Children Want to Meet Their Birth Parents*, N.Y. Times (Aug. 7, 2018), https://www.nytimes.com/2018/08/07/well/when-adopted-children-want-to-meet-their-birth-parents.html. ("Adoption experts say first-time meetings between adult adoptees and their birth parents are becoming more common among the more than five million American adults who were adopted as children."). In an open adoption, such involvement by biological parents has been shown to have significant benefits for the families. Brittany Neal, *Reforming the Safe Haven*

in Ohio: Protecting the Rights of Mothers Through Anonymity, 25 J.L. & Health 341, 375–76 (2012) ("As more adoption agencies are encouraging both adoptive parents and children to share birth information, safe haven laws are seen as a setback to the open process currently advocated."). But safe haven adoptees are functionally barred from ever exercising that right—in fact, Michigan's SDNL goes so far to ensure parental anonymity that it actually *criminalizes* the act of disclosing the child's placing agency records. Mich. Comp. Laws Ann. § 712.2a. Safe haven laws make it virtually impossible for an adoptee, such as Doe, to one day get the opportunity to reconnect with his birth parents.

A child's physical health also suffers when the child is adopted through a safe haven process that lacks information about biological parentage. Family medical history and genetic data have the ability to "aid in the prevention, early detection, pre-symptomatic diagnosis and treatment of thousands of inherited diseases." Evan B. Donaldson Adoption Inst., *supra*, at 2–3. Reports show that safe haven infants are more likely to lack prenatal care and be exposed to material substance abuse, and they may predisposed to medical vulnerabilities. Micah Orliss, et al. *Safely Surrendered Infants in Los Angeles County: A Medically Vulnerable Population*. *Child Care Health Dev.* (July 19, 2019), https://doi.org/10.1111/cch.12711; see also Micah Orliss, *Adoptive Parents Often in the Dark About Care for 'Safe Haven" Kids*, STAT (July 20, 2022), https://bit.ly/3MO45Va ("[M]ore than half of the safely surrendered babies in Los Angeles County were diagnosed with medical issues in their first year of their life."). Adoptive families often are unaware of any preexisting medical conditions, family medical history, or of medical issues that have arisen in the biological

family in the years subsequent to the state-sanctioned abandonment.

From a mental health perspective, unanswered questions about their own identity and the psychological impact of abandonment for safe haven children can have life-long impacts. Adoptees left with unanswered questions will often experience feelings of abandonment, grief, and confusion about their identity and background. Ashley Albert & Amy Mulzer, *Response to the Symposium: Strengthened Bonds: Adoption Cannot Be Reformed*, 12 Colum. J. Race & L. 557, 586–87 (2022). In a study, researchers found that sealed-record adoptees reported a lower self-esteem and were "less likely to classify themselves as secure in adult attachment." Emily Ingall, *A Presumption In Favor of Openness: Unsealing Adoption Records*, 26 Cardozo J. Equal Rts. & Soc. Just. 305, 317 (2020). The denial of familial information, such as "nationality, ancestry, and genealogy, and the lack of control over this access, can be enraging for adoptees. This anger is often manifested as embarrassment . . . and feelings of hopelessness and worthlessness." *Id.* at 316; see Baffer, *supra,* at 161 ("[O]offering some basic information on birth families could lessen some of the psychological effects of adoption."). The anonymity provisions of these laws deprive safe haven children of vital information that can detrimentally affect their physical and mental health.

II. THE PETITION PRESENTS AN EXCELLENT VEHICLE TO REVIEW THE ISSUES PRESENTED BEFORE SAFE HAVEN LAWS BECOME MORE DEEPLY ENTRENCHED.

The petition offers an excellent vehicle to clarify due process standards for safe haven processes at a point when safe haven surrenders are poised to increase in frequency significantly.

One of the premises of this Court's decision in *Dobbs* was that the burdens of unwanted pregnancies have been reduced significantly by the enactment of safe haven laws in every state—and, presumably, by the expectation that parents will utilize those procedures to an increasing degree with the enactment of restrictions on abortion. *Dobbs*, 142 S. Ct. at 2259 & n.45; see also Oral Arg. Tr. at 56:19–21, *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Guttmacher Institute, *100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care* (Oct. 6, 2022), https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care (noting that 17 states have restricted abortion availability since *Dobbs*). Indeed, "safe haven surrenders, experts in reproductive health and child welfare say, are likely to become more common after [*Dobbs*]." Dana Goldstein, *Drop Box for Babies: Conservatives Promote a Way to Give Up Newborns Anonymously* (Aug. 13, 2022), https://www.nytimes.com/2022/08/06/us/roe-safe-haven-laws-newborns.html.

The expected rise in safe haven surrenders means that this petition comes at the perfect juncture for the Court to issue needed clarity on what due process protections apply to that process. Biological parents, adoptive parents, and the children involved all deserve a system that balances their respective rights in a humane and constitutional manner. Review is warranted here to ensure that the nation's safe haven laws live up to that calling.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 26, 2022

Appendix

Appendix: List of Amici

1. Access Connecticut Now, Inc.
2. Adoptees United Inc.
3. Bastard Nation: The Adoptee Rights Organization
4. Catholic Mothers for Truth and Transparency
5. Concerned United Birthparents
6. Hands Across The Water, Inc.
7. National Center on Adoption and Permanency