IN THE SUPREME COURT

(On Appeal from the Kent County Circuit Court – Family Division)

MELISSA POAG-EMERY,

Plaintiff/Appellant,

vs

MATTHEW EMERY,

Defendant/Appellee.

Kent County Family Court Case No. 2008-001251-DM
Michigan Court of Appeals Docket No. 318401
Michigan Supreme Court Docket No. _____

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae, A Better Balance, The Alliance: State Advocates for Women's Rights and Gender Equality (five regional women's law and policy organizations), the Carr Center for Reproductive Justice at New York University School of Law, Deborah M. Fisch J.D., National Advocates for Pregnant Women, National Organization for Women Foundation, and National Organization for Women Michigan are non-profit advocacy organizations and experts in women's health and reproductive issues that advance the civil rights of pregnant women. Undersigned *amici* wish to express their concern about the basis for subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in the ongoing child custody proceedings between Ms. Melissa Renee Poag-Emery and Mr. Matthew John Emery regarding their minor child. *Amici* are particularly concerned that the Michigan court below assumed jurisdiction over this child custody matter without regard to the home state of the child, which was Illinois. *Amici* urge the Court to grant leave to appeal for the purpose of addressing the issue of subject matter jurisdiction under the UCCJEA. *Amici* are interested in ensuring that the UCCJEA is interpreted and applied in a manner that honors the UCCJEA's express terms to give the child's home state priority in subject matter jurisdiction determinations. *Amici*'s interpretation of the UCCJEA is not only consistent with the UCCJEA's clear statutory language but is also necessary to preserve fundamental constitutional rights of pregnant women.

In the case at bar, because the UCCJEA prioritizes home state jurisdiction by design – making a child's home state the presumptive forum for initial and continuing custody determinations, *amici* assert that the Michigan trial court below improperly interpreted and applied the UCCJEA to assume subject matter jurisdiction in the custody proceedings at issue. *Amici* urge this Court to accept this case on appeal to clarify the appropriate interpretation of the UCCJEA and protect the constitutional rights of pregnant women.

Amicus curiae A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation,

research, public education and technical assistance to state and local campaigns, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been actively involved in working to end employment discrimination against pregnant women, who are routinely pushed out of the workplace at a time when they need job security the most. The organization runs a clinic where our callers frequently report pregnancy discrimination and a lack of support for pregnant and parenting workers. A Better Balance understands that discrimination at work, as well as insufficient legal rights and protections in a particular state, often factor into a woman's decision to move during her pregnancy. A woman should not be further punished for making a decision that will better serve the economic needs of her growing family.

Amicus curiae The Alliance: State Advocates for Women's Rights & Gender Equality is a nationwide collaborative of regional law and policy centers - Legal Voice in the Northwest, Gender Justice in the upper Midwest, Women's Law Project in Pennsylvania, Southwest Women's Law Center in New Mexico, and California Women's Law Center - formed to strengthen our collective advocacy impact, and promote pro-active strategies to advance women's rights, LGBT rights, and reproductive justice in the states.

- Legal Voice is a regional non-profit public interest organization dedicated to advancing the legal rights of women in 5 states in the Pacific Northwest (WA, OR, ID, AK, and MT). Founded in 1978 as the Northwest Women's Law Center, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, and is currently involved in numerous legislative and litigation efforts. Legal Voice has developed expertise in many areas of law pertaining to women's rights, including family law. For over 30 years, Legal Voice has played a key role in shaping the development of family law in the Northwest and to ensure its fair and equitable application to women, issues that are directly raised in this case. Among other initiatives, Legal Voice led efforts to prohibit Washington courts from delaying dissolution proceedings in cases where a woman is pregnant. Legal Voice continues to serve as a regional expert on family law and gender violence issues.

- Gender Justice is a nonprofit law firm based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, schools, businesses, and the public better understand the central role of cognitive bias and gender stereotypes in perpetuating gender discrimination. Gender Justice addresses gender discrimination in all its forms, including discrimination on the basis of sex, gender identity, and sexual orientation. As part of its impact litigation program, Gender Justice represents individuals in the Midwest and provides legal advocacy as *amicus curiae* in cases that have an impact in the Midwest and beyond. Gender Justice strongly supports equal treatment under law for all parents and believes that consistent enforcement of the "home state" rule under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) benefits mothers, fathers, and children.
- Founded in 1974, the Women's Law Project (WLP) is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination in employment, education, insurance, and in family matters relating to custody, support, domestic violence and divorce. Primary among the many areas of the Law Project's advocacy are issues affecting the relationship between women and children, including family law issues relating to custody, support, and domestic violence and economic issues relating to support of the family. The Law Project's far-reaching family law advocacy agenda includes original litigation and participation as *amicus curiae* in numerous family law cases as well as extensive advocacy to reduce barriers to justice in family court through publications such as *Report to the Community: Access to Justice in the Domestic Relations Division of Philadelphia Family Court* (2003) and *Deciding Child Custody When There is Domestic Violence: A Benchbook for Pennsylvania Courts* (Rev'd 2008), and development of informational materials for *pro se* litigants. The Law Project's

telephone counseling service also responds to thousands of family law inquiries annually.

- Southwest Women's Law Center (SWLC) is a non-profit policy and advocacy law center creating opportunities for girls and women in the state of New Mexico. SWLC collaborates with community members, organizations, attorneys, heath care providers and public officials to improve policy outcomes in the areas of access to family planning services, reproductive justice, equal pay, school athletics discrimination, economic security for survivors of domestic violence, sexual assault and stalking. SWLC helps women and girls fulfill their personal and economic potential by eliminating gender discrimination, lifting women and their families out of poverty and ensuring that all women have full control over their reproductive lives through access to comprehensive health services and information.
- The California Women's Law Center (CWLC) is a nonprofit public interest law and policy center specializing in the civil rights of women and girls. Founded in 1989, CWLC works in the following priority areas: Gender Discrimination, Women's Health, Violence Against Women, and Reproductive Justice. Since its inception, CWLC has placed a strong emphasis on the impact of domestic violence and family law issues on women's economic security. CWLC has authored numerous *amicus* briefs, legislation, and legal education materials on these issues and thus has the requisite interest and expertise to join this *amicus* brief.

Amicus curiae the Carr Center for Reproductive Justice at NYU Law (CCRJ) was established in 2013 to conduct innovative research, provide legal services, promote dialogue, and expand the academic disciplines on reproductive justice issues. CCRJ's goal is to ensure justice and democracy for all. The Carr Center sponsors the Reproductive Justice Clinic at New York University School of Law, a law school clinic that advocates and litigates to advance the rights of pregnant women, while training students in the legal knowledge and skills required to secure fundamental liberty, justice, and equality for each person regardless of gender, sexuality, or reproductive or family circumstance. The Carr Center and Clinic have identified erroneous assertions of

jurisdiction to be a particular problem in state family courts when a woman has moved while she is pregnant, and are accordingly eager to assist as *amicus* in this matter.

Amicus curiae Deborah M. Fisch received her J.D. from Wayne State University Law School and was admitted to practice in Michigan in 2011. She works as a researcher, writer, and advocate in the fields of Reproductive Justice, public health law, and public policy. Her focus is the role of women in childbirth and parenting as constrained and supported by legal, medical, bioethical, social, and economic factors. A specific area of interest includes the legal rights of women in pregnancy, childbirth, postpartum, and parenting, with particular attention to the interaction of abortion jurisprudence and those rights.

Amicus curiae National Advocates for Pregnant Women (NAPW) is a non-profit organization dedicated to ensuring that women retain their full human and civil rights, including the rights to equality, self-determination, and due process of law, during all stages of pregnancy. NAPW applies its legal and social science expertise in advocating for reproductive and family justice, including the right to carry a pregnancy to term and become a parent without punishment and without unjustified state supervision and surveillance.

Amicus curiae the National Organization for Women Foundation (NOW Foundation) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have been to achieve equal rights for all women and to end bias against women. NOW Foundation is committed to reforming and strengthening family courts so that proper jurisdiction, custody, visitation, child support, and marital property determinations are fairly made and that the safety and well-being of women and their children are not placed at further risk.

Amicus curiae Michigan National Organization for Women (Michigan NOW) is a membership organization committed to statewide advocacy to advance women's rights in Michigan, and is a chapter of the National Organization for Women. Since 1969,

Michigan NOW's purpose is to take action to bring women into full participation in the mainstream American society- sharing equal rights, responsibilities and opportunities with men, while living free from discrimination. With over 2,000 Michigan members, Michigan NOW works to eliminate discrimination and harassment in the workplace, schools, the justice system, and all other sectors of society. Michigan NOW strives to ensure that the laws of Michigan are free of gender bias in language and application and that its courts apply the law appropriately respecting and protecting the rights and interests of women and their children.

FACTS

The factual record is summarized by Ms. Poag-Emery's Application before this Court, filed June 3, 2014. It is not the place or within the capacity of *amici* to present a complete factual narrative in this matter. Moreover, much of what transpired is not directly relevant to the question of subject matter jurisdiction being raised in the application for permission to appeal. In spite of extensive proceedings in two states over six plus years in this custody dispute, *amici* contend that what is centrally relevant and dispositive of this case is the following simple, undisputed factual sequence:

(1) Ms. Poag-Emery became pregnant in late 2007;

(2) She subsequently moved, while pregnant, to Illinois on May 1, 2008;

(3) She gave birth in Illinois on May 30, 2008, where she continuously lived with her son for many years thereafter;

(4) On August 28, 2008, Ms. Poag-Emery filed a motion in Illinois requesting jurisdiction over the child custody proceeding for her newborn son; and

(5) Illinois has never declined its subject matter jurisdiction to make a child custody determination in accordance with the UCCJEA.[1]

[1] Ms. Poag-Emery sought temporary, emergency jurisdiction by motion in Illinois under the Illinois equivalent to M.C.L.A. § 722.1204 ("§ 204"). In denying that motion, the Illinois trial court made no findings regarding the home state of the child and did not conduct any analysis pertinent to subject matter jurisdiction under M.C.L.A.. § 722.1201 ("§ 201") for initial child custody determinations. Accordingly, the Illinois decision does not represent the sort of finding that could qualify as a declination of jurisdiction sufficient for Michigan to assume subject matter jurisdiction.

Under a proper interpretation of the UCCJEA, these facts are determinative of the case at bar: Illinois was the child's home state and therefore the proper jurisdiction unless and until a court of Illinois specifically declined jurisdiction under the relevant provisions of the UCCJEA. That a Michigan court nonetheless asserted subject matter jurisdiction in this case is therefore legal error – no Illinois court ever declined subject matter jurisdiction, so jurisdiction in the courts of Michigan was without any statutory basis. Moreover, as detailed in this brief, the Michigan trial court's exercise of child custody jurisdiction and associated interpretation of the UCCJEA is in violation of the United States Constitution.

For these reasons, *amici* urge this Court to accept review, announce the proper statutory interpretation of the UCCJEA regarding subject matter jurisdiction for child custody proceedings, reverse and vacate the trial court's child custody orders, and refer the parties to Illinois, the only state that, since the inception of this case, has ever had subject matter jurisdiction to make a child custody determination.

ARGUMENT

Michigan does not have subject matter jurisdiction in this child custody dispute as a matter of established principles of statutory interpretation and constitutional law. In what follows, these points are discussed in turn.

I. Under established principles of statutory interpretation, the UCCJEA must be interpreted to prioritize jurisdiction in the child's home state.

Proper interpretation of the UCCJEA leads to one conclusion: subject matter jurisdiction rests first with the home state of the child, and this home state priority commands that subject matter jurisdiction be recognized only after the child is born. The UCCJEA defines "home state" as:

> [T]he state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

M.C.L.A. § 722.1102 (g).

The means of statutory interpretation in Michigan are well settled and require explication of the statute's plain language and purpose. The plain language of the statute, specifically §§ 201, 202, 206, 207, and 208, compel an interpretation that prioritizes home state jurisdiction. This is the intended effect of the statute, as illustrated by a historical understanding of the UCCJEA's purpose.

(1) *The legal standard for statutory interpretation requires this Court to follow the UCCJEA's plain language.*

Michigan courts interpret statutes so as to give them the effect intended by the legislature as indicated through the statute's plain language. Wickens v. Oakwood Healthcare Sys., 631 N.W.2d 686, 690 (Mich. 2001) ("the paramount rule of statutory interpretation is that we are to effect the intent of the Legislature"); Tryc v. Michigan Veterans' Facility, 545 N.W.2d 642, 646 (Mich. 1996). In interpreting the text of a statute, non-technical statutory language should be given its "ordinary and generally accepted meaning," id. (citing Turner v. Auto Club Ins. Ass'n, 528 N.W.2d 681, 684 (Mich. 1995)), except when a statute specifically defines a given term, in which case the definition provided by the legislature controls. Tryc, 545 N.W.2d at 646 (Mich. 1996); Detroit v. Muzzin & Vincenti, Inc., 254 N.W.2d 599, 601 (Mich. Ct. App. 1977). If a court determines that the text of the statute in question is "clear and unambiguous," the court will conclude that the legislature intended its plain meaning and will "enforce the statute as written." Wickens, 631 N.W.2d at 690 (Mich. 2001) (citing People v. Stone, 621 N.W.2d 702, 704 (Mich. 2001)).

The language of the statute is clear in this instance; moreover the legislative purpose of the statute fully supports the language as it reads.

(2) *Plain language analysis of the Michigan UCCJEA confirms that the child's home state court had exclusive subject matter jurisdiction in the first instance.*

As codified in Michigan, M.C.L.A. § 722.1101 *et seq.*, the UCCJEA prioritizes one factor over all others in determining subject matter jurisdiction for child-custody proceedings: the home state of the child. This is apparent from the plain language of several provisions within the UCCJEA, namely §§ 201 (initial child custody

determinations), 202 (continuing child custody jurisdiction), 206 (simultaneous proceedings), 207 (forum inconvenience), and 208 (unjustifiable conduct). Each of these provisions is explicated in turn.

(A) Section 201: initial child custody determination

Section 201 governs the question of which court is authorized to make an initial child custody determination – it is here that the UCCJEA first and most strongly announces its structure for determining subject matter jurisdiction in child custody determinations. The text holds that jurisdiction for an initial child custody proceeding is only proper when:

> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
> (b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 207 or 208, and the court finds [two additional conditions pertaining to the connection of relevant persons and evidence to the state in question].
> (c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.
> (d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

M.C.L.A. § 722.1201. The structure and text of this section thus make clear that determination of subject matter jurisdiction is a decision tree: at the top, the court must determine the existence of the home state, where jurisdiction is proper unless a specific exception applies. See Dekinderen v. Dekinderen, 2010 WL 99269, at *2 (Mich. Ct. App. Jan. 12, 2010) ("Under the UCCJEA, home-state jurisdiction is the sole focus for an initial custody determination."). Accordingly, § 201 states an unambiguous priority in home state jurisdiction.

(B) Section 202: continuing jurisdiction

Home state is further prioritized in the Act's discussion of subject matter jurisdiction beyond the initial determination. Under § 202, the state making the initial child-custody determination – the home state according to UCCJEA priority – has

"exclusive, continuing jurisdiction" unless, effectively, all relevant parties move away or there is a determination of forum inconvenience under § 207. M.C.L.A. § 722.1202. Modification of a child-custody decision is limited to courts having jurisdiction to make an initial decision under § 201, and even temporary, emergency jurisdiction (§ 204) is narrowly defined and difficult to satisfy. See id. at § 722.1204. So in effect, the UCCJEA home state priority for initial child-custody decisions is so fundamental that it is carried forward for all custody determinations thereafter. See Atchison v. Atchison, 664 N.W.2d 249, 253 (Mich. Ct. App. 2003) ("The rules regarding home-state priority and retention of continuing, exclusive jurisdiction for the state that entered the decree are designed to rectify conflicting proceedings and orders in child-custody disputes.").

(C) Sections 206-208: exceptions

UCCJEA statutory exceptions for subject matter jurisdiction are limited to the following circumstances: (1) a simultaneous proceeding properly filed first in a foreign jurisdiction in substantial conformity with the UCCJEA, § 206;[2] (2) forum inconvenience, § 207; or (3) unjustifiable conduct by the party seeking to gain home state jurisdiction, § 208. Each of these exceptions is tightly circumscribed in a manner that reinforces the priority of the child's home state jurisdiction. Moreover, the application of these exceptions must be evaluated and decided in the first instance by the child's home state court.

(i) Section 206: simultaneous proceedings

Section 206 provides the first exception to otherwise valid subject matter jurisdiction: the existence of a pre-existing child-custody proceeding "in a court of another state having jurisdiction substantially in conformity with this act[.]" M.C.L.A. § 722.1206(1). The "substantially in conformity" requirement of this exception serves a reflexive function, referring courts back to § 201 to analyze the propriety of a foreign court's prior jurisdiction. This is important, as the interplay between §§ 201 and 206 establishes the hierarchy for subject matter jurisdiction between two different metrics –

[2] Technically speaking, in the language of the statute, § 206 is not an "exception" to otherwise valid subject matter jurisdiction – the statute demarcates §§ 207 and 208 as the only exceptions. *Amici* nonetheless use the term "exception" to refer to § 206 as well because functionally, that section describes another factual scenario and related analysis by which a court having otherwise appropriate subject matter jurisdiction is to decline in favor of another forum.

home state versus first-filed. Between these two, the statute requires that home state prevail, as follows:

- Where the first in time is the home state → subject matter jurisdiction is proper in that state;

- Where the first in time is not the home state → subject matter jurisdiction is not proper in that state unless:
    1. there is no home state; or
    2. the home state has declined jurisdiction in accordance with the UCCJEA.

In other words, under § 206, the court having home state status must be the court to determine that the first in time state proceeding is, "a simultaneous proceeding …in substantial conformity with the UCCJEA." See Foster v. Wolkowitz, 785 N.W.2d 59, 66 (Mich. 2010). The first filed court is not privileged to make that determination on its own behalf except in the unusual circumstance in which there is no state which meets the definition of the child's home state, which was not the case in the matter below. As one court explained, "the potential conflict of simultaneous proceedings in different states will only arise if there is no home state, no state with exclusive, continuing jurisdiction, and more than one state with significant connections." Al-Hawarey v. Al-Hawarey, 388 S.W.3d 237, 247 (Mo. Ct. App. 2012). Or, to put it another way, the UCCJEA eliminates the possibility of simultaneous proceedings where the child has a home state, except in those particular circumstances where the home state declines jurisdiction under §§ 207 and/or 208. In this manner, the Section 206 exception reaffirms the priority of home state jurisdiction.

(ii) Section 207: forum inconvenience

Section 207 provides a second exception to home state jurisdiction for cases of "forum inconvenience" – under this exception, a home state court may decline jurisdiction in opposition to the home state preference but only upon consideration of eight factors.[3] But four facets of § 207 underscore that it is a limited exception to the home state priority, and not one that may be permitted to swallow the rule.

[3]The eight factors are:

(a) whether domestic violence or mistreatment or abuse of a child or sibling has occurred and is likely to continue in the future and which state could best protect the parties and the child;

First, consideration of and deliberation over the forum inconvenience factors is limited to the court having home state jurisdiction. Foster v. Wolkowitz, 785 N.W.2d 59, 66 (Mich. 2010) ("[U]nder the UCCJEA, it is the home state that must decide whether to 'decline to exercise its jurisdiction' because 'it determines' that 'it is an inconvenient forum' and that 'a court of another state is a more appropriate forum.'") (internal citation omitted). "This is critical: To allow the state without home state jurisdiction to conduct the hearing would lead to the jurisdictional competition the drafters sought to avoid." Welch-Doden v. Roberts, 42 P.3d 1166, 1176 (Ariz. Ct. App. 2002); accord In re Custody of T.G.M.D., 2011 WL 1364437, at *3 (Minn. Ct. App. Apr. 12, 2011).

Second, consideration of the § 207 factors is discretionary with the court of the home state, following the permissive "may" language of the statute. In other words, the home state court is neither compelled to assess forum convenience issues nor to decline its home state jurisdiction simply because an argument could be made that another forum meets any of the eight convenience factors.

Third, if the court having home state jurisdiction chooses to consider the § 207 factors, then it must give appropriate weight to each and every factor or face reversal for abuse of discretion. See, e.g., In re Milton, 420 S.W.3d 245, 273 (Tex.App. 2013); Frank MM. v. Lorain NN., 960 N.Y.S.2d 232, 234 (N.Y. App. Div. 2013) Brewer v. Carter, 160 Cal.Rptr.3d 853, 859 (Cal. Ct. App. 2013); Cole v. Cushman, 946 A.2d 430 (Me. 2008). This serves to reinforce the duty of the child's home state court to oversee child custody

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(b) the length of time the child has resided outside this state;

(c) the distance between the court in this state and the court in the state that would assume jurisdiction;

(d) the relative financial circumstances of the parties;

(e) any agreement of the parties as to which state should assume jurisdiction;

(f) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) the familiarity of the court of each state with the facts and issues in the pending litigation.

M.C.L.A. § 722.1207.

proceedings. Careful examination of the eight § 207 "inconvenience" factors precludes denial of jurisdiction with the child's home state simply to serve the convenience of the court.

Fourth, and quite significantly, § 207 contains no explicit reference to the "best interests of the child." This omission was intentional and comports with two of the purposes behind the UCCJEA and its emphasis on home state jurisdiction: (1) to avoid merits disputes at the jurisdictional threshold, and (2) to prevent forum competition and forum-shopping generally. Atchison v. Atchison, 664 N.W.2d 249, 252 (Mich. App. 2003) (noting the UCCJEA drafters' decision "to eliminate the term 'best interests' to the extent it invited a substantive analysis into jurisdictional considerations"). Accordingly, § 207 should be understood as a tightly constrained exception to the child's home state priority: it permits deviation from home state jurisdiction to prevent substantial unfairness or practical complications, but the assessment can only be made by a court of the child's home state, and it should never be employed to undermine the UCCJEA's emphasis on home state jurisdiction as the preferred vehicle to prevent forum competition and intrusion of merits arguments at the jurisdictional threshold.

(iii) Section 208: Unjustifiable Conduct

The third and final ground on which a court of the home state may nonetheless decline jurisdiction is § 208 "jurisdiction declined by reason of conduct," or "unjustifiable conduct." In substance, the statute specifies:

> Except as otherwise provided in section 204 or by other law of this state, if a court of this state has jurisdiction under this article because a person invoking the court's jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction…[.]

M.C.L.A. § 722.1208. The core of this provision – the term "unjustifiable conduct" – is itself not defined by statute, but a clear standard has emerged: "unjustifiable conduct" is reserved for cases in which one parent removes a child across state lines for the express purpose of obtaining jurisdiction *and* either (a) there was an existing custody order in the state of departure, (b) the removal of the child was an unlawful abduction, or (c) both (a) and (b). See, e.g., Merril Sobie, *Practice Commentaries,* N.Y. Dom. Rel. Law § 76-g (McKinney) (2011) ("[The unjustifiable conduct exception] is not meant as a

catchall to permit dismissal whenever a parent's conduct might not be justifiable. Consistent with its intent, *the section should be invoked only rarely in situations involving a parent who has abducted the child, or has engaged in similar unconscionable acts*; even then, the provision should not be used to short circuit initial home state jurisdiction or exclusive, continuing modification jurisdiction." (emphasis added)); Huffaker v. Huffaker, 2013 WL 5763058 (Mich. Ct. App. Oct. 24, 2013), appeal denied, 495 Mich. 959, 843 N.W.2d 557 (2014) (father removing minor child from mother's care without her knowledge and consent and taking child back to father's state was unjustifiable). By definition under the statute, child abduction cannot occur before a child is actually born; moreover no valid court order can exist with respect to a child before a child is born. See Part II, below. Accordingly, § 208 cannot work to erase the § 201 child custody subject matter jurisdiction rested with the state in which a child has been born.

(3) *Analysis of the UCCJEA's history and purpose demonstrates that the home state jurisdictional priority was the chosen means to solve child custody jurisdictional disputes among the states.*

The importance of home state jurisdiction is also apparent in the history and purpose of the UCCJEA. The UCCJEA was developed by the National Conference of Commissioners of Uniform State Law (NCCUSL) as a necessary revision of its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA, drafted in 1967, was intended to provide uniformity across states in child custody proceedings and to facilitate the full faith and credit due to custody decisions in other state courts. The UCCJA approach was to make subject matter jurisdiction in initial custody proceedings a matter of judicial balancing of myriad factors, including the child's home state, the best interests of the child, conveniences and conduct of the parties, and so forth. Inevitably, this highly discretionary standard led to inconsistent views of the same evidence in different courts, producing the very inter-state competition over jurisdiction that the act was intended to foreclose. See David Carl Minneman, *Annotation, Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act*, 100 A.L.R.5th 1 (2002).

Moreover, in the years following the UCCJA's proliferation through state legislatures, Congress passed two acts that directly conflicted with the UCCJA – the Parental Kidnapping and Prevention Act (PKPA), and the Violence Against Women Act (VAWA). See Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child Custody Practice under the New Act*, 32 FAM. L. Q. 267, 268 (1998). The PKPA's conflict was particularly acute because that statute assigned priority to home state jurisdiction in a field closely related to that regulated by the UCCJA; the result was a number of cases in which the UCCJA was rendered obsolete by federal preemption. See, e.g., Reis v. Zimmer, 700 N.Y.S.2d 609, 615 (N.Y. App. Div. 1999).

The NCCUSL responded with the UCCJEA. The most salient change in that statute from the previous one lay in the prioritization of home state jurisdiction. See Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction and Enforcement Act – A Metamorphoses of the Uniform Child Custody Jurisdiction Act*, 75 N.D. L. REV. 301, 305 (1999) ("The most important changes the UCCJEA makes to the UCCJA is giving jurisdictional priority and exclusive continuing jurisdiction to the home state."). This is evident from the drafters' comments accompanying the relevant language:

> The jurisdiction of the home State has been prioritized over other jurisdictional bases. Section 3 of the UCCJA provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a 'significant connection' State when there is no home State. This Act [UCCJEA] prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201 comment (1997).

Additionally, the UCCJEA deliberately eliminated any "best interests" language from the jurisdictional criteria of initial custody determinations. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 101 prefatory note (1997) ("The UCCJEA eliminates the term 'best interests' in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children"). The significance of these changes was that the NCCUSL recommended a bright line rule for subject matter jurisdiction, one that would definitively *not* invite parties and courts into competing evidentiary deliberations at the jurisdictional threshold. See In re L.S., 226 P.3d 1227, 1233 (Colo. App. 2009), rev'd on other grounds, 257 P.3d

201 (Colo. 2011) ("[T]he first stated purpose of the UCCJEA is to: 'Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being.'") (internal citations omitted).

The solution, in sum, was to place priority for interstate jurisdiction on the "home state" of the child – an objective determination based on relatively straightforward evidence. See Landrum-Spitia v. Spitia, 2007 WL 1470728, at *1 (Conn. Super. Ct. May 9, 2007); Stephens v. Fourth Judicial Dist. Court, 128 P.3d 1026, 1028 (Mont. 2006); Powell v. Stover, 165 S.W.3d 322, 326 (Tex. 2005); Welch-Doden v. Roberts, 42 P.3d 1166, 1173 (Ariz. Ct. App. 2002). Both Michigan and Illinois endorsed this solution by enacting the UCCJEA as part of their child custody statutory regimes.

II. **The home state priority means there is no jurisdiction under the UCCJEA until a pregnant woman gives birth**.

The priority of jurisdiction in the child's home state straightforwardly entails a simple corollary: there is no subject matter jurisdiction for a child custody proceeding prior to the birth of the child in question. This point emerges from the definition of "home state" within the UCCJEA as codified in Michigan and elsewhere. Section 102 defines "home state" as:

> [T]he state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

M.C.L.A. § 722.1102(g). "Child" is further defined as "an individual who is younger than 18 years of age." Id. at § 102(b). Traditional tools of statutory interpretation make clear that these definitions require a child to have already been born before subject matter jurisdiction regarding a child custody matter can be said to exist.

First and foremost, the plain meaning of "an individual who is younger than 18 years of age" contemplates a living, born person, and not a fertilized egg, embryo, or fetus. This obvious meaning is ratified by the rest of the statute, as the home state

formula's reliance on the child's six month residency period is explicit with regard to calculation's for a child under six months of age. In such cases, "the term [home state] means the state in which the child lived from birth[.]" In other words, the clock starts when the child is born.

When coupled with the UCCJEA's emphasis on home state jurisdiction, this plain text interpretation of "child" makes manifest that the UCCJEA does not confer child custody subject matter jurisdiction over pregnant women. The child's home state priority means there must be the *possibility* of a home state, which in turn requires the birth of the child in question. Under the UCCJEA, subject matter jurisdiction of a child custody proceeding prior to birth is therefore forbidden because any such jurisdiction would defeat the home state priority and thereby undermine the UCCJEA's most central jurisdictional mechanism and improvement over the preceding UCCJA.

State decisions addressing whether the UCCJEA enables custody determinations before a child is born have overwhelmingly held that there is no subject matter jurisdiction for child custody proceedings pre-birth. See In re Sara Ashton McK. v. Samuel Bode M., 111 A.D.3d 474 (NY App. Ct. 2013); Gray v. Gray, 2013 WL 3967672 (Ala. Civ. App. Aug. 2, 2013); Arnold v. Price, 365 S.W.3d 455, 461 (Tex. App. 2011); B.B. v. A.B., 916 N.Y.S.2d 920 (N.Y. Sup. Ct. 2011); Waltenburg v. Waltenburg, 270 S.W.3d 308 (Tex. App. 2008); Arkansas Dept. of Human Services v. Cox, 349 Ark. 205 (2002); In re Unborn Child of Starks, 18 P.3d 342 (Okla. 2001); In re Marriage of Tonnesson, 189 Ariz. 225 (Ariz. Ct. App. 1997); In re Marriage of Tonnesson, 937 P.2d 863 (Colo. App. 1996); In re Steven S., 178 Cal.Rptr. 525 (Cal. Ct. App. 1981). In the few decisions reaching a contrary result, the specific courts conducted no statutory analysis whatsoever; instead those courts apparently presumed without inquiry that the UCCJEA applied prior to birth. See Stewart v. Vulliet, 888 N.E.2d 761 (Ind. 2008); In re P.D.M., 2001 WL 1503276 (Iowa Ct. App. 2001); Gullet v. Gullet, 992 S.W.2d 866 (Ky. Ct. App. 1999). Accordingly, there can be no serious question that the UCCJEA prohibits subject matter jurisdiction over child custody proceedings until such time as the relevant child has been born.

III. Any interpretation of the UCCJEA that permitted subject matter jurisdiction over a pregnant woman prior to her giving birth would violate the United States Constitution.

If the UCCJEA is understood to confer subject matter jurisdiction before a pregnant women has given birth, then the statute is in violation of the constitutional rights of pregnant women. Specifically, such an interpretation would violate the right to travel, a fundamental right that cannot be burdened absent compelling justification on the part of Michigan or any other state. Accordingly, *amici* urge this Court to accept this case and announce the appropriate construction of the UCCJEA so that lower courts throughout Michigan can protect constitutional rights in their exercise of jurisdiction.[4]

1. *Pre-birth jurisdiction under the UCCJEA would violate the right to travel*.

The right to travel is fundamental. Saenz v. Roe, 526 U.S. 489, 498 (1999); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974); Musto v. Redford Twp., 357 N.W.2d 791, 793 (Mich. Ct. App. 1984). It is so central to personal liberty that it is protected against encroachment even by private citizens. Saenz, 526 U.S. at 498. In application, the Supreme Court has determined that "the right to travel" provides umbrella protection for three distinct rights: (1) the right to enter and leave a foreign State; (2) the right to be treated as "a welcome visitor" in a foreign State; and (3) upon permanent relocation to a foreign State, the right to be treated equally with other, prior residents. Saenz, 526 U.S. at 500. Any of these rights, and so the right to travel generally, is violated by conduct that either (a) deters migration from a would-be departure State or (b) attaches a penalty upon arrival in a destination State. Memorial Hosp., 415 U.S. at 257. Where State action burdens the right to travel by either of these means, that action is unconstitutional unless necessary to achieve a compelling state interest. Id.

[4] Statutory interpretation may be informed by the canon of constitutional avoidance. This tool of statutory construction provides that, between competing interpretations, courts should choose the one that will avoid constitutional problems. Clark v. Martinez, 543 U.S. 371, 385 (2005). While this canon comes into play only after ordinary textual analysis reveals ambiguity – ambiguity which is completely absent in the UCCJEA – constitutional analysis in this case lends further support to the plain language of the statute. Moreover, the confusion among lower courts evidenced by this case impels this Court to lend clarity and guidance in applying the UCCJEA in accordance with constitutional law. See generally People v. Nyx, 734 N.W.2d 548 (Mich. 2007) (applying constitutional avoidance principles without identifying textual ambiguity in the underlying statute).

Interpretation of the UCCJEA in a manner permitting pre-birth subject matter jurisdiction primarily concerns the first and third component rights – the right to leave a state and the right to equal treatment upon relocation in a new state. This is for the following reason: where the UCCJEA permits a court to exercise jurisdiction in a child custody proceeding before a child is born, then the pregnant woman faces a serious impediment should she wish to move or relocate to another state while pregnant. A court exercising jurisdiction pre-birth might issue a restraining order against moving out of state. But even absent the threat of criminal sanctions, any relocation by a pregnant women after a court has taken jurisdiction would be burdened by (a) the denial of jurisdiction in the home state of her child once born, and (b) the cost of repeated travel to litigate child custody matters in the state of departure. It bears emphasizing that these financial barriers would be recurrent: the UCCJEA presumes that once a state has asserted subject matter jurisdiction, that state is the presumptive jurisdiction for all future modifications to custody arrangements under § 202. A pregnant woman considering relocation would thus have to consider the costs of repeated return to the state of departure for court proceedings, or alternatively, face the consequences of non-appearance.[5] This would burden the constitutionally protected right to travel under Supreme Court precedent. See Saenz, 526 U.S. at 500.

2. *Michigan cannot justify an infringement on women's right to travel.*

State laws and actions which violate fundamental rights are subject to strict scrutiny review – they are unconstitutional unless narrowly tailored to achieve a compelling government interest. Saenz v. Roe, 526 U.S. 489, 498-99 (1999) (right to travel is fundamental and requires showing of compelling governmental interest); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (noting of substantive due process

[5] It is foreseeable that some pregnant women would need to relocate but be forced to choose between terminating a wanted pregnancy and paying for protracted litigation in a foreign state – such a Hobson's choice is in itself unconstitutional, but even this unconstitutional choice may in reality be illusory for those pregnant women of more limited resources who cannot sustain the cost of either constitutional or child custody litigation. An interpretation of the UCCJEA that pressures a woman to terminate pregnancy in this manner violates the right to carry a pregnancy to term. See Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992) (noting that its decision in Roe v. Wade, 410 U.S. 113 (1973), "had been sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry to term); Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of the right to privacy."); Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981) (citing Maher v. Roe, 432 U.S. 464 (1977)) ("[T]he decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy.").

protections, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (right to privacy is fundamental and infringements are subject to strict scrutiny); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (discussing wide scope of liberties protected by due process).

Michigan has no state interest – let alone a compelling one – in providing a forum for custody determinations before a child is born. In the present case, though the record is unclear on this point, the Michigan trial court may have been motivated by the desire to keep the litigants' divorce and custody proceedings together in the same jurisdiction. This amounts to an interest in administrative efficiency, which is insufficient to justify infringement on a fundamental right as a matter of law. See Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 192 (1999); Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) ("[A]lthough efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'") (internal citation omitted).

It might be argued, more generally, that states have an interest in recognizing pre-birth jurisdiction under the UCCJEA to discourage forum-shopping. According to this view, taking jurisdiction over a child custody dispute while a woman is still pregnant would serve the purpose of preventing her from moving and giving birth in a more desirable forum for the express purpose of gaining jurisdiction there. But this argument is doubly mistaken. First, a pregnant woman is not forbidden from considering the various benefits offered by a prospective new State of residence. Shapiro v. Thompson, 394 U.S. 618, 632 (1969) ("[W]e do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's public assistance.").[6] In this sense, what some may term 'forum-shopping' is in fact a protected facet of the right to travel.

Second, even supposing that Michigan had an interest in preventing so-called forum-shopping, "[s]tatutes affecting constitutional rights must be drawn with 'precision,'

[6] *Shapiro* was overruled in part on other grounds. See Edelman v. Jordan, 415 U.S. 651 (1974). Consequently, *Shapiro*'s holding with regard to discrimination against pregnant women who evaluate the relative public assistance of states before relocating remains the law.

and must be 'tailored' to serve their legitimate objectives." Dunn. v. Blumstein, 405 U.S. 330, 343 (1972) (internal citations omitted). Interpreting the UCCJEA to recognize pre-birth jurisdiction is not a remedy tailored to the alleged interest in preventing forum-shopping. It is overbroad because, as a matter of logic, the percentage of women who relocate while pregnant specifically and solely to gain access to a more desirable forum for child custody proceedings is a very small piece of the whole, if any piece at all. Yet a UCCJEA interpretation recognizing pre-birth jurisdiction would apply equally to all, without regard to individual motives. So for this reason, as well, such an interpretation would fail constitutional muster.

As a result, the constitutional infringements discussed above are without justification. Accordingly, the UCCJEA may not be afforded the interpretation that would countenance pre-birth jurisdiction.

CONCLUSION

In this issue of first impression, the Supreme Court of Michigan has a vital role to play: *amici* urge the Court to grant leave to appeal to announce the only interpretation of the UCCJEA that will conform to the statute's language, give effect to the statute's purpose, and protect the constitutional rights of pregnant women. There cannot be subject matter jurisdiction over a child custody proceeding under the UCCJEA until such time as the child has been born. Once a child has been born, the UCCJEA – as enacted by the State of Michigan and the State of Illinois – clearly rests sole initial and continuing subject matter jurisdiction with the child's home state, which in this case was Illinois, where the child was born and living when child custody jurisdiction was initiated. The State of Michigan, by its own laws, had no authority to be ruling on matters of child custody in this matter. The abundant child custody proceedings in this state have thus all been in error, resulting in great expense and waste of judicial resources. To prevent this sort of hardship and inefficiency going forward, *amici* urge this Court to grant permission for the appeal and, ultimately, cure the Michigan trial court's error here, thereby giving appropriate guidance to the lower courts of this state while doing justice in this individual case

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this Brief as well as *Amici*'s Motion to Substitute were sent by overnight mail delivery on July 14, 2014 to the following parties:

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[7] Admission on motion pro hac vice granted by Order dated June 27, 2014.