Supreme Court No. S274943
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF N.R., Minor.	Court of Appeal No. B312001 Superior Court Nos. 20CCJP06523, 20CCJP06523A
Los Angeles Department of Children and Family Services, Petitioner and Respondent, v. O.R., Objector and Appellant.	

Appellant's Opening Brief On The Merits

After the Unpublished Decision by the Second District Court of Appeal, Division Five Filed April 29, 2022

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Questions Presented

1) Concerning the term "substance abuse" in Welfare and Institutions Code section 300[1], subdivision (b)(1) did the Legislature intend juvenile courts to utilize the objective and scientifically based definition accepted by the medical and mental health professions? Or did the Legislature intend to adopt a separate and more expansive definition of

[1] Further statutory references will be to the California Welfare and Institutions code unless otherwise stated.

"substance abuse" not recognized by medical or mental health professionals?

2) Does recurrent use of an illicit substance qualify as "substance abuse" for the purposes of section 300, subdivision (b)(1) despite no evidence the use has ever negatively impacted the parent's ability to fulfill any major life obligation?
3) Despite no indication of such in the statute itself, where a child is under the age of six does a finding of parental substance abuse *alone* provide sufficient evidence to warrant juvenile court jurisdiction?

Introduction

Jurisdiction over seventeen-month-old N.R. was based solely on Father's past recreational use of cocaine during weekends that his child was in the exclusive care of Mother. The parents lived separately and amicably shared custody. The record contains no evidence Father ever cared for N.R. under the influence of any substance, and no evidence he had ever jeopardized N.R.'s safety in any way or ever would. Father had no drugs or drug paraphernalia in his home, no criminal history, and no history of violent or otherwise inappropriate behavior. There was also no evidence Father's recreational cocaine use had ever negatively impacted his schooling or employment. The trial court's exercise of jurisdiction despite no evidence of risk was then affirmed by the Second District Court of Appeal, Division Five.

The plain language of section 300, subdivision (b)(1) is clear: jurisdiction over a child is not authorized based solely on parental substance use. The parent's substance use must amount to *abuse* and that "substance abuse" must actually place the child at a current substantial risk of serious physical harm. Unfortunately, many appellate courts have written these fundamental inquiries out of the statute. In their view, the Department need not satisfy any recognized definition of "substance abuse" and also need not even prove risk if the child is under the age of six. This confusing appellate guidance led to the nonsensical exercise of jurisdiction here based solely on Father's past recreational use of cocaine that had not impacted N.R. in any way.

To find that substantial evidence supported the trial court's conclusion that Father's recreational use of cocaine outside the presence of N.R. amounted to "substance abuse," the Court of Appeal relied on a line of cases leaving the term "substance abuse" undefined. These cases sanction a "you'll know it when you see it" approach which is at odds with the purpose of section 300. Section 300 was enacted in its present form to avoid disparate and subjective treatment of families. A better approach, used by other courts, relies on the criteria from the Diagnostic and Statistical Manual of Mental Disorders (DSM).[2] The

[2] Throughout this brief counsel will use "DSM" to refer to the entity DSM and not a particular edition of the treatise. Counsel will specify the edition by number (i.e., DSM-III or DSM-IV) and refer to the most current edition, the fifth edition, text revision as "DSM-V-TR."

Legislature intended this objective definition of the term "substance abuse." This Court should hold accordingly and avoid the type of subjective reasoning allowed by the alternative approach which was utilized here. Under the objective and scientifically based definition intended by the Legislature, there is no substantial evidence to support the trial court's finding of "substance abuse" and reversal is required.

Even if Father's cocaine use amounted to "substance abuse," both the trial court and the appellate court were required to determine whether this "substance abuse" actually placed N.R. at substantial risk of serious physical harm. The lower courts failed to perform this fundamental inquiry, instead relying on a judicially created doctrine that has no basis in the language of any statute. Under this rule, parental substance abuse alone serves as prima facie evidence that a child under the age of six is at substantial risk of serious physical harm. Pursuant to this doctrine, the burden was placed on Father to prove the absence of risk. Father respectfully requests this Court reject this judicially created doctrine and instead follow the plain language of the controlling statutes. Had the Department been required to actually prove that this child was at substantial risk of serious physical harm, this family would have never been subjected to court intervention. Father respectfully requests this Court adopt the legislatively intended definition of "substance abuse" present in the DSM and also clarify the Department's burden to actually prove risk.

Combined Statement of Facts/Procedure

A. Events prior to Detention

N.R. originally came to the attention of the Department in November 2020 based on concerns regarding relatives with whom Mother lived. (CT 9.) A police detective contacted the Department on November 19, 2020 because of a search warrant that had been authorized on Mother's home. (CT 9-10.) The police were looking for weapons and narcotics belonging to the maternal uncle and maternal grandmother's (MGM) boyfriend. (CT 10.)

While the police searched the home, the social worker met with Mother and they agreed that N.R. would be placed with Father during the Department's investigation. (CT 10.) Mother had no concerns with N.R. being in Father's care. (CT 11.) She explained that Mother and Father were not in a relationship but amicably co-parent "without a problem." (CT 10.) Mother called Father, and he headed to the home immediately. (CT 11.) When Father arrived, he took N.R. (CT 12.)

The social worker then assessed Father's home. (CT 12.) Father lived in an apartment with a small kitchen and restroom, and had working utilities and plenty of food. (CT 12.) The social worker saw no signs of any illegal or dangerous substances. (See CT 12.) The only safety concern noted by the social worker was that N.R. slept in the bed with Father when N.R. was there; the social worker was concerned about the dangers of co-sleeping. (CT 12.) Father stated that he would buy a "pack and play" for N.R. to sleep in instead. (CT 12.) Father denied substance abuse and agreed to a drug test. (CT 12.) The social worker noted: "The

child was seen in the father's care and appeared to be comfortable. The child was seen clean, neat and on target with all developmental milestones." (CT 12.)

Four days later on November 23, 2020 the social worker received the result for Father's drug test and it was positive for cocaine and negative for all other substances. (CT 12, 21.) The social worker did not discuss this positive result with Father until November 30, 2020, one week later. (CT 12.) N.R. had been in Father's exclusive custody for twelve days at this point and no concerns were noted beyond the positive drug test. (CT 12-13.) Father explained that he had used cocaine the weekend before he took the drug test and he was afraid to disclose this to the social worker. (CT 13.) That weekend was his birthday weekend and he had used cocaine with friends. (CT 13.) According to the social worker, "cocaine can usually be detected in a urine test for up to 4 days after use." (CT 78.) Father further explained that he is "not an active user and ha[d] not used since then." (CT 13.) The social worker expressed concern for N.R.'s safety. (CT 13.) "[F]ather stated that he understood and took full responsibility for his actions and will do what the department is asking him to do." (CT 13.)

On December 8, 2020, N.R. was taken into protective custody. (CT 13.) N.R. had been in Father's exclusive care from November 19, 2020 until the date of his removal nineteen days later on December 8, 2020 and no concerns were noted other than the single positive test.

B. Detention

A detention hearing was held on December 15, 2020. (CT 51.) The Department had filed a petition alleging that N.R. was described by section 300, subdivision (b)(1). (CT 1.) The petition contained two allegations. Allegation b-1 alleged that Mother had exposed N.R. to a "detrimental and endangering home environment." (CT 3.) Allegation b-2 alleged that Father has a history of "substance abuse" and "is a current abuser of cocaine" and that Father's "substance abuse" "endangers the child's physical health and safety and places the child at risk of serious physical harm, damage, [and] danger." (CT 4.) The court found Father to be the presumed father of N.R. (CT 52.) The court detained N.R. from both parents and ordered supervised visitation. (CT 53.)

C. Continuing Investigation

Father visited N.R. once a week and there were no concerns. (CT 158.)[3] Mother explained that she never knew that Father used drugs and was shocked when she found out. (CT 63.) Mother later stated that she did know Father was using when they were dating. (CT 63.) After finding out about Father's positive test, Mother told Father he should stop using and he did. (CT 63.) Mother told the social worker that Father "seems different now…I think he's sober…" (CT 64.)

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[3] Counsel focuses on the evidence regarding allegation b-2 because b-1 was ultimately dismissed and not relevant to the present appeal.

Father stated "I'm so upset that they caught me! My mom was upset too. She was crying when I told her I tested positive. This cocaine thing is not me! I'm so upset!" (CT 66.) Father explained that his birthday was November 11, 2020 and he celebrated from that Thursday (11/12) to Sunday (11/15). (CT 66.) Father and his friends "would pitch in 10 dollars each to get something small." (CT 66.) Father consumed alcohol during the weekend as well, "just maybe 2 tall cans a day." (CT 66.) Father received N.R. into his care four days later on November 19, 2020 and voluntarily submitted to a drug test that day. (CT 11-12.) Father had also smoked marijuana in the past. (CT 66.)

Father stated further:

> I don't stay here and take care of my child while high. [Mother] knew I used cocaine, but I wouldn't party at all every other weekend when [N.R.] came over. Me and [Mother] figured out our schedules, if she wanted to do things with her friends, I'd take [N.R.]

(CT 66.) "It was never serious, never out of control. I still go to work and school." (CT 66.)

Father first tried cocaine when he was twenty-one or twenty-two. (CT 66.) Father stated "I never had a problem with it, I never bought it myself, all these friends did it together. I used to rave a lot, and when there were big parties, I'd do it with my friends." (CT 66.) Father used cocaine "once or twice every two weeks" and explained "I don't have an addiction, otherwise I'd be broke." (CT 66.) Father did not believe he had a problem with cocaine but was willing to participate in services if the court

ordered him to. (CT 74.) Father was also willing to participate in random drug testing. (CT 73.)

Prior to Department involvement, N.R. had overnight weekend visits with Father. (CT 74.) The parents were co-parenting and this was working well. (CT 74.) Since the removal, Father was sad to miss N.R.'s developmental milestones and learned that N.R. had begun to walk since he was placed into protective custody. (CT 74.)

The maternal uncle who was caring for N.R. stated he had no concerns regarding Father prior to hearing about the positive test. (CT 69.) He had observed a visitation between Father and N.R. and stated that "N.R. was happy, knows his father, and they had positive interactions." (CT 69.)

Father identified his support as his mother (PGM) and Mother. (CT 72.) Father lived with PGM, his older brother (a paternal uncle) and his sister (a paternal aunt) slept over sometimes. (CT 72.) Father had completed barber school at twenty-two years old and was licensed two years later. (CT 73.) Father had worked at a barber shop for four years but lost his job when the "COVID-19 pandemic [] shut down barber shops." (CT 72.) Father's ultimate goal was to have his own barber shop. (CT 72.) Father was at the time working in a warehouse twenty hours a week. (CT 72.) Father denied any prior arrests, gang affiliation, mental health history, child welfare history, and any significant health problems. (CT 73.)

Father tested negative for both scheduled drug tests in January: January 6th and January 27th, 2021. (CT 158.) Father

missed a test scheduled for Tuesday, February 9, 2021. (CT 158.) Father called the social worker and explained he missed the test because of work. (CT 158.) Father asked if his tests could be scheduled for Mondays and Fridays as these were the days he could make due to work. (CT 158.) The social worker denied Father's request and stated the testing must be "random." (CT 158.) The social worker set up a make-up test for Father three days later on February 12, 2021 and this test "leaked" (due to no fault of Father) so no results were available. (CT 158.) Father then missed another test on Tuesday, February 23, 2021. (CT 158.) Father appeared at the next scheduled test on Friday, March 19, 2021 and the result was negative. (CT 158.)

D. Combined Jurisdiction/Disposition Hearing

After several continuances, a combined jurisdiction/disposition hearing was held on April 7, 2021. (CT 189.) Both parents submitted the matters of jurisdiction and disposition to the court on the basis of the social worker's reports but objected to the recommendations. (CT 189-80; RT 15-17, 27-30.)

Jurisdiction

The court dismissed allegation b-1 concerning Mother as Mother had moved out of the home. (RT 23; CT 180, 189.) The court then sustained allegation b-2 which concerned Father's cocaine use. (CT 181.) The court modified the language to read that Father was a "*recent* abuser of cocaine" opposed to a "*current*

abuser of cocaine." (CT 181, 189 [emphasis added].) The court found N.R. to be a child described by section 300, subdivision (b)(1). (CT 189; RT 24.)

Disposition

The court released N.R. to the care of Mother explaining that the detrimental environment was no longer a concern as Mother had moved out of that home. (CT 191; RT 27-28.) The court removed N.R. from Father's care and provided Father with enhancement services. (CT 191.) The court believed the child was at risk in Father's custody "given his drug abuse history." (RT 28.) In regards to Father's case plan, the court did not believe a "full [drug treatment] program" was warranted. (RT 33.) Because Father was no longer using cocaine or any other substance, he would not be eligible for a treatment program. (RT 33.) The court believed "it would be more appropriate to require tests, and then if any test is dirty, to do a program." (RT 33.)

E. The Appeal

On April 9, 2021 Father timely filed a notice of appeal. (CT 195-96.) In the subsequent appeal, Father challenged both jurisdiction and the order removing N.R. from his custody. In an unpublished opinion, the Second District Court of Appeal, Division Five affirmed the trial court's findings and orders in full. (*In re N.R.* (April 29, 2022, B312001) [unpub. Opn.].) Regarding jurisdiction, the appellate court concluded that Father's "rather longstanding cocaine habit, with intensive use on at least one

known occasion, provides substantial evidence to support the trial court's finding of substance abuse." (Opn., p. 11.)[4] The appellate court then concluded that jurisdiction was authorized because "[w]here very young children like N.R. are concerned, [] 'the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (Opn., p. 12.) Father's petition for rehearing was denied on May 13, 2022. Father timely filed a petition for review on June 8, 2022 and this Court granted review on August 24, 2022.

Argument

I. The term "substance abuse" in section 300, subdivision (b)(1) refers to a substance use disorder as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM).

As explained, *infra,* I.A., pp. 19-25, there is a split in authority on the definition of "substance abuse" for purposes of section 300, subdivision (b)(1). Some cases utilize objective and medically based criteria from the DSM while others leave the term undefined and sanction a "you'll know it when you see it" approach. As explained, *infra,* I.B., pp. 25-41, utilization of DSM criteria to define "substance abuse" is the correct approach based on statutory language, legislative history and public policy. As explained, *infra,* I.C., pp. 41-44, the Court of Appeal here crafted a definition of "substance abuse" out of line with legislative

[4] Counsel cites to the unpublished opinion in B312001 filed on April 29, 2022 as "Opn."

intent, this definition amounts to nothing more than repeated use, and therefore reversal is required.

A. There is currently a conflict of authority concerning the definition of "substance abuse" for purposes of section 300.

The current form of section 300 was enacted in 1987 and states in relevant part that a juvenile court is authorized to take jurisdiction over a child if:

> The child has suffered, or there is a substantial risk that the child will suffer serious physical harm or illness, as a result of…the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or *substance abuse*.

(Section 300, subdivision (b)(1) [emphasis added].)[5] The Legislature did not specifically define "substance abuse" and "a review of the legislative history surrounding the revisions has revealed no specific discussion of how such term should be defined in practice." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764 (*Drake M.*).)

[5] Section 300 has been amended since 1987 but these revisions have no relevance to the present appeal.

i. The Court in *Drake M.* held that a finding of "substance abuse" must be made pursuant to the objective and scientifically based criteria of the DSM.

In 2012, the Second District Court of Appeal, Division Three addressed the question of what parental conduct qualifies as "substance abuse." (*Drake M., supra,* 211 Cal.App.4th at p. 765.) As the *Drake M.* court noted, in the twenty-five years since the current form of section 300 had been enacted, dependency cases had "varied widely in the kinds of parental actions labeled 'substance abuse'." (*Ibid*.) Most courts' analyses were fact driven and did not articulate any specific criteria for lower courts or social workers to utilize. (Compare *In re J.N.* (2010) 181 Cal.App.4th 1010, 1026 [single drunk driving accident with child in the car not sufficient]; *In re B.T.* (2011) 193 Cal.App.4th 685, 694 [witnesses' claim that the mother drank more beer than she should not sufficient] with *In re E.B.* (2010) 184 Cal.App.4th 568, 575 [single DUI arrest and family member's claims the mother had a problem was sufficient]; see also *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [the father had *abused* marijuana because he used it before obtaining a prescription].) Some courts focused on the potential effect to the child from the parent's substance use or abuse but varied on what effect was sufficient to warrant jurisdiction. (E.g., compare *In re Alexis E., supra,* at p. 451 [jurisdiction warranted because children could smell marijuana] with *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1001 [evidence daughter had reported smelling marijuana was insufficient to establish risk].)

The *Drake M.* court relied on a prior case *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 (*Jennifer A.*) which had examined whether a mother's substance use rose to the level of "substance abuse." (*Drake M., supra,* 211 Cal.App.4th at p. 765.) In *Jennifer A.*, the children had been removed from the mother's custody after she left them alone in a motel room. (*Jennifer A., supra,* at p. 1326.) Despite Mother's compliance with her case plan, the court terminated services and scheduled a section 366.26 hearing because Mother had tested positive for marijuana on two occasions. (*Id.* at p. 1327.) The reviewing court found Mother's use of marijuana insufficient to support the trial court's finding that the children would be placed at a substantial risk of detriment. (*Id.* at p. 1346.) This was because "[n]o evidence was presented to establish Mother displayed clinical substance abuse" as defined by the DSM-IV-TR. (*Ibid.*)

Adopting the *Jennifer A.* reasoning, the *Drake M.* court held that a finding of substance abuse for purposes of section 300, subdivision (b)(1), must be based on evidence sufficient to:

> (1) show that the parent had been diagnosed as having a current substance abuse problem by a medical professional, or
> (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM-IV-TR.

(*Drake M., supra,* 211 Cal.App.4th at p. 766.) The DSM-IV-TR defined substance abuse as substance use manifesting as one or more of specified criteria such as the "failure to fulfill major role

obligations" and "substance-related legal problems." (*Id.* at p. 766 [citing DSM-IV-TR, at p. 199].)

The *Drake M.* court went on to find that the father before them did not have a clinical substance abuse disorder. (*Drake M., supra,* 211 Cal.App.4th at p. 767.) The father had never failed to fulfill a major role obligation and did not have any recurrent substance-related legal problems. (*Ibid.*) There was no evidence the father had ever operated a vehicle or cared for his child while under the influence. (*Ibid.*) The father had never used marijuana less than four hours before assuming care of the child. (*Ibid.*) Therefore, the court concluded the father had not *abused* marijuana and reversed the trial court's finding that the father's marijuana use was sufficient to support jurisdiction under section 300, subdivision (b)(1) over the one-year-old child. (*Ibid.*)[6]

ii. The Court in *Christopher R.*, held that juvenile dependency courts and social workers are not confined to medically recognized criteria when determining whether a parent's substance use qualifies as "substance abuse."

In 2014, the Second District Court of Appeal, Division Seven addressed whether the mother's substance use qualified as abuse placing her child at risk of serious physical harm. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 128 (*Christopher R.*).) The *Christopher R.* court believed that the mother's

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[6] The *Drake M.* court believed the distinction between *use* and *abuse* was dispositive and that a finding of "substance abuse" is prima facie evidence of risk if the child is under six. This separate legal question is addressed, *infra,* II., pp. 44-60.

"repeated use of cocaine and her ingestion of that drug while pregnant constitutes recurrent substance use that resulted in her failure to fulfill a major role obligation within the meaning of DSM-IV-TR." (*Id.* at p. 1218.) Nevertheless, the court held that juvenile courts and social workers were not confined by medically recognized criteria. (*Ibid.*) According to the *Christopher R.* court, the *Drake M.* definition was "a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b)" but not exclusive. (*Id.* at p. 1218 (*Christopher R.*).) The court affirmed the trial court's finding of "substance abuse" and reasoned that whether or not the mother's conduct qualified as "substance abuse" pursuant to the DSM-IV-TR her conduct qualified as "substance abuse" for purposes of section 300. (*Id.* at p. 1219.)[7] The *Christopher R.* court did not articulate any particular definition of "substance abuse" beyond the facts before it and therefore, sanctioned a "you'll know it when you see it" approach. (*Ibid.*)

iii. This split in authority has left trial courts and social workers with no clear direction as to what evidence is required to support a finding of parental "substance abuse."

Since *Drake M.* and *Christopher R.*, appellate courts have varied greatly on the question of what evidence is required to

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[7] The *Christopher R.* court ended the inquiry there because it relied on the judicially created theory that parental substance abuse alone is sufficient to support a jurisdictional finding if the child is under the age of six. This issue is addressed, *infra,* II., pp. 44-60.

support a finding of parental "substance abuse." Some opinions do not articulate a specific definition or identify whether their holding relies on *Drake M.* or *Christopher R.* (E.g., *In re L.W.* (2019) 32 Cal.App.5th 840, 850; *In re J.M.* (2019) 40 Cal.App.5th 913, 922; *In re J.A.* (2020) 47 Cal.App.5th 1036, 147.) Some opinions have agreed with *Drake M.* (E.g., *In re Alexzander C.* (2017) 18 Cal.App.5th 438, 447; *In re L.C.* (2019) 38 Cal.App.5th 646, 652.) Other opinions follow *Christopher R.* and hold that a parent's substance use may qualify as "abuse" regardless of whether DSM criteria is satisfied. (E.g., *In re K.B.* (2021) 59 Cal.App.5th 593, 601.) Some of these cases require "life-impacting" effects. (E.g., *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 727.)

In opinions relying on *Christopher R*, appellate courts often note that the parent's use arguably would qualify as abuse under the *Drake M.* definition, but nevertheless hold that the satisfaction of DSM criteria is unnecessary. (E.g., *In re Rebecca C., supra,* 228 Cal.App.4th at p. 727.) This type of reasoning instructs lower courts and social workers that the scientifically based criteria in the DSM may be ignored. Section 300 uses only the term "substance" and does not differentiate among substances based on legality or any other feature, and therefore under the *Christopher R.* framework a parent may be found to abuse even alcohol absent any indicia of a substance use disorder.

The Court of Appeal here relied on *Christopher R.* to conclude that Father's history of recreational cocaine use, "with intensive use on at least one known occasion, provides

substantial evidence to support the trial court's finding of substance abuse." (Opn., p. 11 [citing *Christopher R., supra,* 225 Cal.App.4th 1210, 1218].) Court intervention into this family rests entirely on evidence of Father's recreational substance use outside the presence of his child. (CT 4, 190.) This child was even taken from parental custody based solely on a single positive test. (CT 13 ["CSW will request a removal order from him as a result of the positive drug test"].) This is despite no evidence of any negative impact on Father or N.R. from his cocaine use. The present case exemplifies the unwarranted state intervention faced by families due to the present confusion in the case law.

B. Juvenile courts should be bound by the objective and scientifically based criteria in the DSM.

The objective and scientifically based definition proposed by *Drake M.* is consistent with the language and spirit of section 300. This definition also best serves families and children.

i. The language and structure of section 300 show the Legislature intended an objective, scientifically based definition of substance abuse.

"We start with the statute's words, which are the most reliable indicator of legislative intent. We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." (*In re R.T.* (2017) 3 Cal.5th 622, 627 [citations omitted] [interpreting section 300, subdivision

(b)(1) to determine whether parental fault is required]; *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844 ["Dependency provisions must be construed with reference to the whole system of dependency law, so that all parts may be harmonized"] [citations omitted].)

"Although not binding, it can be useful to refer to the dictionary definition of a word in attempting to ascertain the meaning of statutory language." (*In re R.T., supra,* 3 Cal.5th at p. 627.) Substance abuse is a brain disorder. (Johns Hopkins Medicine, Substance Abuse/Chemical Dependency, *available at* https:www.hopkinsmedicine.org/health/conditions-and-diseases/substance-abuse-chemical-dependency [as of December 14, 2022].) Therefore, the term is best understood by consulting the dictionary of brain disorders: the DSM. The DSM has long been accepted as an "official nomenclature" across a wide array of professional disciplines, "to communicate the essential characteristics of mental disorders presented by their patients." (JN-A, p. 5.)[8] This "common language" is "of value to all professionals associated with various aspects of mental health care, including psychiatrists, other physicians, psychologists, ***social workers***, nurses, counselors, forensic and legal specialists, occupational and rehabilitation therapists, and other health professionals." (JN-A, p. 5 [emphasis added].) The *Drake M.* court logically consulted the DSM, while *Christopher R.* and

[8] Concurrent with this brief, counsel has filed a request for judicial notice and accompanying exhibits. Counsel will cite to these exhibits as "JN," and specify the particular exhibit and page number.

its progeny have identified no particular reference, treatise or other authoritative source in support of their "you'll know it when you see it approach." (E.g., *In re K.B., supra,* 59 Cal.App.5th at p. 601; *In re Rebecca C., supra,* 228 Cal.App.4th at p. 725.)

When section 300 was enacted in 1987, the DSM-III was uniformly recognized as the leading authority on mental disorders and used the term present in section 300 "substance abuse." (JN-B, pp. 18-29, 30.) The DSM-III specified that "substance abuse" includes: (1) pattern of pathological use; (2) impairment in social or occupational functioning caused by the pattern of pathological use; (3) Duration of at least one month. (JN-B, p. 30.) Subsequent editions of the DSM have updated the relevant language and criteria. The *Drake M.* court utilized the version of the DSM in effect at the time, the DSM-IV-TR. (*Drake M., supra,* 211 Cal.App.4th at p. 765.) Following *Drake M.* a new edition of the DSM was released, the DSM-V. (*Christopher R., supra,* 225 Cal.App.4th at p. 1219 fn. 6.) The current edition of the DSM is the DSM-V-TR.

The DSM-V-TR has replaced the terms "substance abuse" and "substance dependency" with "an overarching new category of 'substance use disorders.'" (JN-A, p. 6.) A "substance use disorder" is defined as "[a] pattern of amphetamine-type substance, cocaine, or other stimulant use leading to clinically significant impairment or distress, as manifested by at least 2 of the following, occurring within a 12-month period." (JN-A, p. 14.) The definition then lists eleven criteria. (JN-A, pp. 14-15.) These criteria are:

(1) The stimulant is often taken in larger amounts or over a longer period than was intended.
(2) There is a persistent desire or unsuccessful efforts to cut down or control stimulant use.
(3) A great deal of time is spent in activities necessary to obtain the stimulant, use the stimulant, or recover from its effects.
(4) Craving, or a strong desire or urge to use the stimulant.
(5) Recurrent stimulant use resulting in a failure to fulfill major role obligations at work, school, or home.
(6) Continued stimulant use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the stimulant.
(7) Important social, occupational, or recreational activities are given up or reduced because of stimulant use
(8) Recurrent stimulant use in situations in which it is physically hazardous.
(9) Stimulant use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the stimulant.
(10) Tolerance, as defined by either of the following:
    a. A need for markedly increased amounts of the stimulant to achieve intoxication or desired effect.

b. A markedly diminished effect with continued use of the same amount o the stimulant.

(11) Withdrawal, as manifested by either of the following:

a. The characteristic withdrawal syndrome for the stimulant (refer to Criteria A and B of the criteria set for stimulant withdrawal, p. 569).

b. The stimulant (or a closely related substance) is taken to relieve or avoid withdrawal symptoms.

(JN-A, pp. 14-15.) The presence of two or three of these criteria indicate a mild substance use disorder. (JN-A, p. 16.) Four or five indicate a moderate substance use disorder. (JN-A, p. 16.) Six or more indicate a severe substance use disorder. (JN-A, p. 16.)

This evolution of medical understanding between the DSM-III and the current DSM-V-TR in no way undermines *Drake M.*'s reasoning. The Legislature certainly did not intend for child welfare practice to freeze in the year 1987 or any year thereafter. (See National Association of Social Worker (NASW) Ethical Code, § 4.01, subd. (b) [Social workers should "keep current with emerging knowledge relevant to social work. Social workers should routinely review the professional literature and participate in continuing education relevant to social work practice and social work ethics"], *available at* https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-

of-Ethics-English/Social-Workers-Ethical-Responsibilities-as-Professionals [as of December 14, 2022].)

The Legislature's intent to utilize the DSM to define "substance abuse" is further supported by looking to the surrounding language in section 300. "[W]hen a statute contains a list of items, the court interpreting that statute should determine the meaning of each item by reference to the others, and give preference to an interpretation that uniformly treats items similar in nature and scope." (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 690.) In section 300, subdivision (b)(1) the term "substance abuse" appears in a list following "mental illness" and "developmental disability." (§ 300, subd. (b)(1).) Both of these other terms have clinical significance and connote the necessity for professional assessment and diagnosis opposed to colloquial jargon or assumptions.

The Legislature chose the term "mental illness." (§ 300, subd. (b)(1).) They certainly intended to refer to a medically recognized mental disorder and not a lay opinion that the parent "seems crazy." Any other interpretation would allow mere judgment of parental behaviors that run contrary to societal convention. If a social worker alleges in a juvenile dependency petition that the parent has a "mental illness," the juvenile court would determine whether the parent has a medically recognized mental illness. (E.g., *In re A.G.* (2013) 220 Cal.App.4th 675, 684 [mother had been diagnosed with "persecutory delusion" and schizophrenia]; *In re A.L.* (2017) 18 Cal.App.5th 1044, 1046 [mother had been diagnosed with schizophrenia].) The same

reasoning would apply if the social worker alleged a "developmental disability." This Court should not adopt a definition of "substance abuse" that would make it "markedly dissimilar to the other items in the list." (*People v. Lucero* (2019) 41 Cal.App.5th 370, 398.) Because "mental illness" and "developmental disability" both require the utilization of objective and medically recognized criteria, it logically follows that the Legislature intended the same treatment of the next term in that list "substance abuse." For these reasons, the language and structure of the statute supports the conclusion that the term "substance abuse" refers to the objective and scientifically based criteria present in the DSM.

ii. The relevant legislative history shows that section 300 in its current form was enacted to avoid disparate, inconsistent and subjective treatment of children. In line with that purpose, the Legislature intended the term "substance abuse" to be defined by DSM criteria.

The Legislature did not specifically define "substance abuse" nor did the legislative history include a "specific discussion of how such term should be defined in practice." (*In re Drake M., supra,* 211 Cal.App.4th at p. 764 (*Drake M.*).) Nevertheless, a review of the legislative history does offer implicit support for the utilization of DSM criteria. The current version of section 300 was enacted for two primary purposes: (1) to ensure that children in need are protected from harm; and (2) to ensure that children not at risk are protected from the harm of "inappropriate intervention." (JN-C, p. 46.) The Legislature

sought to replace the former vague language with specific criteria to avoid the type of inconsistent results and improper court intervention that *Christopher R.* and its progeny sanction. When interpreting a statute, "[c]ourts may also consider the purposes of the statute, the evils to be remedied, and the public policy sought to be achieved." (*Weiss v. City of Del Mar* (2019) 39 Cal.App.5th 609, 618.)

Prior to 1987, section 300 had authorized a juvenile court to take jurisdiction over a child for reasons including the child not being "provided with the necessities of life" or "[w]hose home is an unfit place." (Stats. 1986, c. 1122, § 2.) In 1987, the Legislature sought to address the vagaries in how the law was applied and "limit court intervention to situations in which children are threatened with serious physical or emotional harm." (*In re R.T., supra,* 3 Cal.5th at p. 631 [citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 303].) The Legislature convened a task force to make recommendations on changes to the dependency scheme. (*In re Marilyn H., supra,* at p. 302; JN-C, p. 39.) When interpreting dependency laws, courts regularly look to the report of that task force. (*In re Caden C.* (2021) 11 Cal.5th 614, 635.)

The task force determined that "a review of court petitions indicated that in every county at least some cases appeared not to belong in the dependency system." (JN-C, p. 47.) This was largely due to the vague wording of the statute which allowed varying interpretations by the courts, individual child protection workers and local child protection agencies. (JN-C, p. 39.)

Accordingly, the members set out to develop "comprehensive guidelines" to be utilized by child welfare agencies and courts before subjecting families to the "critical and imposing step" of court intervention. (JN-C, p. 40.) The task force explained:

> Revisions to WIC Section 300 reflect the belief that while children should be protected from a wide range of harms, inappropriate intervention can be harmful to children and parents. Investigations and court hearings are traumatic for parents and children, particularly in cases where children are removed from their homes during the investigation process. Children can suffer real emotional damage.

(JN-C, p. 46.)

This "task force spent a great deal of time on the wording of each section and several legislative committees reviewed the specified language in lengthy hearings." (JN-C, p. 47.) Task force members were guided by objective standards and wished to avoid subjective moral judgments of individuals workers because "court intervention is not appropriate just because a social worker, teacher or child welfare professional thinks that a parent's behavior is somewhat undesirable." (JN-C, pp. 47, 54; see also JN-C, pp. 47 ["resolution of these value conflicts and difference in professional judgment, should not be left to the many individual workers"], 54 ["there is substantial clinical evidence…"].)

The Legislature adopted the recommendations of the task force, and replaced "the vague jurisdictional language of section

300 with 10 specific grounds for declaring a child a dependent of the juvenile court." (*In re Marilyn H., supra,* 5 Cal.4th at p. 303.) This change to section 300 came as part of a comprehensive revision of laws affecting children. (*Id.* at p. 302.)

The term "substance abuse" was not included in the earliest drafts of proposed language for section 300. As of January 30, 1987, the task force intended to recommend section 300, subdivision (b)(1) read in relevant part:

> The minor has suffered, or there is a demonstrated danger that the minor is at risk of suffering, serious physical harm…by the inability of the parent, guardian or primary caretaker to provide regular care for the minor due to the parent, guardian or primary caretaker's ***use*** *of drugs, alcohol*, or mental illness or developmental disability…

(JN-D, p. 81 [emphasis added].) The minutes from the following meetings occurring on February 19th and 20th, 1987, indicate that after discussion, the task force chose to alter the language to read:

> …guardian or primary caretaker's mental illness, developmental disability or *substance* ***abuse***.

(JN-D, p. 83.) The task force chose to change the word use to abuse. (JN-D, pp. 81, 83.) The task force determined that the utilization of the term "substance abuse" better served their goal of ensuring only those children actually at risk would be subjected to juvenile court jurisdiction. Of note, the DSM-III

distinguished "nonpathological substance *use* from Substance *Abuse*." (JN-B, p. 31 [emphasis added].)

In the final report, within a discussion of "reasonable efforts" the task force referred to "treatment for substance abuse/chemical addiction." (JN-C, p. 62.) By equating "substance abuse" with "chemical addiction" the task force indicated that in their minds, substance abuse meant much more than use even recurrent use. "Substance abuse" meant that the parent would be addicted, or in other words the parent would suffer from a compulsion to use beyond their control. (See JN-C, p. 31.) For the foregoing reasons, both the plain language of the statute and the legislative history support the conclusion that for the purpose of section 300, "substance abuse" must refer to a substance use disorder as defined by the DSM.

The appellate court cases that reject an objective scientifically based definition of "substance abuse" offer no workable alternative that can be universally applied. (See e.g., *Christopher R., supra,* 225 Cal.App.4th at p. 1218; *In re K.B., supra,* 59 Cal.App.5th at p. 601; *In re Rebecca C., supra,* 228 Cal.App.4th at p. 725.) The alternative approach is nothing more than "you'll know it when you see it" which encompasses the exact type of vagueness that section 300 in its current form was designed to avoid. Arguably, many of these cases concern parental substance use that may have qualified as a substance use disorder under the DSM-V-TR. (See e.g., *In re Rebecca C., supra,* at p. 727.) Nevertheless, by holding that such criteria need not be satisfied these opinions direct juvenile courts and social

workers that vague subjective judgments may be utilized and that scientifically based criteria may be ignored. By contrast, the *Drake M.* reasoning supplies a definition in line with both the language and spirit of section 300. This definition can be universally utilized and will avoid subjective and highly variable practices among individual social workers and counties.

iii. Utilizing DSM criteria to define substance abuse best serves children and families.

An objective scientifically based definition of "substance abuse" best serves families and children by bringing California Child Welfare practice in line with nationally recognized best practices. In addition, this will better focus the provision of services on families' true needs.

a. Treatment of substance use not tied to the DSM is out of line with nationally recognized best practices for child welfare.

The varying interpretations of the term "substance abuse" allowed by *Christopher R.* and its progeny are at odds with professional and ethical expectations for social workers. Social workers are ethically bound to "base practice on recognized knowledge, including empirically based knowledge, relevant to social work and social worker ethics." (NASW Ethical Code, § 4.01 (Competence) <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-Responsibilities-as-Professionals> [as of December 14, 2022].)

Specifically, best practices for social workers in the field of child welfare is to utilize "evidence-based practice" which includes using "the best available scientific knowledge derived from randomized controlled outcome studies and meta-analyses of existing outcome studies." (NASW Standards for Social Work Practice in Child Welfare, pp. 10-11, 20-21 <https://www.socialworkers.org/LinkClick.aspx?fileticke=_Flu_UDcEac %3D&portalid=0#:~:text=A%20social%20worker%20in%20child,the%20NASW%20Code%20of%20Ethics> [as of December 14, 2022].)[9]

Adopting an objective scientifically based definition of "substance abuse" would bring California child welfare practice in line with nationally recognized best practices. According to the National Center on Substance Abuse and Child Welfare, "child welfare workers need a working knowledge of SUDs (Substance Use Disorders) ..." (National Center on Substance Abuse & Child Welfare, Drug Testing For Parents Involved in Child Welfare: Three Key Practice Points 2 (2021), *available at* https://ncsacw.acf.hhs.gov/files/drug-testing-brief-2-508.pdf [as of October 22, 2022] (*Drug Testing*).) "Substance use disorders [] are complex, progressive, and treatable diseases of the brain that profoundly affect how people act, think and feel." (National Center on Substance Abuse & Child Welfare, Understanding

[9] Child welfare agencies across the state supported enactment of section 300 in its current form based on concern that the former section 300 was "widely open to interpretation by the courts, individual child protection workers and local child protection agencies." (JN-E, pp. 93-102.)

Substance Use Disorders – What Child Welfare Staff Need to Know, *available at* https://ncsacw.acf.hhs.gov/files/tips-staff-need-to-know-508.pdf [as of October 22, 2022].) "[D]rug testing results alone cannot identify a SUD, ensure child safety, or identify child safety concerns." (*Drug Testing*, p. 3.) The social worker should gather information using "standardized screening tools and assessments…" (*Ibid*.) If the social worker identifies the possibility of a substance use disorder, the social worker should "refer the parent to a SUD treatment professional who can conduct biopsychosocial assessment to determine any SUD-related needs and develop an individualized treatment plan." (*Drug Testing,* p. 5.)

By contrast, in the present case Father's positive drug test alone prompted a mechanical response from the Department without any analysis into whether Father actually required treatment or whether N.R. was actually at risk. The social worker requested a removal order based on the positive test alone. (CT 13 ["CSW will request a removal order from him as a result of the positive drug test"].) The social worker instructed Father to begin drug testing and recommended a "full drug/alcohol program with aftercare." (CT 158-59, 187; RT 33.) This was all without utilization of any objective scientifically based criteria and without consultation with any expert or other medical professional. The holding Father requests from this Court would assist social workers by supplying them with objective criteria to determine whether the parent indeed requires treatment or simply uses a certain substance.

b. Utilizing the objective and scientifically based criteria in the DSM will assist families and children by focusing services on their true needs.

Further, the petition in practice serves as much more than a charging document. The sustained petition serves as a tool throughout the case to focus the court and parties on the protective issues that services should be tailored to address. (See § 332, subd. (f); JN-C, p. 40 ["Once court intervention is determined necessary, children and parents should receive…time-limited and clearly focused protective and/or reunification services…"].) Virtually every time a trial court sustains a petition with an allegation of parental substance abuse, that parent is then ordered to participate in substance abuse related services. (E.g., RT 33; *In re Natalie A.* (2015) 243 Cal.App.4th 178, 186.) These services can range from random drug testing to residential treatment which can all unduly interfere with a parent's employment and other life obligations. Here, Father was ordered to submit to random drug testing and he was required to complete a "full drug rehab program" if he missed a single test. (RT 33; CT 186.) Father had already explained that random drug testing was difficult to comply with due to his employment but no accommodation was made. (CT 158-59.) Father would have also been required to complete a "full drug rehab program" if he showed up positive for even alcohol meaning he was barred from sipping wine with dinner despite no medical diagnosis of a substance use disorder. (RT 33; CT 186.) Under the *Christopher R.* reasoning, Father was subjected to

these cumbersome demands and other parents could be subjected to even more. If social workers and courts are required to assess whether a parent's substance use actually qualifies as a substance use disorder which requires treatment, then parents will be protected from these onerous and unnecessary burdens.

Here, N.R. was released to Mother but where a child is placed out of home the parent may face permanent loss of custody if he cannot complete his case plan. (§ 366.21, subd. (e)(1) [failure to comply with case plan "prima facie evidence" that return would be detrimental], (e)(4) [scheduling of section 366.26 hearing where parental rights may be terminated].) This loss of custody is entirely erroneous if those services are not focused on actual protective issues. Further, "[s]tudies have shown that when parents receive services targeting their [actual] problems, they are more likely to reunify." (D'Andrade et al., *Parental problems, case plan requirements, and service targeting in child welfare reunification* (2012); see also D'Andrade, *Professional Stakeholders' Concerns about Reunification Case Plan Requirements* (2019).) Also, public resources are utilized to fund these services. (*In re John W.* (1996) 41 Cal.App.4th 961, 975 ["It is common knowledge that the resources of local government social services agencies are stretched thin; in the juvenile dependency context those resources are manifestly intended to be directed at neglected and genuinely abused children"].) If services are ordered not actually focused on an issue which places the child at risk, the parent, child and public are harmed.

Further, an often-unwritten component of a case plan is for the parent to take accountability or otherwise acknowledge responsibility for placing the child at risk. Parents are regularly required to admit to the specific factual allegations within a sustained petition. (See e.g., *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197 ["One cannot correct a problem one fails to acknowledge"].) A parent in juvenile dependency may be forced to choose between maintaining the truth that he merely *used* a substance and does not require treatment or admit to an imagined problem and comply with an onerous case plan in order to regain custody of his child and/or secure dismissal of the case. Here, circular reasoning that because Father denied he had a problem therefore, he must have a problem was relied upon at the trial and appellate level. (RT 19-20, 29; Opn., p. 13.) The objective and scientifically based definition of "substance abuse" intended by the Legislature would avoid an over-simplified reaction to any and all parental substance use and allow the actual needs of families to be addressed.

C. Applying these principles to the present case requires reversal. Evidence showing only recurrent use of a substance does not support the trial court's finding of "substance abuse."

For the foregoing reasons, this Court should "hold that a finding of substance abuse for purposes of section 300, subdivision (b), must be based on evidence sufficient to "(1) show that the parent or guardian at issue had been diagnosed as having a current [substance use disorder] by a medical

professional; or (2) establish that the parent or guardian at issue has a current [substance use disorder] as defined in the [current edition of the DSM]." (*Drake M., supra,* 211 Cal.App.4th at p. 766.) This holding would be in line with the words of the statute, the legislative history behind the statute, and the purpose of the statute. Mandating use of objective criteria will protect children and families against unnecessary state intervention. For children who are at risk, this holding will ensure the provision of services focused on families' actual needs and avoid distraction by subjective judgment of substance use that does not actually require treatment.

The Court of Appeal here essentially defined substance abuse as a lot of use. (Opn., p. 11.) Mere use, even repeated use, falls far short of even a mild substance use disorder pursuant to the DSM-V-TR. (*L.C., supra,* 38 Cal.App.5th at p. 654.) *In re L.C.* (2019) 38 Cal.App.5th 646 is instructive here. The *L.C.* court utilizing DSM criteria found the record showed the legal guardian *used* but did not *abuse* methamphetamines:

> [The legal guardian] used methamphetamine at most seven times between December 2017 and September 2018…he did not crave it and…never purchased it…he dropped [the child] off and picked her up from school every day, accompanied her to her medical and dental appointments, and never appeared under the influence when he undertook these caregiving tasks. Further, [the Department] presented *no* evidence that [the legal guardian] gave up social, occupational, or recreational activities because of his use of methamphetamine.

(*L.C., supra,* at p. 652.)

Here, like in *L.C.*, Father's usage did not satisfy the criteria for a substance use disorder. There was no evidence Father had ever cared for N.R. under the influence of any substance. (CT 14.) There was also no evidence Father's substance use effected his ability to fulfill any parental responsibility. Father had no criminal history – drug related or otherwise. (CT 14.) Father's substance use had never negatively affected his employment or ability to fulfill any major life obligation. (CT 72.)[10] Additionally, Father immediately stopped using cocaine after the Department became involved with the family and N.R. was placed in his care. (CT 13, 74.) Father missed only one random drug test that was not made up (and he had given the social worker advanced notice that he was unavailable that day of the week due to work). (CT 158.)[11] This record contains only evidence of substance use not *abuse*.

Because the Court of Appeal relied on the incorrect definition of substance abuse, this Court should reverse the Court

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[10] The Court of Appeal implied otherwise by derogatorily referring to Father as "an out-of-work barber" who lived with his mother. (Opn., p. 6 fn. 1.) This is an unfair and inaccurate characterization though; Father lost his job as a barber due to the COVID-19 pandemic and not substance use. (CT 72.) Living with a parent is also not indicative of a substance use disorder.

[11] "[A] missed drug test, *without adequate justification*, is properly considered the equivalent of a positive test result." (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384.) Retaining employment in order to provide for one's basic needs is surely an "adequate justification."

of Appeal's affirmance of jurisdiction and remand with instructions to reverse the trial court's judgment. In the alternative, this Court should instruct the Court of Appeal to reconsider the matter utilizing the correct definition of "substance abuse."

II. The Department has the burden of proving risk to a child, and this Court should reject the judicially created rule that parental substance abuse is prima facie evidence for the purposes of taking jurisdiction over a child under six.

The Court of Appeal here relied on a long-standing judicially created rule that "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm" for children under the age of six. (Opn., p. 12 [citing *Christopher R., supra,* 225 Cal.App.4th at p. 1219].) This judicially created doctrine is contrary to the plain language of the statute, contravenes legislative intent, and violates the due process that must be provided to parents and children before courts intervene in their lives.

Parents have a "fundamental liberty interest" "in the care, custody, and management" of their children. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753.) At a jurisdictional hearing, the Department asks the court to infringe on this fundamental right. The Department asks the court to step in and act as surrogate parent for the child. (§ 300.) In support of this request, the Department must prove by a mere preponderance of the evidence

that the child is at risk of serious harm as specified by section 300. (§ 355, subd. (a).) The Department is allowed to satisfy this low evidentiary burden with relaxed procedural and evidentiary protections afforded to the parent. With some limitation, the Department is allowed to rely on hearsay within social worker reports. (See § 355, subd. (b).) Pending trial, the child can be detained in a location kept confidential from the parent. (§ 308; § 309.) The child can be interviewed outside the presence of the parent. Then in some circumstances, the child's statements may be relied on even if not subject to cross-examination. (E.g., § 355, subd. (c)(1)(B); *In re Lucero L.* (2000) 22 Cal.4th 1227, 1246.) The Department may also rely on character evidence and past criminal history that would be inadmissible in other contexts. (E.g., CT 14-15.) The question presented here is whether in cases of parental substance abuse, the Department may be relieved of this low evidentiary burden and place on the parent the unreasonable burden of proving that the child is *not* at substantial risk of serious physical harm.

As explained, *infra,* II.A., pp. 46-49, the Legislature has specified the few instances where the Department may be excused from this relatively low evidentiary burden and parental substance abuse is not among them. As explained *infra,* II.B., pp. 49-51, courts have improperly taken it upon themselves to re-write the law. As explained, *infra,* II.C., pp. 51-54, courts have improperly treated substance abuse entirely differently than the terms "mental illness" and "developmental disability" it is listed with in section 300. As explained, *infra,* II.D., pp. 54-58,

requiring the Department to affirmatively prove risk best serves children and families. Finally, as explained, *infra,* II.E., pp. 58-60, had the Court of Appeal not utilized this rule of prima facie evidence, the jurisdictional finding would have been reversed as there is no evidence in this record that N.R. was actually at substantial risk of serious physical harm.

A. In line with constitutional guarantees, the Legislature has directed that the Department must affirmatively prove that a child is at substantial risk of serious physical harm before the juvenile court may exercise jurisdiction over that child.

As stated previously, when interpreting a statute, reviewing courts take into "account [] any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose." (*In re R.T., supra,* 3 Cal.5th at p. 627 [citations omitted].) Section 300, subdivision (b)(1) authorizes juvenile court jurisdiction if the child is at substantial risk of serious physical harm "as a result of…the inability of the parent" "to provide regular care…due to the parent's [] mental illness, developmental disability, or *substance abuse*." (§ 300, subd. (b)(1) [emphasis added].) The Department bears the burden to prove that a child is described by section 300. (§ 355, subd. (a).) Based on a plain reading of the statute, that burden is not shifted on to the parent in the case of parental substance abuse. (§ 300, subd. (b)(1).) The question is not whether the parent "abuses" any substance. "Subdivision (b) means what it says. Before courts and agencies

can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness." (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1137.)

In section 355.1, the Legislature has explicitly indicated the circumstances that do constitute "prima facie evidence that the minor is described by subdivisions (a), (b), or (d) of Section 300." (§ 355.1, subds. (a), (d).) These "constitute[] a presumption affecting the burden of producing evidence." (§ 355.1, subd. (c). (d).) Section 355.1 contains no reference to parental substance abuse. (§ 355.1.)

"The Legislature's chosen language is the most reliable indicator of its intent because it is the language of the statute itself that has successfully braved the legislative gauntlet." (*LGCY Power, LLC v. Superior Court* (2022) 75 Cal.App.5th 844, 861 [citations omitted].) In fact, a proposal to include parental substance abuse in section 355.1 has faced the "legislative gauntlet" and lost. In 1989 Assembly Bill 1762 proposed modifying section 355.1 to include a new paragraph stating where "the parent or guardian of the minor is unable to provide the basic necessities of life for himself or herself because of his or her substance abuse, that evidence shall be prima facie evidence that the minor is a person coming within the dependency jurisdiction of the juvenile court." (JN-F, p. 106; *In re Troy D.* (1989) 215 Cal.App.3d 889, 898 fn. 1.) This proposal was rejected by the Legislature and while the Legislature has modified section

355.1 in other ways since, the Legislature has chosen not to include any reference to parental substance abuse.

Section 300.2 has also been relied upon to support this rule of prima facie evidence. (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384.) Section 300.2 in relevant part reads:

> The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child.

(§ 300.2.) As the Second District Court of Appeal, Division One has explained: "Section 300, subdivision (b), however, requires a showing of a risk of serious physical harm resulting from [the parent's] substance abuse. Thus, the 'negative effects' referenced in section 300.2 must be of the sort likely to result in serious physical harm." (*In re Destiny S., supra,* 210 Cal.App.4th at p. 1005.) When the Legislature "has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576 [citations omitted].) The Legislature chose to use the words "prima facie evidence" in relation to specific circumstances in section 355.1 but did not use those words in section 300.2 or any other statute regarding parental substance abuse. (Compare § 355.1 with § 300.2.) Therefore, a rule of prima facie evidence should not be implied where the Legislature has chosen to exclude it.

For the foregoing reasons, the Legislature's readily apparent intent is for the burden to be placed on the Department

to affirmatively prove any risk associated with parental substance abuse. (§ 355, subd. (a); § 300, subd. (b)(1); § 355.1.)

B. Appellate courts have improperly re-written the statute to relieve the Department of its evidentiary burden in cases of parental substance abuse.

The proposition that parental substance abuse serves as prima facie evidence of substantial risk can be traced back to 2012, when the *Drake M.* court held that for children of "tender years" (under the age of six) "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M., supra,* 211 Cal.App.4th at p. 767; *Christopher R., supra,* 225 Cal.App.4th at p. 1219 [defining "tender years" as under the age of six].) The *Drake M.* court relied on a prior case *Rocco M.* (*Ibid* [citing *Rocco M.* (1991) 1 Cal.App.4th 814, 824.) This holding actually runs contrary to the reasoning in *Rocco M.*

The *Rocco M.* court explained how a child's age affects the question of whether "the general lack of or inadequacy of [the parent's] supervision" places the child at substantial risk of serious physical harm. (*Rocco M., supra,* 1 Cal.App.4th at p. 825.) The *Rocco M.* court spoke not of parental substance abuse but the lack of adequate supervision for any reason. (*Rocco M., supra,* 1 Cal.App.4th at p. 824.) For older children there must be an "identified, specific hazard in the child's environment…" (*Id.* at p. 824.) This is because they are "old enough to avoid the kinds of physical dangers which make infancy an inherently hazardous

period of life." (*Ibid.*) Younger children are "of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety." (*Ibid.*)

The child in *Rocco M.* was eleven and was regularly left "entirely to his own devices over prolonged periods of time." (*Rocco M., supra,* 1 Cal.App.4th at pp. 817, 825.) Because of his age, the inquiry did not end there with lack of supervision alone and the court asked whether there was some specified hazard in the child's environment. (*Id.* at p. 825.) The court explicitly rejected the notion that his mother's substance abuse alone placed Rocco at risk. (*Ibid* [favorably citing *In re Jeanette S.* (1979) 94 Cal.App.3d 52 which held that a father's alcoholism alone would not support jurisdiction over his five year old child].) Instead, the court found that jurisdiction was properly taken over Rocco due to the fact that Rocco had access to dangerous substances when he was left unsupervised. (*Ibid.*)

The *Drake M.* court relied on the reasoning of *Rocco M.* to support a conclusion that the *Rocco M.* court had explicitly rejected. (*Drake M., supra,* 211 Cal.App.4th at p. 767.) Since then, appellate courts and practitioners have widely accepted this rule of prima facie evidence and effectively re-written the statutes. (E.g., *In re Kadence P., supra,* 241 Cal.App.4th at p. 1384; *Christopher R., supra,* 225 Cal.App.4th at p. 1216; *Seiser & Kumli on California Juvenile Courts Practice and Procedure* (2020), § 2.84[3].)

"[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them." (*Kopp v. Fair Pol. Practices*

Com. (1995) 11 Cal.4th 607, 675; Code Civ. Proc. § 1858 ["In the construction of a statute…the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted…"].) The law requires the Department to prove that a child is at substantial risk of serious physical harm before a juvenile court takes jurisdiction over that child. It is not for courts to second-guess the Legislature's decision.

Further, if the Legislature had intended to draw a line based on age, it would have done so. The Legislature has drawn a line based on age in other instances. (E.g., § 317, subd. (e)(2); § 366.21, subd. (c), (e)(3).) The Legislature has even included a bright line distinction based on age in section 300 but not in section 300, subdivision (b)(1). (§ 300, subd. (e).) This distinction based on age should not "be implied where excluded." (*Pasadena Police Officers Assn. v. City of Pasadena, supra,* 51 Cal.3d at p. 576.)

C. Appellate courts have improperly treated substance abuse entirely differently from the terms it is listed with in section 300, subdivision (b)(1).

As discussed, *supra,* I.B.i, pp. 30-31, the term "substance abuse" appears in a list following "mental illness" and "developmental disability." (§ 300, subd. (b)(1).) Again, "when a statute contains a list of items, the court interpreting that statute should determine the meaning of each item by reference to the others, and give preference to an interpretation that uniformly treats similar in nature and scope." (*Colgan v. Leatherman Tool*

Group, Inc. (2006) 135 Cal.App.4th 663, 690.) Courts have not followed this basic rule of statutory interpretation and treat substance abuse entirely differently from mental illness and developmental disability.

With "mental illness" or "developmental disability" the same concerns articulated by courts regarding parental substance abuse exist: children of "tender years" are especially vulnerable to harm when not adequately supervised. Nevertheless, courts have uniformly recognized that "harm may not be presumed from the mere fact of mental illness of a parent." (E.g., *In re James R.* (2009) 176 Cal.App.4th 129, 136; *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 542.) "Substance abuse" listed right after "mental illness" and "developmental disability" is treated completely differently by courts. (E.g., *In re Kadence P., supra,* 241 Cal.App.4th at p. 1384.) There is no reason based either on the words of the statute or on any overriding policy for this disparate treatment.

Perhaps the Department will argue that "substance abuse" can and should be treated differently than "mental illness" or "developmental disability" based on some notions of culpability or fault on the part of the parent. The argument would be: a mentally ill parent cannot help their situation so it would be unfair to punish them but a parent chooses to abuse substances. First, this argument would be based on misconceptions and judgments surrounding substance use disorders. (JN-A, p. 10 ["An important characteristic of substance use disorders is an

underlying change in brain circuits that may persist beyond detoxification…behavioral effects…may be exhibited in the repeated relapses and intense drug cravings when the individuals are exposed to drug-related stimuli"].)

This argument also conflicts with relatively recent precedent from this Court. In *In re R.T.* (2017) 3 Cal.5th 622 this Court held that parental culpability or *fault* has no bearing on the question of jurisdiction pursuant to section 300, subdivision (b)(1). (*In re R.T., supra,* at p. 635.) The question is whether the child has been seriously physically harmed or is at substantial risk of serious physical harm. (*Ibid.*) A "good" person may place their child at risk despite their best efforts and a "bad" person's child may not be at risk – the question is not one of morals or worthiness but solely whether "[t]he child has suffered, or there is a substantial risk that the child will suffer serious physical harm or illness." (§ 300, subd. (b)(1); cf. *In re R.T., supra,* at p. 637 [passing no judgment on mother's inability to control her teenaged child].)

For these reasons, this Court also need not be concerned with any notion that this holding would condone substance use in any way. Again, as this Court has made clear, a finding of jurisdiction pursuant to section 300, subdivision (b)(1) is not a punishment for parental fault. (*In re R.T., supra,* 3 Cal.5th at p. 637; see also *In re Nolan W.* (2009) 45 Cal.4th 1217, 1233 ["In the dependency context, the juvenile court intervenes to protect a child, not to punish the parent"].) When a petition is dismissed, that is likewise not a reward for good parenting. The sustaining

of a juvenile dependency petition pursuant to section 300, subdivision (b)(1) is solely a declaration that the child is actually at "substantial risk of serious physical harm or illness." (§ 300, subd. (b)(1).) By statute (in line with constitutional guarantees), the burden of proof to support this finding is on the Department, and the unreasonable burden to prove the absence of risk is not placed on the parent. (§ 355, subd. (a); *Santosky v. Kramer, supra,* 455 U.S. at p. 753.) For these reasons, this Court should hold that harm or risk of harm may not be presumed from parental substance abuse alone. The judicially created doctrine to the contrary has no basis in the law and should be rejected by this Court.

D. This rule of prima facie evidence regarding parental substance abuse contravenes public policy by sanctioning unwarranted state intervention.

Requiring the Department to affirmatively prove risk in all instances (unless specified by the Legislature) including in cases concerning parental substance use or abuse best serves children and families. As stated previously, the current form of section 300 was enacted with two primary purposes: 1) protecting children who are at risk of harm; and 2) protecting children from unnecessary state intervention who are *not* at risk of harm. (E.g., JN-C, p. 46.) All Father proposes here is that pursuant to the controlling statutes the Department be required to prove and articulate how a parent's substance abuse places a particular child at risk of serious physical harm. This will serve the overall purposes of section 300 by ensuring that the court only intervene

where a child is at risk of serious harm and the court not intervene when unnecessary.

This approach is unlikely to leave a child at risk. This is because there is little support for "the assumption that a parent who uses an illegal drug or [even] who is dependent on such drugs is likely to abuse or neglect a child." (Korn, *Detoxing the Child Welfare System* (2016) 23 Virg. Journ. of Soc. Pol. & L. 293, 320.) "[B]est evidence to date suggest that substance abusing parents pose no greater risk to their children than do parents of other children taken into child protective custody." (Mark F. Testa & Brenda Smith, *Prevention and Drug Treatment*, 19 The Future Children 147, 147.) While some correlation may exist, "modern research suggests that concurrent problems such as depression, homelessness, or strained social relationships may be the source of potential neglect, rather than the substance abuse itself. For this reason, some experts question whether substance abuse alone is a legitimate reason for governmental interference." (Harris, *Child Abuse and Cannabis Use: How a Prima Facie Standard Mischaracterizes Parental Cannabis Consumption as Child Neglect* (2020) 41 Card. L.R. 2761, 2768 [and authorities cited therein]. (*Prima Facie*).)[12] Further, resting on any statistical

[12] "As noted by *amici curiae* in support of Defendant-Petitioner in *New Jersey Division of Youth and Family Services v. A.L.*, the source most often cited for the claim that drug use increases the likelihood of abuse is a self-published report from the National Center on Addiction and Substance Abuse at Columbia University (CASA) entitled 'No Safe Haven: Children of Substance-Abusing Parents.' The report itself points out that those who were surveyed received grossly inadequate training in issues concerning drug use and addition. Further, in the

correlation would be a dangerous precedent to set. "Children living in poverty, or in households with four or more children, have an increased risk of neglect, but the government does not impose a presumption of neglect upon poor parents or parents with many children." (*Id.* at p. 2769.)

As child welfare agencies across the state noted when Senate Bill 243 was before the Legislature in 1987, former section 300 "broadly focused on the actions of the parent or guardian rather than on the harm to the child. SB 243 propose[d] clearer standards for dependency which are focused on the harm to the child and the action or inaction of the parent, guardian or caretaker which contributed to the child's condition." (JN-E, pp. 93-102.) It was their "view that state law should be more specific about when an authoritative intervention by government is appropriate to protect children." (JN-E, pp. 93-102.) The rule of prima facie evidence based on parental substance abuse created by appellate courts runs contrary to this purpose by focusing not on potential harm but instead on parental conduct. Here, N.R. was thriving in his parents' care and jurisdiction was based not on any tangible evidence of risk but as a reflexive reaction to conduct by Father. (CT 12.)

"[T]he juvenile court is constantly faced with the necessity of choosing on behalf of a child, the best of several not entirely

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appendix, CASA acknowledges that, 'studies are inconsistent in defining whether substance involvement is the primary or causal reason for a parent's involvement with the child welfare system, or whether substance involvement is an ancillary or co-occurring problem." (*Detox*, p. 320.)

satisfactory alternatives. It is seldom possible to make such a choice on the mechanical basis that the proof of some particular fact 'ipso facto' calls for a predetermined response." (Cf. *In re Jamie M., supra,* 134 Cal.App.3d at p. 541 [discussing whether the parent's mental illness supported removal under a prior removal statute] [citation omitted].) Concerning a parent's mental illness, the Third District Court of Appeal observed forty years ago: "There are innumerable eccentric parents whose behavior on certain occasions may be less than socially acceptable and yet they are loving and compassionate parents. Conversely, there are parents who always exhibit socially acceptable behavior publicly, but whose children have parent-induced psychological and emotional problems their entire lives. The trial court's duty [] is to examine the facts in detail. The social worker must demonstrate with specificity *how* the minor has been or will be harmed by the parents' mental illness." (*Ibid.*) The same reasoning applies here today; a juvenile court must decide based on the family before it. Without legislative approval, appellate courts cannot declare that an entire class of children in the state of California all "ipso facto" can be subjected to juvenile court jurisdiction. Further, such a rule may dissuade parents from seeking help due to fear of automatic court intervention.

As the court in *Rebecca C.* observed a presumption of jurisdiction based on parental substance abuse, "excises out of the dependency statutes the elements of causation and harm…This is not what the law provides. Further [such a rule] would essentially mean that physical harm to a child is *presumed*

from a parent's substance abuse under the dependency statutes, and that it is a parent's burden to prove a negative, i.e., the *absence* of harm. Again, this is not what the dependency law provides." (*In re Rebecca C., supra,* 228 Cal.App.4th at p. 728.) If parental substance abuse (or any other parental action or inaction) places a child at risk as described by section 300, then the Department simply must prove it.

E. Because a finding of parental substance abuse does not serve as "prima facie evidence" for the purposes of jurisdiction over a child under the age of six, the Court of Appeal's affirmance of jurisdiction must be reversed.

For the foregoing reasons, this Court should hold that only where specified by the Legislature may the Department be relieved from its evidentiary burden to affirmatively prove risk. Accordingly, substance abuse alone is not prima facie evidence that a child under the age of six is described by section 300, subdivision (b)(1). The Opinion stated that: "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (Opn., pp. 12-13 [citing *Christopher R., supra,* 225 Cal.App.4th at p. 1219].) The Opinion then reasoned that Father had not "rebutted" this "prima facie evidence." (Opn., p. 13.) Under the controlling statutes, opposed to this judicially created doctrine, the jurisdictional finding here cannot stand.

Even assuming "substance abuse" there is no evidence that N.R. was ever placed at a substantial risk of serious physical harm. Father had no criminal history, had gone to school, obtained a professional barber license and worked consistently; there was no evidence that his cocaine use had negatively impacted any aspect of his life or his ability to care for N.R. (CT 14, 72-73.) Before Department intervention, Father had regularly provided care for N.R. without incident. (E.g., CT 74.) Father took custody of his child in November 2020 while the Department investigated Mother. (CT 66.) While Father tested positive for cocaine on the day he took N.R. into his home, there is no evidence he was ever actually inebriated while caring for N.R. (CT 12, 21.) Father then cared for N.R. without incident for nearly three weeks before N.R. was placed into protective custody due to the positive test alone.

Substantial evidence may consist of inferences but "such inferences must be a product of logic and reason and must rest on the evidence; *inferences that are the result of mere speculation or conjecture cannot support a finding*." (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) A finding of risk here without any prima facie rule would require layers upon layers of unsupported speculation. First, the court would have to speculate that Father would begin to use again despite four months of clean tests. The court would have to speculate further that Father would for the first time ever use while caring for N.R. Then the speculation would have to go one step further and the court would have to assume that Father would physically harm N.R. directly or

indirectly because of this supposed future use. If the Department was required to prove risk as required by the law, it is clear they would not have been able to.

Because the Court of Appeal relied on a doctrine entirely absent from the controlling statutes and out of line with legislative intent and constitutional guarantees, the affirmance of jurisdiction should be reversed. The matter should be remanded to the appellate court with instructions to reverse the jurisdictional findings of the trial court. In the alternative, the matter should be remanded to the appellate court with instructions to only determine whether there is substantial evidence to support the required finding that the child was at "substantial risk of serious physical harm." (§ 300, subd. (b)(1).

Conclusion

For the foregoing reasons, Father requests this Court hold that "substance abuse" for purposes of section 300 is defined by the current edition of the DSM. Because the Court of Appeal utilized a definition of "substance abuse" not in line with legislative intent, the Court of Appeal's order affirming jurisdiction should be reversed. In keeping with the plain language of the statute, a finding of parental substance abuse cannot be relied upon as prima facie evidence that a child of any age is at substantial risk of serious physical harm. Because the Court of Appeal relied on this rule of prima facie evidence in affirming jurisdiction, the finding of substantial evidence to support jurisdiction should be reversed and the matter should be remanded to the Court of Appeal with instructions to reverse

jurisdiction or in the alternative to reconsider. If jurisdiction is reversed then all subsequent orders must be reversed as well.

DATED: December 14, 2022

Respectfully submitted by,

/S/

Sean Burleigh, Attorney for Petitioner

CERTIFICATE OF WORD COUNT

The foregoing petition contains 13,305 words, including footnotes according to the word count in the computer program utilized to create this brief Microsoft Word for Mac 2019 version 16.67.

Executed on December 14, 2022 at Tucson, AZ.

Respectfully submitted by,

/S/

Sean Burleigh, Attorney for Petitioner

PROOF OF SERVICE
IN THE SUPREME COURT OF CALIFORNIA

In re N.R.,
Supreme Court Case No: S274943
Appellate Court Case No.: B312001

I, Sean Burleigh, declare and state:

That I am not a party to the within action; that I am an attorney admitted to practice law in the State of California appointed by this Court to represent Appellant.

That on December 14, 2022, I served the following:

Appellant's Opening Brief On The Merits

Upon the persons or organizations listed below electronically. I utilized service through the true filing electronic system.

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Upon the persons or organizations listed below, by placing this document in the mail addressed to:

O.R. - Appellant, Address on file

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 14, 2022 at Tucson, Arizona.

/S/
Sean
Burleigh

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE N.R.**
Case Number: **S274943**
Lower Court Case Number: **B312001**

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/s/Sean Burleigh

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