No. 22-0419

In the Supreme Court of Texas

IN THE INTEREST OF J.N., L.N., K.N., AND M.N., CHILDREN

On Petition for Review
from the Fifth Court of Appeals, Dallas

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

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Statement of Interest of Amicus Curiae

The State is tasked with safeguarding the best interests of Texas children when their parents are unable to do so. The Legislature has mandated that, under certain circumstances, a trial court must "interview in chambers a child twelve years of age or older . . . to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence." Tex. Fam. Code § 153.009(a). The State has an interest in seeing that mandate fulfilled.

The State also has an interest in ensuring that Texas appellate courts review judgments according to uniform standards. As a frequent litigant in Texas appellate courts, the State is well versed in this Court's procedural doctrines and the operation of the harmless-error rules. Its perspective differs from that of the parties with regard to how a reviewing court should, under those doctrines, approach a statutory violation like the one at issue here.

No fee has been or will be paid for the preparation of this brief.

To the Honorable Supreme Court of Texas:

"[A] litigant is not entitled to a perfect trial." *Gunn v. McCoy*, 554 S.W.3d 645, 668 (Tex. 2018). So a party seeking reversal based on a trial court's error must show more than the fact of the error. She must also show that the error "probably caused the rendition of an improper judgment" or "probably prevented the petitioner from properly presenting the case to the appellate courts." Tex. R. App. P. 61.1; *accord id.* R. 44.1(a). This harmless-error rule is generally applicable, and this Court has long refused to exempt certain types of errors from the harmless-error inquiry. It should not do so here. But it should nevertheless reverse the court of appeal' judgment.

The court of appeals purported to apply the harmless-error rule, but instead held Petitioner to a burden of showing—with clear and compelling reasons—that the trial court's ultimate decision would have been different but for its failure to interview M.N. That is not the proper standard for identifying reversible error under this Court's precedent. The trial court's failure to interview M.N. requires reversal under a proper application of the harmless-error rule.

The trial court refused to interview M.N. due to a legal error unrelated to the substance of its inquiry into what would be in the best interests of the children. Because the trial court's error prevented it from ascertaining and considering M.N.'s desires, its best-interests inquiry was incomplete. And it is virtually impossible to replicate an *in camera* interview through an evidentiary proffer or even by calling the child as a witness. Where there is no way to tell from

the record whether the interview would have affected the court's decision, the "the appellate court cannot determine whether" the error affected the ultimate judgment. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000) (citing Tex. R. App. P. 61.1(b)). That makes it reversible error. Tex. R. App. P. 44.1(a)(2), 61.1(b).

The Court should reverse the court of appeals' judgment and remand the case for further proceedings.

Summary of Argument

I. This Court's harmless-error doctrine reflects decades of thoughtful development. At bottom, it protects the appellate courts' proper role—appellate courts review judgments, so they do not reverse based on errors that do not affect the judgment. The historical development of the harmless-error doctrine illuminates the importance of these principles.

Under today's harmless-error rules, reversal is required not only when the error "probably caused the rendition of an improper judgment," but also when the error "probably prevented the complaining party from presenting the case to the court of appeals." Tex. R. App. P. 61.1; *accord id.* R. 44.1(a). The first type of analysis focuses on harm to the trial court's judgment, while the second focuses on harm to the appellate process.

This Court has long refused to exempt whole categories of error from harmless-error analysis. It should stand by that position. Statutory violations are no different than other trial errors with respect to the role of an appellate court—reviewing the judgment. This Court has refused to create such an

exemption for statutory violations even in a quasi-criminal case, and it should not do so here. Exempting statutory violations from harmless-error analysis would elevate them to the level of structural error in a criminal case. The structural error doctrine narrow, encompassing only a few constitutional rights that are considered essential to the essence of any fair criminal trial; all other constitutional errors are assessed for harmless error. The Court should not treat a statutory violation like this one as structural error or its equivalent.

II. But the court of appeals judgment should be reversed. The State agrees with Petitioner that the trial court erred. Texas Family Code section 153.009(a)'s requirements were met, and Petitioner's verbal application sufficed to invoke the statute, so an *in camera* interview of M.N. was mandatory.

In this case, the trial court's error is the second type of reversible error: it "probably prevented the complaining party from presenting the case to the appellate courts." Tex. R. App. P. 61.1(b). Like a refusal to allow discovery, failing to conduct a mandatory *in camera* interview can mean that crucial evidence is absent from the record. That is the case here. No other evidence reflected M.N.'s preference regarding which parent should have the right to designate her primary residence, but that was an important component of the best-interests inquiry.

The court of appeals correctly found error, but it misapplied the harmless-error doctrine. Its analysis placed too heavy a burden on Petitioner. This Court should reverse and remand for further proceedings.

ARGUMENT

I. Texas's Two-Prong Harmless-Error Doctrine Serves, and Should Continue to Serve, an Important Function in All Civil Appeals.

The harmless-error doctrine is central to the function of appellate courts, as its history reflects. The current version of the doctrine is reflected in Texas Rules of Appellate Procedure 44.1(a) and 61.1. These rules recognize two types of reversible error: the type that affected the judgment and the type that prevented the reviewing court from determining whether it affected the judgment. The harmless-error doctrines applies to all appeals, and this Court has long refused to create *per se* exemptions from harmless-error analysis. It should not do so here.

A. The harmless-error doctrine, which replaced the presumed-prejudice doctrine, respects the role of an appellate court: reviewing lower courts' judgments.

An appellate court reviews a lower court's *judgment*, so it will not reverse unless an error affected the judgment. *See* Tex. R. App. P. 25.1(c), 43.2, 53.1, 60.2. As already noted, for purposes of appellate review "a litigant is not entitled to a perfect trial." *Gunn*, 554 S.W.3d at 668 (quoting *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 819 (Tex. 1980)); *see also Lutwak v. United States*, 344 U.S. 604, 619 (1953) ("A defendant is entitled to a fair trial but not a perfect one."). For example, erroneously submitting an issue to the jury is not reversible if the issue was immaterial to the judgment. *See Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995) (holding that an erroneous jury submission was not reversible because the jury's answers to other

questions required judgment for the appellee anyway). Even "a trial court's erroneous shackling of a defendant at trial" does not require reversal "if the judgment was unaffected." *In re K.R.*, 63 S.W.3d 796, 799–800 (Tex. 2001) (in a suit to terminate parental rights, the father, who was serving a prison sentence, was handcuffed during trial).

Standards for identifying when an error requires reversal have shifted over time. In the nineteenth century, Texas courts borrowed the doctrine of "presumed prejudice" from English law. *See* Louis S. Muldrow & William D. Underwood, *Application of the Harmless Error Standard to Errors in the Charge*, 48 Baylor L. Rev. 815, 820–21 (1996). Under that doctrine, reversal was mandatory any time an error "*may have* influenced the jury in finding a verdict." *Id.* at 821 (emphasis added) (quoting *Bailey v. Mills*, 27 Tex. 434 (1864)). The presumed-prejudice doctrine, which placed the burden on the appellee to show that an error was harmless, was strongly criticized as requiring reversal for "seemingly insubstantial errors." *Id.* at 823; *see also* Robert W. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 Tex. L. Rev. 1, 2–3 (1952).

This Court adopted the harmless-error standard by rule in the early twentieth century. *See* Muldrow & Underwood, *supra*, at 824-30. Although there was inconsistency in the early interpretation of the rule, *see id.*; Calvert, *supra*, at 5-8, the Court ultimately held that, in civil cases, the harmless-error doctrine had replaced the presumed-prejudice doctrine, *see Walker v. Tex. Emp. Ins. Ass'n*, 291 S.W.2d 298, 301 (Tex. 1956). The Legislature has since exempted

certain trial errors, such as holding a trial on the merits in an improper venue, from the harmless-error rule. *See* Tex. Civ. Prac. & Rem. Code § 15.064(b). But such exemptions are rare, and none applies here.

B. The current version of the harmless-error doctrine includes two ways to show reversible error.

The harmless-error rule currently appears in Texas Rules of Appellate Procedure 44.1 and 61.1, which apply in the courts of appeals and in this Court, respectively. The two rules are substantively identical, so this brief will cite Rule 61.1 from this point forward. Rule 61.1 provides:

> No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of:
>
> (a) probably caused the rendition of an improper judgment; or
>
> (b) probably prevented the petitioner from properly presenting the case to the appellate courts.

Tex. R. App. P. 61.1. These two prongs are briefly explored below.

1. The first means of obtaining reversal is to show that a different judgment would "probably" have been rendered in the absence of the trial court's error. Tex. R. App. P. 61.1(a). "Probably" means more likely than not. *Gunn*, 554 S.W.3d at 671 ("defining 'probably' as 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely'" (quoting *Aultman v. Dall. R. & T. Co.*, 260 S.W.2d 596, 600 (Tex. 1953))). It "is a higher standard than 'might' or 'could have.'" *Id.* (quoting *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 144–45 (Tex.

2016)). But it "does not mean 'definitively'"; "the complaining party [need not] prove that 'but for' the [error] a different judgment would *necessarily* have resulted." *Id.* (quoting *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009)) (emphasis added).

The Court has "recognized the impossibility of establishing a specific test for determining harmful error, and thus ha[s] entrusted the matter to the sound discretion of the reviewing court." *Caffe Ribs*, 487 S.W.3d at 145; *see also, e.g.*, *Gunn*, 554 S.W.3d at 668-69; *Cent. Expressway Sign Assocs.*, 302 S.W.3d at 870. But the Court has supplied guiding principles for assessing common types of error. For example, the "erroneous *admission* of testimony that is merely cumulative of properly admitted testimony is harmless error." *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989) (emphasis added). And erroneous *exclusion* of evidence is "likely harmless if the evidence was cumulative, or the rest of the evidence was so one-sided that the error likely made no difference in the judgment." *Cent. Expressway*, 302 S.W.3d at 870. Either way, appellate courts assess such errors in the context of the record as a whole; "the role excluded evidence plays in the context of [the] trial is important." *Gunn*, 554 S.W.3d at 668.

2. The second type of reversible error is one that prevents the appellate court from determining whether the error resulted in an improper judgment. Tex. R. App. P. 61.1(b). The fundamental consideration is still whether the error caused harm, but the focuses is on the appellate process. For example, a trial court's failure to file findings of fact and conclusions of law may or may

not prevent the complaining party "from properly presenting its case to the court of appeals or this Court." *Graham Cent. Station, Inc. v. Peña*, 442 S.W.3d 261, 263 (Tex. 2014) (per curiam) (citing *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996) (per curiam)). If it does not, there is no call to reverse, *see id.*, but if it does, it is reversible, *cf. Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989).

This type of error arose in *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), in which the Court held that "when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." *Id.* at 388 (citing Tex. R. App. P. 61.1(b)); *see also Harris County v. Smith*, 96 S.W.3d 230, 233 (Tex. 2002) (similar, for damages).

An erroneous discovery order that prevents the complaining party from obtaining evidence—and thus prevents her from including that evidence in the appellate record—can also be reversible error of this type. *See Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009).

C. This Court has refused to categorically exempt certain errors from harmless-error analysis, and it should not change course now.

1. This Court has explained that the harmless-error rule "applies to all errors." *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam). As the Court put it in *Dennis v. Hulse*, 362 S.W.2d 308 (Tex. 1962), "an appellate court is not authorized to reverse merely because the record

discloses some error that is reasonably calculated to cause a miscarriage of justice." *Id.* at 309. Rather, "[t]he party appealing must also show that [the error] probably *did* cause the rendition of an improper judgment *in the case*." *Id.* (emphases added). The Legislature by statute has exempted certain trial errors from the harmless-error rule, as it did where a case is tried in an improper venue. *See* Tex. Civ. Prac. & Rem. Code § 15.064(b). There is no such legislative exemption applicable to this case.

Petitioner is not the first litigant to propose that reviewing courts exempt statutory violations from the harmless-error doctrine. In 1999, a petitioner in a juvenile-delinquency appeal asked the Court to hold that failure to give certain statutorily mandatory warnings was reversible error *per se*. *In re D.I.B.*, 899 S.W.2d 753, 758–59 (Tex. 1999). The Court refused. It held that "[w]here an error is shown to be harmless, it is not a ground for reversal, regardless of the category or label attached to that particular error." *Id.*; *see also Gunn*, 554 S.W.3d at 668 (rejecting a proposed rule that would make the harmless-error rule "meaningless for entire categories of error"). But even while refusing to exempt "entire categories of error" from harmless-error analysis, the Court observed that "the harm flowing from a trial court's error . . . may be apparent from the nature of the error and the particular facts." *D.I.B.*, 988 S.W.2d at 759. Where that is so, the complaining party will have little difficulty showing that the error is reversible.

2. The court of appeals dissent would have set aside *D.I.B.* because, as a quasi-criminal juvenile case, it relied on precedent from the realm of criminal

law. To be sure, "[c]riminal cases are different from civil cases." 3B Charles Alan Wright & Arthur R. Miller, 3B Fed. Prac. & Proc. Crim. § 853 (4th ed.). But that difference cuts the other way here. The criminal standard makes it easier to reverse, not harder. *See id.*; *K.R.*, 63 S.W.3d at 800 (discussing the difference between criminal and civil standards). While criminal judgments are also reviewed for harmless error, a criminal defendant's showing of a constitutional error requires reversal *unless* the error is proved harmless. *See* Tex. R. App. P. 44.2(a). So it falls to the government, as appellee, to show that the error was harmless, and it must do so "beyond a reasonable doubt." *Id.* In civil cases, by contrast, it is the appellant who must establish reversible error. To conclude that aa statutory violation is *per se* reversible in a civil case gives the civil litigant greater procedural protection than the criminal defendant. That is backwards.

Moreover, the error in this case is failure to honor a statutory mandate, not a constitutional mandate. Treating all statutory violations as *per se* reversible would elevate them to the level of structural error, a category of constitutional trial error that requires reversal for violation of "certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). Chief among these structural errors are "complete deprivation of counsel or trial before a biased judge." *Neder v. United States*, 527 U.S. 1 (1999); *see Gideon v. Wainwright*, 372 U.S. 335 (1963); *Tumey v. Ohio*, 273 U.S. 510 (1927). Neither this Court nor the U.S. Supreme Court has extended the structural-error doctrine to civil cases. *See In re S.A.G.*, 403 S.W.3d 907, 917 & n.6 (Tex. App.—Texarkana 2013, pet. denied). But

even if the Court were inclined to do so, this case, which involves a statutory violation that does not implicate the constitutional rights already subject to the structural-error doctrine, would be a poor vehicle for the extension.

Petitioner cites *Exxon Corp. v. Brecheen*, 526 S.W.2d 519 (Tex. 1975), for the proposition that "legislative mandates are not susceptible to a harm analysis." Pet. BOM 12-13. To be sure, that case did refuse to consider whether a statutory violation was harmful. *Exxon*, 526 S.W.2d at 525. But *Exxon* is an outlier in this Court's precedent, not evidence of a broader rule. The Court has not extended it to other statutory violations, and the State is aware of no other decision finding that violation of a statutory mandate, standing alone, is reversible error. Subsequent precedent rejects that proposition. The Court should not extend it here.

Petitioner also cites *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989). There, this Court stated it presumed harm from a trial court's failure to fulfill its statutory duty to file findings of fact and conclusions of law. *Id.* at 772. But, as discussed above (at 7–8), the Court has subsequently addressed this type of error using type-two analysis. *See Graham Cent. Station*, 442 S.W.3d at 263. That is not an exemption from the harmless-error rule. *See supra* Part I.B.2. So *Cherne Industries* likewise does not support exempting failure to conduct a mandatory *in camera* interview from harmless-error analysis. Tex. Family Code § 153.009(a) (setting out circumstances where a trial court "shall" interview a child who is twelve years of age or older).

Finally, the court of appeals dissent reasoned, and Petitioner argues, would violate the canon against surplusage. Petitioner contends (at 19) that applying the harmless-error rule to a violation of section 153.009(a)'s mandate would make section 153.009(c), which provides that "[i]nterviewing a child does not diminish the discretion of the court in determining the best interests of the child," surplusage. *See In re J.N.*, No. 05-20-00695-CV, 2022 WL 1211200, at *6 (Tex. App.—Dallas Apr. 25, 2022, pet. granted) (Carlyle, J., concurring in part and dissenting in part). It would not. The canon against surplusage counsels against a reading that gives a provision "an effect already achieved by another provision, or that deprives another provision of *all* independent effect." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) (emphasis added). The canon is not implicated just because the provision does not apply to the particular case before the court. *See Surplusage*, Black's Law Dictionary (11th ed. 2019) (surplusage is language that is "redundant" or "does not add meaning"); *cf. Skilling v. United States*, 561 U.S. 358, 413 n.45 (2010) ("Overlap with other federal statutes does not render [a provision] superfluous."). So long as it applies in *some* cases, it is not surplusage. And here, subsection (c) has meaning in any case where the trial court *does* conduct an *in camera* interview: it ensures that the trial court determining best interests is not bound to a child's preferences.

3. Treating this type of error as reversible *per se* could have troubling practical consequences. The Twelfth Court of Appeals recently confronted a case in which a twelve-year-old child exhibited severe anxiety and physical distress

at the prospect of being interviewed by the trial court. *In re C.R.D.*, No. 12-20-00143-CV, 2021 WL 3779224, at *3 (Tex. App.—Tyler Aug. 25, 2021, no pet.). The child's attorney *ad litem* explained to the court that the boy "was feeling sick, his stomach hurt, he was very concerned, and he did not want to be 'stuck in the middle of all of this,'" and that the *ad litem* had previously observed the child "develop physical manifestations of stress including stomachache and vomiting." *Id.* The trial court concluded that "when a child exhibits physical manifestations of stress related to coming to the courthouse to talk to the judge, he is being traumatized." *Id.* So the trial court declined to require the child to come to the court's chambers for an interview. *Id.*

A *per se* rule would require reversal under those circumstances. But the harmless-error doctrine, properly understood, leaves room for such a case. Interviewing a child who experiences physical symptoms at the very thought of appearing for an interview will not provide the trial court with a meaningful insight into his preferences or desires. So the reviewing court can infer from the record that an *in camera* interview of this child would not have affected the trial court's best-interest inquiry, and thus the judgment.

II. Under a Proper Application of the Harmless-Error Doctrine, the Trial Court's Error is Reversible.

The State agrees with Petitioner that the trial court erred. And because the trial court's error means the substance and significance of M.N.'s *in camera* interview is unknown, the error prevents the appellate courts from assessing whether the error likely affected the judgment—the best-interests

determination. In finding the error harmless, the court of appeals misapplied the harmless-error doctrine. Its judgment should be reversed.

A. The trial court erred.

In determining whether M.N. and her siblings should live primarily with their father or with their mother, the trial court was required to decide which would be in the best interests of the children. In this type of case, the first of many relevant considerations is "the desires of the child." *Holley v. Adams*, 544 S.W.2d 367, 372 (Tex. 1976). As already noted, the Legislature has provided a mechanism for identifying those desires in Texas Family Code section 153.009, which allows the trial court to interview a child *in camera* under many circumstances. Tex. Fam. Code § 153.009(a), (b). And under certain circumstances, the trial court "shall" interview a child who is at least twelve years old "to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence." *Id.* § 153.009(a). The State agrees with Petitioner and the court of appeals that such an interview was mandatory here. The trial court's failure to interview M.N. *in camera* was error.

B. Failing to conduct the *in camera* interview "probably prevented the complaining party from presenting the case to the appellate courts."

1. Deciding which parent will have primary custody of a child is, as one court has put it, "one of the most demanding undertakings of a trial judge." *Dempsey v. Dempsey*, 292 N.W.2d 549, 554 (Mich. Ct. App. 1980), *j. modified*,

296 N.W.2d 813 (Mich. 1980). "A child custody determination is much more difficult and subtle than an arithmetical computation of factors." *Id.* The trial judge "must not only listen to what is said to him and observe all that happens before him, but [also must] discern and feel the climate and chemistry of the relationships between children and parents." *Id.*

The court's inquiry begins with "the desires of the child." *Holley*, 544 S.W.2d at 372. This factor can be, and often is, shown by testimony from others or from circumstantial evidence. *E.g.*, *In re C.B.*, No. 13-11-00472-CV, 2012 WL 3139866, at *7 (Tex. App.—Corpus Christi–Edinburg Aug. 2, 2012, no pet.). But courts have long recognized that where the child is old enough to communicate her preferences directly, she should be allowed to do so. *See, e.g.*, *Cline v. May*, 287 S.W.2d 226, 228 (Tex. App.—Amarillo 1956, no writ) (observing that "unless children be permitted to tell their side of the controversy between their parents . . . the real issue involved (the interests of the children) might be overlooked and defeated"). An *in camera* interview mandated by section 153.009(a) is designed to allow the child to communicate with the trial court while "protect[ing] the child from the trauma of choosing between her two parents in open court." *Impullitti v. Impullitti*, 415 N.W.2d 261, 263 (Mich. App. 1987) (per curiam); *see, e.g.*, *Otto v. Otto*, 438 S.W.2d 587, 588–89 (Tex. Civ. App.—San Antonio 1969, no writ) (concluding that the trial court did not err in privately interviewing children, who "stated that they did not wish to participate in the lawsuit for either side").

A trial court's failure to conduct an interview mandated by section 153.009(a) will usually be type-two reversible error. Tex. R. App. P. 61.1(b). It is the kind of error that probably prevents the complaining party from showing whether or not the judgment would have been different. As with a denial of discovery, this kind of error means that the complaining party cannot show what the child would have communicated *in camera*. *See Ford Motor Co.*, 279 S.W.3d at 667. Because the interview "[wa]s denied and because of the denial the evidence sought does not appear in the record, determining harm from the denial is impossible and the party is prevented from properly presenting its case on appeal." *Id.*

The substance of an *in camera* interview cannot readily be duplicated through another evidentiary medium. "Due to the unique dynamics of custody litigation and the child's particular vulnerability in this context, the child's ability to objectively contribute to the fact-finding process [through testimony] is questionable." Debra H. Lehrmann, *The Child's Voice*, 65 Tex. B.J. 882, 886 (2002) (citing Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (American Psychological Association, 1995)). "The probative value of the testimony is impacted by the dynamics of the child in relation to his or her parents," and "[p]arental influence upon children who testify in their parents' presence is significant." *Id.* at 887.

2. There is type-two reversible error in the case. The trial court's refusal to interview M.N. *in camera* "probably prevented [Petitioner] from presenting the case the appellate courts." Tex. R. App. P. 61.1(b). The trial court did not

indicate that M.N.'s presumed desire to live with her mother could not possibly change the court's best-interests determination. *Contra In re C.B.*, 2012 WL 3139866, at *6. Instead, the trial court refused to interview M.N. based on an unrelated legal error: its incorrect view that Petitioner had not timely made an "application." 3.RR.15; 1.SCR.445–48; *see J.N.*, 2022 WL 1211200, at *5. A reviewing court cannot infer from that anything about the trial court's best-interests decision.

And the trial court's best-interests inquiry was incomplete. M.N.'s preference should have been part of the court's best-interests determination, but there is no evidence in the record directly reflecting her preference. And the evidence for granting primary custody to Respondent was hardly overwhelming; the parents hotly contested matters that, if true, could be significant in the best-interests determination. *See J.N.*, 2022 WL 1211200, at *2–3, 6; *e.g.* 3.RR.60–63, 74, 81–85, 89, 106–07, 110. But because M.N.'s preference is absent from the record, the reviewing courts cannot determine how it would have weighed against the evidence on other factors.

3. Respondent contends the error is harmless for two reasons. Neither is persuasive.

First, Respondent argues that the trial court's refusal to interview M.N. is harmless because "interviewing a child does not diminish the discretion of the court in determining the best interests of the child." Tex. Fam. Code § 153.009(c). But even where a court as factfinder has discretion in making a determination, the Legislature may require the court to take certain facts or

considerations into account when exercising that discretion. Indeed, chapter 153 of the Family Code is full of directives to guide the best-interests determination. *See, e.g.*, Tex. Fam. Code § 153.003, .004(a), .131, .191. In this case, one such requirement was an *in camera* interview "to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence." *Id.* § 153.009(a). The trial court was not free to ignore that mandate. *Cf. In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292, 295 (Tex. 2022) ("Such commands are part of the law; whether they prescribe a consequence, . . . they are not mere suggestions to be disregarded."). There may be cases where the reviewing court is able to determine from the record that the trial court's discretionary best-interests determination would not have been altered by the interview, *e.g.*, *C.B.*, 2012 WL 3139866, at *6, but that is not so here.

Second, Respondent contends (at 13–18) that the error is harmless because there are other ways a court can determine a child's wishes. It seems doubtful that a third-party witness could adequately substitute for a court or replace an *in camera* interview. *See supra* at 15–16. But the Court need not entirely foreclose that possibility because it did not happen here. To be sure, the children were interviewed by third parties, including a court-appointed counselor. *See* 2022 WL 1211200, at *6. But the counselor did not testify to M.N.'s "wishes as to conservatorship or as to the person who shall have the exclusive right to determine [her] primary residence." Unless M.N.'s wishes were communicated to the trial court, it is immaterial that M.N. was interviewed by a

counselor. Perhaps such a showing could be made in another case, but it was not made here. *E.g.*, *In re C.B.*, 2012 WL 3139866, at *7 (noting that "several witnesses gave testimony regarding the children's preferences").

C. The court of appeals misapplied the harmless-error doctrine.

The court of appeals recognized that the trial court erred, but it subjected that error to the slightest of scrutiny. It pointed to evidence that could have supported the trial court's decision to grant custody of the children to their father, *J.N.*, 2022 WL 1211200, at *6, cited the statutory preference for "all children to be together during periods of possession," *id.* (citing Tex. Fam. Code § 153.251(c)), and then concluded that "even if M.N. expressed a desire to live with Mother, we cannot say that alone would present a clear and compelling reason to separate her from her siblings." *Id.* That analysis misapplies this Court's precedent in two respects.

First, this Court has long emphasized that an appellant does not have to "prove that 'but for' the exclusion of evidence, a different judgment would necessarily have resulted." *Gunn*, 554 S.W.3d at 671 (quoting *Cent. Expressway Sign Assocs.*, 302 S.W.3d at 870). As if it were conducting legal-sufficiency review, the court of appeals started with the trial court's judgment appointing Respondent as the person with the right to designate the children's primary residence and then looked to whether that judgment was supported by some evidence. 2022 WL 1211200, at *5. That confuses "probably" with "necessarily." *See supra* at 6–7.

Second, the court of appeals improperly placed a heightened burden on Petitioner. It refused to reverse unless Petitioner could meet the substantive standard for separating children from their siblings, which requires a "clear and compelling" reason. 2022 WL 1211200, at *6 (quoting *Coleman v. Coleman*, 109 S.W.3d 108, 112 (Tex. App.—Austin 2003, no pet.) ("There is a long line of jurisprudence in Texas supporting a preference that two or more children of a marriage should not be divided absent clear and compelling reasons.")). But had M.N. expressed a strong desire to live with her mother, that would weigh in favor of granting Petitioner custody of *all* the children. The court of appeals did not even consider that possibility. And by assuming that nothing could have changed the trial court's mind about custody of the younger children and then requiring Mother to show "clear and compelling reasons" her eldest daughter should be separated from them, the court of appeals demanded more than Petitioner was required to show.

Prayer

The Court should reverse the court of appeals' judgment and remand the case for further proceedings.

Respectfully submitted.

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Certificate of Service

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