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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In Re the Termination of D.R. and A.R.

AMICUS CURIAE BRIEF
OF THE MOCKINGBIRD SOCIETY

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I. INTRODUCTION

The children of Washington's foster care system deserve the right to be represented by legal counsel in termination of parental rights (TPR) proceedings. Without an attorney to advocate for their express interests and to protect their legal rights, foster youth often feel alienated and powerless in decisions that affect every aspect of their lives, including their family integrity and their physical and psychological well-being. When youth are not allowed to voice their interests, Mockingbird has observed that they often react by disengaging from TPR proceedings and, in many cases, much earlier in the dependency process. This withdrawal can lead to devastating consequences not only for the youth involved but for society as a whole.

A majority of states have already recognized the importance of youth involvement in TPR proceedings by either legislatively creating¹ or judicially recognizing² a foster child's right to legal representation.

¹ According to First Star, a nonprofit organization that tracks legislation affecting at-risk youth, 35 states have passed legislation mandating legal representation of youth. See Amy Harfeld, Christina Riehl & Elisa Weichel, *A Child's Right to Counsel: First Star & Children's Advocacy Institute, National Report Card on Legal Representation for Abused and Neglected Children* (2d ed. 2009), available at <http://www.journalismcenter.org/resource/health-and-safety/%E2%80%9C-childs-right-counsel-national-report-card-legal-representation-abused-a> (last visited Dec. 12, 2010).

² *Kenny A. ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359-60 (N.D. Ga. 2005) ("It is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake. . . . The Court finds that children have fundamental liberty interests at stake in deprivation and [TPR] proceedings. These include a child's interest in his or her own safety, health, and well-

Washington, however, remains among a handful of states that leave the appointment of counsel to the inconsistently applied discretion of trial court judges.

The issue of legal representation has been a focal point for Mockingbird and the present and former foster youth of Washington for many years. For the following reasons, this Court should rule in favor of ensuring foster children's right to legal representation through a complex, technical legal process in which the most fundamental decisions will be made that will forever impact the children's quality of life.

II. IDENTITY AND INTEREST OF AMICUS

The identity and interest of Mockingbird are set forth in Mockingbird's Motion to File Amicus Curiae Brief, filed herewith.

III. STATEMENT OF THE CASE

Amicus Mockingbird adopts Petitioners' statement of the case.

IV. ARGUMENT

Foster children not only need legal representation in TPR proceedings, but they are constitutionally entitled to it. Under the due process balancing test set forth in *Mathews v. Eldridge*, a foster child's interests in TPR proceedings and the risk of erroneous deprivation of these interests far outweigh any countervailing interests identified by the State, being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents."

including any fiscal or administrative burden that may result from the provision of such counsel.³

Because of its daily interaction with foster youth and its continual efforts to improve the foster care system, Mockingbird is uniquely able to inform this Court of the impacts of providing counsel to foster youth. Understanding the gravity of a foster child's interests in TPR proceedings, Mockingbird submits this brief to expand on the importance of guaranteeing the right to counsel and the undeniable consequences that will result, both for foster youth and Washington, if the right continues to be withheld.

A. Depriving Foster Youth of Legal Representation in TPR Proceedings Is Detrimental to the Youth.

1. Depriving foster youth of meaningful involvement in TPR proceedings exacerbates the feelings of abuse, neglect, and powerlessness.

To understand why legal representation is so important to foster youth, it is necessary to highlight what these youth have already suffered. Most children in foster care have experienced some form of abuse,

³ In determining the dictates of due process, *Mathews* balanced the private interests affected by official action, the risk of erroneous deprivation of such interests, the probable value of additional or substitute safeguards, and the government's interests, including any fiscal or administrative burdens that the additional procedural requirement would entail. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

neglect, or abandonment at the hands of a parent or caregiver.⁴ Once removed from their abusive or neglectful homes, these children may then be exposed to further maltreatment or lack of adequate services once placed in Washington's foster care system.⁵ Through no fault of their own, foster youth have been made to feel powerless and invisible. By denying foster youth the ability to voice their interests and to actively participate in TPR proceedings, Washington continues to silence these vulnerable youth and perpetuate the feelings of abuse, neglect, and powerlessness.⁶ Recognition that foster youth have a constitutional right to counsel will empower these youth by providing them a way to voice their fears and concerns and by placing them on equal footing with the

⁴ See Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* 9 (2004) ("on any given day in the United States, half a million children and youth are in foster care, removed from their homes because of abuse or neglect"), available at pewfostercare.org/research/docs/FinalReport.pdf (last visited Dec. 20, 2010).

⁵ Carolyn Kubitschek, *Holding Foster Care Agencies Responsible for Abuse and Neglect*, 2005 A.B.A. Sec. Individual Rights & Resp. 32 (last visited Dec. 20, 2010) ("throughout our country, foster children are placed in homes and institutions where they suffer horrendous abuse and neglect, and sometimes even death, at the hands of their purported protectors"), available at <http://www.abanet.org/irr/hr/winter05/fostercare.html> (last visited Dec. 20, 2010).

⁶ Jonathan Lahn, *Writing as Remedy: The Possibilities of Court-Generated Narrative in "Personal Status Litigation"*, 34 Vt. L. Rev. 121, 145 (2009) (children involved in child protective proceedings value the ability to take part in proceedings, while a lack of meaningful participation exacerbates their feelings of powerlessness and victimization). See also Miriam Aroni Krinsky, *Overwhelmed System Must Not Silence Voices of Foster Youth*, Daily Journal of L.A. & S.F. (Mar. 15, 2005) (when society excludes children from their own court cases, we send them the message "that we don't value them, that they are not a meaningful part of the process"), available at pewfostercare.org/press/files/DailyJournal031505.pdf (last visited Dec. 20, 2010).

other litigants in TPR proceedings.⁷

2. Attorneys serve as critical voices for those who are greatly affected by TPR proceedings.

The ability of foster youth to voice their fears and concerns is critical in TPR proceedings because it is the youth who most directly experience the consequences of the decision; it is the youth whose most fundamental and physical liberty interests are at stake.⁸

If the parent-child relationship is terminated, it is the child who is exposed to the foster care system. It is the child who often bounces from one foster home to another. It is the child who is forced to live in sometimes overcrowded and unsanitary conditions.⁹ It is the child who may suffer from abuse and neglect at the hands of substitute guardians.¹⁰ It is the child who is punished or detained for contempt for contacting the estranged biological parents.¹¹ It is the child who is removed from

⁷ "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." See *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed 158 (1932).

⁸ As Petitioners have argued, a foster child's fundamental interests in family integrity as well as physical liberty interests are at stake in TPR proceedings. See Petitioner's Joint Reply Brief at 6-10.

⁹ Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 677 (2006) (a child in state custody "may live in overcrowded, unsanitary conditions").

¹⁰ *Id.* (a child in state custody "may suffer neglect or even abuse at the hands of her substitute caretakers").

¹¹ Mockingbird has observed one particular 15-year-old foster youth who was detained due to a chronic pattern of running away. Each time this young girl ran away, it resulted in a failed foster home placement, change in schools, loss of friends, and loss of any semblance of a normal life. After working with this child, Mockingbird learned that the young girl, who had been taken away from her mentally ill mother, was not "running

everything that was once familiar and certain. It is the child—not the State, not the parents,¹² not the judge, and not the guardian ad litem (GAL) or court-appointed special advocate (CASA)—who must cope with living in a new and often daunting world.

Both the State and the parents are afforded the absolute right to counsel in TPR proceedings. But the child, whose most fundamental and physical liberty interests are at stake and whose interests are, at a minimum, equivalent to those of the parents,¹³ is not afforded the same protection. Children deserve the right to counsel at least as much as any other participant in the TPR process.

3. Attorneys substantially decrease the risk of erroneous decisions in TPR proceedings.

In addition to serving as a critical voice and advocate for foster

away” but was rather “running back” to care for her biological mother. She believed that her court-appointed special advocate (CASA) and social worker did not approve of the visitations and therefore she needed to do it “this way.”

¹² All of the tribulations of the foster care system “can be painful to the parent as well, but only derivatively or empathetically so; they are, in contrast, actually *lived* by the child.” See Pitchal, *supra* note 9, at 677 (emphasis added).

¹³ See *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (“a child’s right to family integrity is concomitant to that of a parent”); *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987), *overruled on other grounds* by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (distinction between the parent-child and child-parent relationships does not justify constitutional protection for one but not the other); *Kenny A.*, 356 F. Supp. 2d at 1360 (children have fundamental liberty interests at stake in TPR proceedings, including an interest in maintaining the integrity of the family unit); *Ruddock v. Ohls*, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87, 91 (1979) (“the establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights”); *Amanda C. ex rel Richmond v. Case*, 275 Neb. 757, 749 N.W.2d 429, 437-38 (2008) (both parents and their children have cognizable substantive due process rights to family integrity).

youth, the presence of an attorney substantially decreases the risk of an erroneous decision, something that current procedural safeguards—GALs, CASAs, the State, and the parents' attorneys—often fail to achieve. Lay GALs and volunteer CASAs typically lack the training to zealously advocate for the child's legal position,¹⁴ nor is it their role to do so. And the interests of the State and the parents not only conflict with one another, but often greatly differ from those of the child.¹⁵ Children, therefore, need a trained legal advocate to advance their express interests and to protect their legal rights. If such an advocate is not guaranteed, courts are likely to be deprived of relevant and critical information, which may result in an erroneous decision.

Deprivation of information serves neither the State's interest of finding a safe environment for the child nor the child's interest of preserving family integrity or protecting physical liberty. When courts are deprived of pertinent facts, judges are likely to be "ill informed or even

¹⁴ The State even admits to this in the current case: "the GAL did not profess that she had the ability to advocate for [D.R.'s] legal position" and thus the "result was that the child's legal position was not advocated." Mot. to Reverse and Remand 1-3. And as to A.R., the State admitted that, despite the presence of a GAL, A.R. "was not able to adequately present a legal argument to the court opposing termination because he did not have counsel." *Id.*

¹⁵ The State has financial, institutional, and pragmatic needs that may conflict with those of the child. *See Kenny A.*, 356 F. Supp. 2d at 1359 n.6 (N.D. Ga. 2005). And the parents' interests usually diverge from those of their children when a dependency order is entered. *Id.* at 1358.

tragically mistaken."¹⁶ If mistaken, the judge's decision can have traumatic, irreversible, and life-long impacts on the child.¹⁷ As one federal court recognized, "an erroneous decision that . . . parental rights should not be terminated can have a devastating effect on a child, leading to chronic abuse or even death" but in the alternative "an erroneous decision that . . . parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships."¹⁸ It is therefore necessary that courts are presented with all relevant information in order to avoid making erroneous decisions.

The current statutory safeguards do not adequately protect the interests of foster youth or those identified by the State. The process currently provided for in TPR proceedings may actually prevent a court from making a fully informed decision because it often deprives the court of relevant information—the child's express interests, perspective, and experience, as well as advocacy to protect the rights that are unique to a child in the State's care. This Court should therefore find that foster youth are entitled to counsel, a safeguard that is likely to provide the court with

¹⁶ Child Protection Issues: Hearings Before the Subcomm. on Human Resources of the House Comm. On Ways and Means, 106th Cong. (2000) (statement of Mark Hardin, Director, Child Welfare, Center on Children and the Law, A.B.A.).

¹⁷ LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam. Ct. Rev. 605, 609 (Oct. 2009) ("Any erroneous decision could have a traumatic, irreversible, and life-long effect on the child.").

¹⁸ *Kenny A.*, 356 F. Supp. 2d at 1360.

information that may not otherwise be presented.

B. The Appointment of Counsel to Foster Youth in TPR Proceedings Benefits All Washingtonians.

1. Legal representation reduces the risk of foster youth becoming financial burdens on society.

In weighing the interests of foster youth and the State, this Court should understand the true financial costs associated with child maltreatment. Foster youth who suffer abuse or neglect are at a substantially higher risk of becoming homeless, unemployed, hospitalized, and incarcerated.¹⁹ To cope with these misfortunes, the citizens of Washington pay taxes to finance homeless shelters and prisons, and to provide medical, welfare, and unemployment benefits. These programs are costly and add economic strain to an already budget-tight community. But by providing foster youth with the necessary support and services to succeed, Washington can decrease the likelihood that these youth will become unproductive and financially dependent members of society.

¹⁹ See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Direction*, in *Adoption Law Institute* 220 PLI/Crim 273, 284-85 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 220, 2009) (stating that "[c]hildren removed from their parents for maltreatment reasons, and placed in foster care for significant periods of time, generally do not fare well in later life. They end up in appallingly high numbers in homeless shelters, unemployed, on drugs, and in prisons, and they often end up continuing the cycle of child maltreatment onto the next generation"). See also Deseree Gardner, *Youth Aging Out of Foster Care: Identifying Strategies and Best Practices*, 2007-2008 Presidential Initiative, National Association of Counties 3 (Feb. 2008) (commenting that "the research that exists on outcomes for foster care alumni shows that these youth are at a higher risk for homelessness, unemployment, illness, incarceration, welfare dependency, and sexual and physical victimization than their peers"), available at www.dshs.wa.gov/pdf/ca/YouthAgingoutofFoster.pdf (last visited Dec. 21, 2010).

The appointment of counsel to foster youth is one way to alleviate the financial burdens that result from traumatic childhood experiences. When foster youth are deprived of a voice and a zealous advocate in life-changing decisions, Mockingbird has noticed that they typically react by withdrawing from the process and, at times, engaging in anti-social behavior. Such behavior, in turn, can lead to incarceration, unemployment, and homelessness, which may add a significant strain on the State's financial resources.

However, when children are allowed to express their interests and when they are provided a legal advocate to ensure equal footing with the other litigants, Mockingbird has observed that they are more likely to accept the path the court has chosen for them, even when the outcome is not what they wanted. This observation is supported by a survey conducted by the California Commission on the Future of the Courts. The Commission found that the most important factor in determining how people view courts is not the end result but rather the extent to which courts' decisions are made using fair procedures, such as the ability of litigants to express their views.²⁰

²⁰ See David B. Rottman, *What Californians Think About Their Courts*, Cal. Cts. Rev. 7 (2005), available at http://www.courtinfo.ca.gov/reference/documents/CCR_05Fall_051031.pdf (last visited Dec. 22, 2010).

Children who are allowed to voice their interests in TPR proceedings are also better able to cope in a healthy way and become happy, stable adults. One scholar has commented that when youth are allowed "to be present in court and privy to the decision making that will chart their future" they are better able "to heal and move on – hearing difficult information in an appropriate setting, with support available and the opportunity to express their own views about their life's course, enables [these youth] to come to terms with and work through the abuse and neglect they have suffered."²¹

The presence of an attorney in TPR proceedings not only enables foster youth to actively participate in life-changing decisions, but it also lessens the strain on the State's financial resources by enabling a healthy transition to a stable post-foster-care life. Each of these reasons weighs heavily in favor of affording foster youth the absolute right to counsel in TPR proceedings.

²¹ Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Young Participation in Court Proceedings*, 6 Nev. L.J. 1302, 1307 (2006) (citing Jennifer Rodriguez, *Empowering Foster Youth: Inclusion in Court Hearings and Decision-Making* (Partners: Programs and Resources for Children and Families, Los Angeles County Juvenile Court Newsletter 2003), available at http://www.casabr.org/Document_Library/Online_Docs/Inservice/inservice_6_05.pdf (last visited Dec. 21, 2010)).

2. The cost of providing legal representation to foster youth is counterbalanced by the positive effects it generates for society.

Legal representation is also likely to generate additional revenue for Washington, thereby counterbalancing any financial investment placed on the State to ensure such representation. When a child is represented by an attorney in a TPR proceeding, she is more likely to achieve legal permanency, either through reunification with her parents or through adoption.²² Permanent placement provides a safe and stable environment for the child, enhancing overall well-being and success later in life.²³ Studies have shown that children who are adopted are more likely to obtain steady employment and earn higher incomes.²⁴ The State benefits financially from these successes because they earn higher revenues than

²² See Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (2008) (finding that foster youth of Palm Beach County, Florida, who were represented by attorneys were more likely to achieve permanent placement than those who were not afforded counsel), available at <http://www.chapinhall.org/research/report/expediting-permanency> (last visited Dec. 21, 2010).

²³ See Taylor, *supra* note 17, at 615 ("[c]hildren who achieve permanency have better outcomes than those who languish in long-term foster care"). See also Mary Eschelbach Hansen, *Despite a Tragedy, Adoption Aid Remains Crucial*, Wash. Post, Oct. 19, 2008, ("adoption confers an irreplaceable sense of belonging: emotional security that enhances overall well-being and promotes gains in educational attainment and success in the labor market"), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/17/AR2008101702417.html> (last visited Dec. 21, 2010).

²⁴ See Mary Eschelbach Hansen, *The Value of Adoption* 7 Am. Univ., Dep't of Econ. Working Paper Series, No. 2006-15, 7 (2006) (reporting that adopted children are 32% less likely to be incarcerated, 15% more likely to be employed, have higher incomes, and lower participation in welfare programs, than those children in long-term foster care).

their counterpart's youth who "age out" of the foster care system without achieving permanency.

Legal permanency also reduces government costs associated with foster care services. Once children are permanently placed, they no longer need to be monitored by child protective services and their files can be closed. Moreover, children who are adopted typically save the government thousands of dollars in child welfare costs,²⁵ while freeing up thousands more that would have been spent on various services to aid these youth, such as special education and rehabilitative programs.²⁶

Providing legal representation to foster youth will require a financial investment on the part of the State, but this investment will be more than offset by the social and financial benefits it will generate.

C. Racial Minorities Involved in Foster Care Suffer Disproportionately Because of the Lack of Counsel.

In Washington, children of color are disproportionately represented in the foster care system and thus disproportionately affected by the lack of legal representation available to foster youth in TPR proceedings.²⁷

²⁵ When a foster child is adopted, it costs the state and federal governments about \$115,000, but saves them about \$258,000 in child welfare and human services costs, netting a savings of \$143,000. *See id.* at 2.

²⁶ Foster children who are adopted are referred less to special education programs and are less likely to be arrested and incarcerated, saving governments between \$190,000 and \$235,000 that would have otherwise been spent on these programs. *See id.* at 5, 7.

²⁷ Mockingbird is a founding member of the King County Racial Disproportionality Coalition, which has found that children of color, and in particular African-American and Native American children, are overrepresented in the foster care system. *See King*

Washington has an interest in remedying, rather than perpetuating, the disparate treatment of racial minorities by the legal system. By providing counsel to foster youth in TPR proceedings, this Court can help alleviate the unequal treatment of minority children who find themselves entangled in the court system.

Many factors contribute to the disproportionality of minorities in the foster care system. To begin with, minorities are often disproportionately associated with familial characteristics that child welfare experts repeatedly find to be reliable predictors of child maltreatment.²⁸ These characteristics include unemployment, poverty, domestic violence, incarceration, substance abuse, and mental illness.²⁹ Minority families are also more likely than non-minority families to live in

County Coal. On Racial Disproportionality in the Child Welfare System in King County, Washington 24 (2004) (noting that "[f]oster home parents are more likely to be Caucasian; children in foster care are more likely to be children of color"), available at www.catalystforkids.org/KingCountyReportonRacialDisproportionality.pdf (last visited Dec. 12, 2010). See also Marna Miller, *Racial Disproportionality in Washington State's Child Welfare System*, Wash. State Inst. for Pub. Policy, 7 (2008) (reporting that, in 2004, Indian, Black, and Hispanic children were over-represented in the child welfare system compared with White children), available at <http://www.wsipp.wa.gov/rptfiles/08-06-3901.pdf> (last visited Dec. 12, 2010).

²⁸ See Bartholet, *supra* note 19, at 315.

²⁹ *Id.* at 315, 334 (stating that child welfare experts find poverty, unemployment, and substance abuse to be accurate predictors of child maltreatment and that most neglect cases are cases where parents suffer from mental illness). See also Keesha Dunbar & Richard P. Barth Casey-CSSP Alliance for Racial Equality in the Child Welfare System, *Racial Disproportionality, Race Disparity, and Other Race Related Findings in Published Works Derived from the National Survey of Child and Adolescent Well-Being* 3 (2006) (noting high rates of domestic violence amongst adult partners as a reason for the high removal of African American children from their homes), available at www.f2f.ca.gov/res/pdf/RDDOtherRelated.pdf (last visited Dec. 22, 2010).

communities that are plagued with high levels of unemployment, poverty, homelessness, greater needs for welfare assistance, and elevated risks of crime and street violence.³⁰ Each of these factors makes minority communities more visible to the surveillance of public authorities³¹ who are, in turn, more likely to report child maltreatment or to permanently remove a child from the home.

In addition to family and community risk factors, minority disproportionality may also result from cultural insensitivity and biases, as well as institutional and structural racisms of society.³² Each of these societal and systemic risk factors may influence the decision made at each stage of the foster care process, including the decision to (1) report potential child abuse or neglect, (2) accept the report and designate it as high risk,³³ (3) place a child into foster care, (4) place a child with

³⁰ Robert B. Hill, Casey-CSSP Alliance for Racial Equality in the Child Welfare System, *Synthesis of Research on Disproportionality in Child Welfare: An Update* 8 (2006) (reporting that some scholars believe minority overrepresentation is greatly attributed to living in communities with high levels of poverty, welfare assistance, unemployment, homelessness, and crime and street violence), available at www.racemattersconsortium.org/docs/BobHillPaper_FINAL.pdf (last visited Dec. 22, 2010).

³¹ *Id.*

³² *Id.* (stating that "theories about *organization and systemic factors* contend that minority overrepresentation [in the foster care system] results from the decision-making processes of CPS agencies, the cultural insensitivity and biases of workers, governmental policies, and institutional or structural racism").

³³ See Miller, *supra* note 27, at 4 (stating that intake workers assign a risk tag ranging from 0 (no risk) to 5 (very high risk), and that a risk of 3 or greater requires an investigation).

adoptive parents, and (5) place a child back into foster care.³⁴ Except for a child's reentry into care, studies show that race is one of the primary determinants at each of these stages.³⁵ Consequently, minority children are more likely to be reported as victims of maltreatment,³⁶ their cases are more likely to be accepted and designated as high risks,³⁷ they are more likely to be removed from their homes and placed into foster care,³⁸ and they are less likely to exit foster care, either through adoption or reunification with their families.³⁹ Regardless of the reasons, children of color are disproportionately represented in the foster care system, and because they are overrepresented in the general system they are also likely overrepresented in TPR proceedings.

³⁴ See Hill, *supra* note 30, at 5, 9.

³⁵ *Id.* at 1, 8, 34.

³⁶ See Miller, *supra* note 27, at 7-8 (finding that Indian children in Washington are nearly three times as likely as White children to be referred to CPS, Blacks nearly twice as likely, and Hispanics almost 1.3 times more likely). Because the child welfare agency is obligated to respond to referrals, it may have little control over disproportionality occurring at the point of referral. *Id.* at 8

³⁷ See *id.* at 8 (concluding that reports of maltreatment of Indian children are three times as likely as White children to be accepted and 3.31 times as likely to be assigned as a high risk, Blacks twice as likely to be accepted and more than two times as likely to be assigned as a high risk, and Hispanics 1.44 times as likely to be accepted and 1.41 times to be assigned as high risk).

³⁸ *Id.* (reporting that Indian children are 4.5 times more likely to be removed from their home than White children, Blacks 2.29 times more likely, and Hispanics 1.48 times more likely).

³⁹ *Id.* at 12-14 (In 2007, Indian children were more likely to remain in foster care, less likely to be adopted, and less likely to be reunified with their parents than White children. Blacks were more likely to remain in foster care, as likely to be adopted, and as likely to be reunified with their parents as Whites, and Hispanics were as likely to remain in foster care, less likely to be adopted, and as likely to be reunified with their parents as Whites.). Miller compared her results to a study conducted in King County showing that reunification for Black children was less likely than for White children; concluding disproportionality with respect to reunification varies by year. *Id.* at 13.

Foster children of color remain disproportionately disadvantaged under the current statutory scheme, something that should be considered when weighing a foster child's interests against those identified by the State. As Justice Thurgood Marshall once stated in another context, "[p]ercentages themselves are certainly not conclusive, but at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant."⁴⁰ The disproportionate percentage of minority children in the foster care system leaves no doubt that Washington's current practice unfairly targets children of color, not only perpetuating their marginalization but also subjecting them disparately to the harm that results from the lack of legal representation in TPR proceedings. This disparate treatment of children of color weighs in favor of the appointment of counsel to foster youth.

D. Judicial Discretion Regarding the Appointment of Counsel Leads to Inconsistent and Unpredictable Results for Foster Youth.

In Washington, trial court judges have the discretion to appoint

⁴⁰ *Jefferson v. Hackney*, 406 U.S. 535, 575-76, 92 S. Ct. 1724, 32 L. Ed. 2d 285 (1972) (Marshall, J, dissenting) (*Jefferson* dealt with the issue of whether Texas welfare officials violated the Equal Protection Clause of the Texas and Federal Constitutions when they applied a lower percentage reduction factor to Aid to Families with Dependent Children (AFDC) than to other categorical assistance programs. Appellants, recipients of AFDC, claimed a violation of equal protection because the portion of AFDC recipients who were black or Mexican-American was higher than the portion of aged, blind, or disabled welfare recipients who fell within these minority groups.).

legal counsel to foster youth in TPR proceedings.⁴¹ Although appropriate in certain situations, judicial discretion can lead to inconsistent and unpredictable results.⁴² The life story of each foster child may differ, but the need for legal advice and guidance through the court system is always the same. Without the definitive right to legal representation the appointment of counsel may hinge on irrelevant factors, such as the judge's personal preference, the jurisdiction's financial resources, or the child's residential location.⁴³ Washington already recognizes the importance of appointing counsel to youth in other court proceedings, such as delinquency hearings,⁴⁴ civil commitment⁴⁵ and at-risk youth proceedings,⁴⁶ and child in need of service petitions.⁴⁷ This state should join the majority of other states and make this right mandatory in TPR

⁴¹ RCW 13.34.100(6).

⁴² Misti N. Nelc, *Inequitable Distribution: The Effect of Minnesota's Child Support Guidelines on Prior and Subsequent Children*, 17 *Law & Ineq.* 97, 111-12 (1999) (judicial discretion leads to inconsistent awards of child support).

⁴³ Judges in certain regions of Washington are more likely to appoint counsel to foster youth in TPR proceedings than those in other regions. See Wash. State Office of Civil Legal Aid, *Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State* (Dec. 2008) (stating that "outside of Benton, Franklin, and King Counties, counsel is appointed for adolescents less than 50% of the time and probably far less frequently" in most counties). There is no reason why a foster child in King County deserves the right to counsel while a foster child in Spokane County does not. Providing a mandatory right to counsel will provide foster youth with the same rights and guarantees, regardless of where the child resides in the state.

⁴⁴ See *Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. 205, 213, n.32, 199 P.3d 1010 (2009) (recognizing that "children in criminal cases require 'the guiding hand of counsel at every step in of the proceedings against him'" (quoting *Powell*, 287 U.S. at 69), review granted, 166 Wn.2d 1011. See also RCW 13.40.140.

⁴⁵ RCW 71.05.300.

⁴⁶ See RCW 13.32A.192(1)(c)(3).

⁴⁷ See RCW 13.32A.160.

proceedings as well. Affording foster youth the right to counsel in such proceedings will assure more consistency for Washington's foster youth.

E. The Age at Which a Child Attains the Right to Counsel Is Not Before this Court; Nonetheless, Foster Youth of All Ages Deserve this Right.

The sole question before this Court is whether foster youth have a constitutional right to the representation of legal counsel in TPR proceedings. The answer to this question does not require a decision regarding the appropriate age at which the child attains this right (i.e., the age at which a child is mature and mentally competent enough to direct his attorney or the age at which he is able to fully understand the ramifications of his decisions). This Court need not define the role of a foster child's attorney in order to find that the child has the constitutional right in the first instance.

Nonetheless, it is important to stress that attorneys serve valuable roles in TPR proceedings, even if the child is unable to convey his wishes.⁴⁸ In addition to advocating for a client's stated position, attorneys are responsible for a number of other tasks, including attending proceedings, providing legal advice, developing theories and strategies,

⁴⁸ The importance of counsel to children is recognized by Washington in other proceedings, such as delinquency hearings. In such situations, the attorney "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." See Wash. RPC 1.14(a). The State already allows the attorney-child relationship to exist and has taken the time to proscribe guidelines for such situations, indicating a general understanding that attorneys serve valuable services to clients who are children.

filing motions, making objections, and complying with deadlines.⁴⁹ Foster youth deserve the benefits of counsel just as much as their parents and the State. Although GALs and CASAs provide valuable services, they are not trained to, nor can they be expected to, perform the tasks required of an attorney. Therefore, foster youth of all ages deserve the right to legal representation in TPR proceedings.

V. CONCLUSION

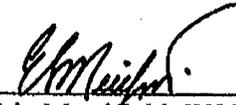
Courts should no longer be allowed to ignore the voices of those it is charged with protecting. Foster youth "want to be heard, need to be empowered, and should not be dismissed."⁵⁰ Depriving children of counsel can have devastating consequences on both the child and the community as our most abused and vulnerable children will continue to be ignored and left out of decisions that profoundly affect their lives. For the reasons explained above, this Court should find that Washington's foster youth have a constitutional right to be represented by counsel in TPR proceedings.

⁴⁹ In TPR proceedings, the "parties, attorneys and the court have an obligation to expedite resolution of issues to limit the period during which children face an uncertain future." *In re Dependency of O.J.*, 88 Wn. App. 690, 696, 947 P.2d 252 (1997). This principle may be disregarded if a foster child's attorney is not present to demand compliance. For example, Mockingbird observed a TPR proceeding involving two children, ages 7 years old and 13 months, both represented by counsel. At the proceeding, the State requested a continuance to prepare its case. After no objection was made by the parents or the 7-year-old's counsel, the 13-month-old's attorney objected stating additional time would run afoul of statutorily mandated court timelines, delay a needed resolution, and unnecessarily extend the child's stay in foster care.

⁵⁰ See Taylor, *supra* note 17, at 606.

DATED: December 28, 2010

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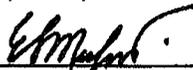
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- 1) Motion for Leave to Participate as Amicus Curiae, and
- 2) Brief of Amicus Curiae The Mockingbird Society.

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Respectfully submitted,

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