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IN RE THE TERMINATION OF

M.S.R. (D.O.B. 10/10/00) and T.S.R. (D.O.B. 10/10/00)

D.S.H.S., STATE OF WASHINGTON

Respondent,

v.

NYAKAT LUAK,

Appellant.

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SUPREME COURT
STATE OF WASHINGTON
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AMICI CURIAE BRIEF OF KIDSVOICE, THE NATIONAL CENTER FOR YOUTH LAW, FIRST STAR, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, CHILDREN'S LAW CENTER OF CALIFORNIA, THE CHILDREN'S ADVOCACY INSTITUTE, JUVENILE LAW CENTER, PROFESSOR MICHAEL DALE, AND PROFESSOR THEODOR LIEBMANN

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I. INTRODUCTION

Children in the midst of termination of parent rights ("TPR") proceedings are thrust into a confusing and critical process that will have a tremendous impact on their future safety, permanency, and well-being. A significant number of states, the American Bar Association, this Court's Commission on Foster Children, and the international community have recognized the risk inherent in allowing children and non-lawyer advocates to fend for themselves during these high-stakes legal proceedings, and have accordingly mandated or recommended that all children be represented by trained legal counsel who will zealously advocate for the children's interests. Despite the many states and organizations that have adopted this view, Washington has remained a jurisdiction where children have little or no input in proceedings regarding their future. The State has acknowledged that legal representation for children is appropriate in some instances;[1] however, this Court should ensure that all of Washington's most vulnerable citizens are protected by recognizing the constitutional right to legal representation for all children in TPR proceedings.

II. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *Amici* are set forth in *Amici*'s Motion for Leave to File *Amici Curiae* Brief, filed herewith.

[1] *See, e.g.*, Supplemental Brief of Respondent Department of Social and Health Services at 9 ("Thus, due process requires a trial court determine in each case whether counsel should be appointed.").

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Appellant's Supplemental Opening Brief.

IV. ARGUMENT

A. Washington's Law Does Not Guarantee a Child's Right to Independent Legal Representation in TPR Proceedings.

Under Washington law, a court may appoint an attorney to a child in TPR proceedings only if: (1) the child requests counsel and is twelve or more years of age; (2) the non-attorney guardian ad litem ("GAL") determines that the child needs to be independently represented by counsel; or (3) the court determines that the child needs to be independently represented by counsel. RCW 13.34.100(6)(f).[2] Additionally, there is no express requirement for legal representation on appeal. *See id.*[3] The Washington statute, moreover, ignores the practicalities of TPR proceedings and provides no check to ensure that legal representation is even considered.[4] The conditional nature of the Washington statute fails to protect children's fundamental interests and fails to allow for their interests to be heard. In the event that the juvenile court does decide to consider whether to appoint an attorney, the statute

[2] *See also* Wash. Juv. Ct. R. 9.2(c)(1).

[3] First Star & Children's Advocacy Institute, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (2d ed. 2009), at 126 (hereinafter, "National Report Card").

[4] *See* RCW 13.34.100(6)(e) (providing a mechanism for consideration of appointment of counsel only after a child turns 12).

fails to provide any standards or guidelines that could focus the court's analysis.

Washington law focuses mainly on the appointment of a non-attorney GAL to represent the child's "best interests." *See* RCW 13.34.030(9). Washington provides a GAL at the discretion of the court if no attorney is provided. A Washington court shall appoint a GAL "unless [it] for good cause finds the appointment unnecessary," and this requirement is "deemed satisfied if the child is represented by independent counsel in the proceedings." RCW 13.34.100(1). In other words, Washington law does not guarantee that children subject to TPR proceedings are provided with a legal professional who can advocate for their needs and interests.[5]

Washington's current statutory scheme is out of step with the laws and policies of a majority of the states, the American Bar Association, various professional organizations and advocacy groups, this Court's Commission on Children in Foster Care, and numerous foreign countries that have recognized the need for legal protections that allow for children's voices to be heard during TPR proceedings.

[5] Washington's Juvenile Court Rules mandate that, in dependency or TPR proceedings, "[u]pon request of a party or on the court's own initiative, the court shall appoint a lawyer for a juvenile who has no [GAL] and who is financially unable to obtain a lawyer..." Wash. Juv. Ct. R. 9.2(c)(1). This requirement is still inadequate because it still permits a court to refrain from appointing an attorney if the child is represented by a non-attorney GAL or if neither the court nor a party raise the issue of attorney appointment.

B. A Growing Number of States Require Legal Representation to Advocate for the Interests of Children in TPR Proceedings, Demonstrating That The Right to Counsel is Necessary, Effective and Administratively Feasible.

Twenty-eight states and the District of Columbia provide a right to legal representation for children subject to TPR proceedings, either by statute or rule.[6] Further, 18 states require that appointed counsel express the wishes and preferences of their children clients during the engagement.[7]

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[6] *See, e.g.*, Ala. Code §§ 12-15-102(10), 12-15-304(a); Colo. Rev. Stat. Ann. §§ 19-1-103(59), 19-3-203(3), 19-3-602; Conn. Gen. Stat. Ann. § 46b-129a(2); D.C. Code § 16-2304(b)(5); Ga. Code Ann. §§ 15-11-6(b), 15-11-98(a); Iowa Code Ann. § 232.113(2); Kan. Stat. Ann. § 38-2205(a); Ky. Rev. Stat. Ann. § 620.100(1)(a); La. Child. Code Ann. art. 106; Md. Code Ann., Cts. & Jud. Proc. § 3-813(d)(1), Maryland Rule, Rule 9-106; Mass. Gen. Laws Ann. ch. 119, § 29; Mich. Comp. Laws Ann. §§ 722.630, 722.638; Miss. Code Ann. § 43-21-201, Miss. Unif. Rules of Youth Ct. Prac., Rule 13(a); Neb. Rev. Stat. §§ 43-272(1), (3); N.J. Stat. Ann. §§ 9:6-8.21(d), 9:6-8.23; N.M. Stat. Ann. § 32A-4-10(C) (providing for appointment of an attorney for children over the age of 14); N.Y. Fam. Ct. Act § 249(a); N.C. Gen. Stat. Ann. § 7B-601(a); Ohio Rev. Code Ann. § 2151.352; Okla. Stat. Tit. 10A, § 1-4-306(A)(5); 23 Pa. Cons. Stat. Ann. § 2313(a); Tenn. Code Ann. § 37-1-149(a)(1), Tenn. Rules of Juv. Proc., Rule 2 § 7; Tex. Fam. Code Ann. §§ 107.001, 107.012; Utah Code Ann. §§ 78A-6-317(2) & (4), 78A-6-902(2); Vt. Stat. Ann. Tit. 33, § 5112; Va. Code Ann. § 16.1-266(A); W. Va. Code Ann. § 49-6-2(a); Wyo. Stat. Ann. § 14-3-211(a). Several other states guarantee a child's right to counsel in dependency proceedings. *See, e.g.*, R.I. Gen. Laws § 40-11-7.1(b)(3); RI R. Juv. P. Rules 15(c)(3), 18(c)(3); S.C. Code Ann. § 63-7-1620; S.D. Codified Laws § 26-8A-18.

[7] *See, e.g.*, Conn. Gen. Stat. Ann. § 46b-129a(2) ("[A] child shall be represented by counsel...[whose] primary role...shall be to advocate for the child..."); Ga. Code Ann. §§ 15-11-6(b), 15-11-98(a) ("[T]he court shall appoint an attorney to represent the child as the child's counsel[.]"); Iowa Code Ann. §§ 232.89(2), (4) ("[T]he court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel..."); La. Child. Code Ann. art. 607 ("[T]he court shall appoint qualified, independent counsel for the child..."), La Sup. Ct. R. XXXIII ("Counsel for a child should...[d]etermine the client's desires and preferences in a developmentally appropriate and culturally sensitive manner; [and]...[a]dvocate for the desires and expressed preferences of the child and follow the child's direction throughout the case in a developmentally appropriate manner."); Md. Code Ann., Cts & Jud. Proc. § 3-813(d)(1), Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings, A ("If the child has considered judgment, the attorney should so state in open court and should advocate a position consistent with the

The commitment of this majority of states reaches further than Washington's conditional statutory option for the appointment of legal representation. The children in these states are entitled to legal representation without question or qualification if the rights of their parents are subject to termination.[8] In some instances, the practice of providing representation is decades long.[9] Additionally, to ensure that

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child's wishes in the matter."); Mass. Gen. Laws Ann. ch. 119, § 29, Mass. Comm. for Pub. Counsel Services, *Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases*, at 1.6(b) (2005), *available at* http://www.publiccounsel.net/Private_Counsel_Manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf ("If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter."); Minn. Stat. §§ 260C.163(3)(b), (d) (requiring the appointment of counsel for children aged 10 or older to advocate for their expressed wishes); Miss. Unif. Rules of Youth Ct. Prac., Rules 13(a), (f) (noting that the role of the child's attorney is to "represent the child's preferences"); N.J. Stat. Ann. §§ 9:6-8.21(d), 9:6-8.23 (any minor "must be represented by a law guardian to help protect his interests and to help him express his wishes to the court"); N.Y. Fam. Ct. Act § 249; N.Y. Ct. Rules, § 7.2(d) ("the attorney for the child must zealously advocate the child's position"); Ohio Rev. Code Ann. § 2151.352, Ohio Rules of Juv. Proc. 4(a) ("When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child."); Okla. Stat. Tit. 10A, § 1-4-306 (A)(2)(c) ("The attorney shall represent the child and any expressed interests of the child."), (5); 42 Pa. Cons. Stat. Ann. § 6311, 23 Pa. Cons. Stat. Ann. § 2313(a); Tenn. Code Ann. § 37-1-149(a)(1), Tenn. Rules of Juv. Proc., Rule 2 ("In a dependency, neglect, or abuse case the guardian ad litem must...ensure that the child's concerns and preferences are effectively advocated."); Tex. Fam. Code Ann. § 107.001(2) (attorney ad litem means "an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and undivided representation."), 107.012 (in a termination proceeding, "the court shall appoint an attorney ad litem to represent the interests of the child"); Vt. Stat. Ann. Tit. 33 § 5112, Vt. Admin. Order No. 32, § 2 ("It is the duty of assigned counsel to represent the interests of clients to the full measure of their professional responsibility."); W. Va. Code Ann. § 49-6-2(a) ("Any attorney appointed pursuant to this section shall perform all duties required as an attorney licensed to practice law in the State of West Virginia."); Wis. Stat. §§ 48.23(1m)(b)(2), (1g).

[8] *See supra* note 6.

[9] In 1962, the New York State Legislature authorized the New York Family Court to appoint attorneys to represent children in (among other actions) child protective proceedings, finding that "counsel [for children] is often indispensable to a practical realization of due process." Merril Sobie, *The Child Client: Representing Children in Child Protective*

each child receives adequate attention, some states limit case loads for attorneys representing children in TPR proceedings.[10]

"[T]he clear trend" in the United States "is toward universal attorney representation" for children in TPR proceedings.[11] As more jurisdictions recognize the importance of hearing the child's interests in proceedings impacting that child's family and future, the number of states that guarantee legal representation for children in dependency and TPR proceedings is growing. Between 2007, when *amici* First Star and the Children's Advocacy Institute issued their First Edition of their National Report Card on Legal Representation for Abused & Neglected Children, and 2009, when the Second Edition was published, 33% of states surveyed adopted new legislation regarding these important matters.[12] Despite the movement toward guaranteed legal representation for all children in such matters, Washington continues to lag behind in protecting children in TPR proceedings.

Proceedings, 22 TOURO L. REV. 745, 752 (2006) (quoting the Family Court Act, 1962 N.Y. Laws, ch. 686 (codified at N.Y. Fam. Ct. Act § 241)). "Over the course of the thirty year period since the initial legislation [in New York], the majority of states have enacted statutes requiring the legal representation of children..." *Id.* at 754-55.

[10] *See, e.g.*, National Report Card, *supra* note 3 , at 13, 33 (Arkansas), 73 (Massachusetts), 95 (New York), 135 (Wyoming). *See also* National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, III.A.2. cmt.A (2001) (recommending full-time attorneys represent no more than 100 clients at a time).

[11] Sobie, *supra* note 9 at 746; *see also In re Gault*, 387 U.S. 1, 38-41, 87 S.Ct. 1428 (1967) (taking notice of the prevalence of states that have passed laws providing for legal representation of children and the significant number of organizations that have advocated for the same).

[12] National Report Card, *supra* note 3, at 8.

The statutory and rule-based provision of legal representation for children in TPR proceedings is consistent with the federal and state court rulings that have recognized the importance of independent legal representation for children. Courts have recognized generally that children have a fundamental right to safety and family integrity separate and apart from their parents' rights.[13] In the context of dependency and TPR proceedings, several federal and state courts have held that due process requires that children have legal representation to ensure that those

[13] *See, e.g., Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent" (internal citation omitted)); *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...").

fundamental rights are protected in these critical matters.[14]

Those states that have recognized a right to legal representation for children subject to TPR proceedings demonstrate that this important right is necessary and can be implemented in a feasible and cost-effective manner. This case presents the opportunity for Washington to join with these jurisdictions in protecting children subject to TPR proceedings and guaranteeing that their voices are heard.

C. The American Bar Association and Several Influential Colloquia Have Recognized the Need for Client-Directed Legal Counsel for Children in TPR Proceedings.

In addition to the states that require independent, client-directed legal representation for children,[15] many important organizations and colloquia also advocate for such a right. The American Bar Association

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[14] *See, e.g., Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (that "[e]ven if there were not a statutory right to counsel for children in deprivation cases and TPR proceedings . . . such a right is guaranteed under the Due Process Clause of the Georgia Constitution."); *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976) (holding that a challenged Alabama child custody procedure "violates the due process clause of the [federal] Constitution because that procedure does not provide for the appointment of independent counsel to represent a child in a neglect proceeding..."); *In re Jamie T.T.*, 599 N.Y.S.2d 892, 894 (N.Y. App. Div. 1993) (holding that "[in addition to a statutory right,] [w]e are also of the view . . . that the Due Process Clauses of the Federal and State Constitutions mandate that there be *some form* of legal representation of [the child's] interests in the proceedings on the petition," because the child's "liberty interest was clearly at stake") (citations omitted)); *In re H.R.C.*, 781 N.W.2d 105, 115 (Mich. Ct. App. 2009) ("It is true that children have a right to appointed counsel in child protective proceedings, and that a child's attorney...'has the same duties that any other client's attorney would fulfill when necessary.'" (citations omitted)); *N.J. Div. of Youth & Fam. Servs. v. Wandell*, 382 A.2d 711, 713-14 (N.J. Cumberland County Ct. 1978) ("Surely if due process required that a mature adult subjected to these proceedings requires the assistance of able counsel, no less should be required to protect the interests of a minor incapable of speaking for himself.").

[15] *See supra* note 7.

("ABA"), the world's largest voluntary professional organization for lawyers, has been at the forefront of arguing for the right to legal representation for all children in dependency and TPR proceedings. In 2005, the ABA passed its "Resolution on Foster Care and Adoption: Foster Care Reform."[16] This resolution stated that all dependent children should "have the right to quality legal representation, not simply an appointed guardian ad litem or lay volunteer advocate with no legal training, acting on their behalf..."[17] In 2007, the ABA reiterated this stance by resolving to provide "all youth with the ability and right to attend and fully participate in all hearings related to their cases."[18] Most recently, the ABA passed the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings ("Model Act").[19] Among the many noteworthy features of this important resolution is the diverse body of co-sponsors representing a broad cross-section of the legal profession.[20] With their backing this

[16] ABA Resolution on Foster Care and Adoption: Foster Care Reform (Aug. 2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/foster_reform.authcheckdam.doc (last visited Aug. 28, 2011).

[17] *Id.* at § (a).

[18] ABA Resolution on Youth Transitioning from Foster Care (Youth at Risk), *available at* http://www.americanbar.org/groups/child_law/projects_initiatives/empowerment/aba_policy_aug2007.html (last visited Aug. 28, 2011).

[19] American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (enacted August 2011), *available at* http://www.caichildlaw.org/Misc/ABA_Resolution.pdf (last visited Aug. 28, 2011).

[20] *Id.* The 14 cosponsors of the Model Act included, among others, the ABA Family Law Section, the ABA Judicial Division, the ABA Government and Public Sector Lawyers Section and the Bar Associations of Philadelphia, Los Angeles County Bar Association, and Louisiana State.

resolution makes clear that all children in dependency and TPR proceedings should be appointed "a 'child's lawyer[.]'"[21] Moreover, the Model Act requires that a child's lawyer is one who "provides legal services for a child and who owes the same duties, including undivided loyalty, confidentiality and competent representation, to the child as is due an adult client[.]"[22] To assist the lawyer representing a child client, the Model Act includes standards for counsel to follow during the engagement.[23]

The ABA's Model Act is only the most recent in a legacy of resolutions or recommendations that advocate for client-directed legal representation for children in TPR proceedings. In 1995, Fordham Law School hosted a conference on "Ethical Issues in the Legal Representation of Children."[24] The co-sponsors and participants at the Fordham conference included national children's experts, academicians, and legal organizations. The conference participants recommended that children in child welfare proceedings should be represented by client-directed counsel.[25] Also in 1996, the American Bar Association adopted the ABA

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[21] *Id.* at 3.

[22] *Id.* at § 1(c).

[23] *See generally, id.* at § 7.

[24] *See* Summary of Ethical Issues in the Legal Representation of Children Conference, *available at* http://law.fordham.edu/louis-stein-center-for-law-and-ethics/13505.htm (last visited Aug. 28, 2011).

[25] Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV. 1301, 1301 (1996) (noting that "[t]he lawyer for a child who is not impaired (i.e., who has the capacity to direct the representation) must allow the child to set the goals of the representations as would an adult client").

Abuse and Neglect Standards,[26] which called for independent counsel for every child in an abuse or neglect proceeding.[27] These Abuse and Neglect Standards also adopted a client-directed approach, noting that lawyers for children should "represent the child's expressed preferences and follow the child's direction throughout the course of litigation."[28]

Ten years later, in 2006, children's law experts gathered at the University of Nevada, Las Vegas for a conference titled "Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham."[29] The national children's law experts, policy makers, and organizations in attendance issued a set of thorough recommendations that "affirm[ed] and buil[t]" upon the core recommendations of the Fordham Conference.[30] Specifically, the UNLV Recommendations strongly supported client-directed counsel for children.[31]

Significantly, the recommendations promulgated by these organizations are in accord with recommendations made by this Court's

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[26] American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (approved by ABA House of Delegates Feb. 5, 1996), *available at* http://apps.americanbar.org/child/rclji/repstandwhole.pdf (last visited Aug. 28, 2011).

[27] *Id.* at 1 ("All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues.").

[28] *Id.* at Standard B-4.

[29] *See* Summary of the "Representing Children in Families" Conference, *available at* http://rcif.law.unlv.edu/ (last visited Aug. 28, 2011).

[30] *See Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L. J. 592, 592 (2006).

[31] *Id.* at 595 ("Children's attorneys should advocate for clients' right to express their identity, principles[,] and opinions.").

Commission on Children in Foster Care ("the Commission"). As directed by House Bill 2735, in 2010 the Commission convened a Statewide Children's Representation Workgroup comprised of a diverse group of children's law constituents, including representatives from the Washington Attorney General's Office, the Washington Department of Social and Health Services, and the courts.[32] This Working Group prepared a thoughtful and detailed report entitled "Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System: Standards of Practice, Voluntary Training, and Caseload Limits in Response to HB 2735."[33] The standards set forth in the Meaningful Representation Report were modeled on the ABA Abuse and Neglect standards, and the Report clearly recommended that all children in dependency and TPR proceedings have a right to legal representation. In addition, the report stated that "[t]he child's attorney should represent the child's stated interest and follow the child's direction throughout the course of the litigation."[34] This Court's Commission on Children in Foster Care unanimously adopted all the report's recommendations, including the recommendation that all children should have legal representation at all stages of dependency or TPR proceedings.[35]

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[32] *See* Statewide Children's Representation Workgroup, *Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System: Standards of Practice, Voluntary Training, and Caseload Limits in Response to HB 2735, available at* http://www.nacchildlaw.org/resource/resmgr/news_items/meaningful_legal_representat.pdf (last visited Aug. 28, 2011).

[33] *Id.*

[34] *Id.* at 6.

[35] *Id.*

In sum, the ABA and other prominent children's law organizations have recognized the necessity of independent, client-directed counsel for children in TPR proceedings. These groups understand the unique role of a child's lawyer as a necessary advocate due to the separate and distinct interests of the state and the child's parents. Without an independent lawyer who will express his or her interests, a child's voice is silenced and the information available to the judge is significantly limited. The result is that some of society's most vulnerable citizens are deprived of their right to have input into proceedings that will profoundly impact their future.

D. The International Community Recognizes that Children's Voices Must be Heard in these Critical Proceedings.

Beyond the borders of the United States, a child's right to legal representation and to be heard in proceedings that affect their interests is now an accepted principle of international law. These authorities further support the necessity and feasibility of legal representation for all children

in TPR proceedings.[36]

1. The United Nations Convention on the Rights of the Child.

Enacted in 1990, the UN Convention on the Rights of the Child ("CRC"),[37] was the result of a 10-year drafting process involving 70 countries, including the United States. One hundred forty countries have signed the CRC and 193 countries have ratified it.[38] The only two countries that have not ratified the CRC are the United States and Somalia.[39] The CRC is the first international treaty to give children full rights independent of their parents. Article 12 of the CRC provides:

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[36] The United States Supreme Court has relied on international law as persuasive authority, particularly when dealing with constitutional issues. *See, e.g., Thompson v. Oklahoma,* 487 U.S. 815, 831 n. 34, 108 S. Ct. 2687, 2696, 101 L. Ed. 2d 702 (1988) (noting that "three major human rights treaties explicitly prohibit juvenile death penalties" and citing the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Geneva Convention Relative to the Protection of Civil Persons in Time of War); *Roper v. Simmons*, 543 U.S. 551, 575-77, 125 S. Ct. 1183, 1198-1201, 161 L. Ed. 2d 1 (2005) (citing to the same treaties identified in *Thompson* and also adding the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child); *Graham v. Florida*, 560 U.S. ---, 130 S. Ct. 2011, 2034, 176 L. Ed. 2d 825 (2010) (citing to the UN Convention on the Rights of the Child); *Grutter v. Bollinger*, 539 U.S. 306, 344, 123 S. Ct. 2325, 2347, 156 L. Ed. 2d 304 (2003) (J. Ginsburg, concurring) (noting that the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women supported the proposition that affirmative action programs are remedial in nature); *Lawrence v. Texas*, 539 U.S. 558, 576-77, 123 S. Ct. 2472, 2483, 156 L. Ed. 2d 508 (2003) (citing to decisions of the European Court of Human Rights); *see also* Ruth Bader Ginsburg, *Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004).

[37] Convention on the Rights of the Child, G.A. Res. 44/25, Art. 3, U.N. Doc. A/44/49 (Nov. 20, 1989), *available at* http://www2.ohchr.org/english/law/crc.htm (last visited Aug. 29, 2011).

[38] *See* United Nations Treaty Collection, Convention on the Rights of the Child, Ratifications and Reservations, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Aug. 29, 2011).

[39] *Id.*

> 1. States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For the purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[40]

Thus, the CRC obligates its parties to enact legislation that protects and secures rights for children, including the rights of children to be heard, and potentially represented, in legal proceedings. Article 12 makes the ability of a child to express his or her views an internationally recognized human right,[41] and in fact, a majority of the countries with legislation complying with Article 12 provide for children to be heard directly.[42]

2. The African Charter on the Rights and Welfare of the Child.

The African Charter on the Rights and Welfare of the Child was adopted by the Organisation of African Unity in 1990 and entered into

[40] *See* Convention on Rights of the Child, *supra* note 37.

[41] The CRC also contains language in Articles 3 and 9 indicating that a child's "best interests" should be a consideration in the determination of the child's future. *Amici* agrees that the ultimate outcome of any TPR proceeding should be guided by the judge's determination of the child's best interests, *see* RCW 13.34.190(1)(b), but the CRC makes clear that a child's expressed interests must be heard by the judge in order to formulate the ultimate conclusion of what is best for the child. Without this information, the judge does not have a full view of all possible evidence and any subsequent analysis fails to account for the wishes of the child.

[42] Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L. J. 966, 967 (2006) (noting that the "international community has nearly unanimously and repeatedly committed itself to assure the child the ability to express her views freely" during dependency proceedings).

force in 1999. It has been characterized as the "first regional treaty on the human rights of the child."[43] Currently, 42 African countries have signed the Charter.[44] The African Charter was based on the CRC, and provides for legal representation for children and an opportunity for the child to be heard. Specifically, Article 4(2) of the African Charter states:

> In all judicial or administrative proceeding affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

The African Charter reiterates the right for children to be heard in Article 7, stating "Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws."[45] The widespread adoption of the African Charter demonstrates the broad acceptance of its precepts in Africa.

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[43] Amnesty International, *African Children's Charter: A Welcome Step to Securing the Rights of Africa's Children* (Nov. 29, 1999), *available at* http://www.amnesty.org.uk/news_details.asp?NewsID=12703 (last visited Sep. 13, 2011).

[44] African Union, List of Countries Which Have Signed, Ratified/Aceded to the African Charter on the Rights and Welfare of the Child (Mar. 1, 2010), *available at* http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

[45] Peters, *supra* note 42 at 975.

3. *The South Asian Association for Regional Cooperation ("SAARC") Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia.*

The SAARC is a regional association of South Asian countries with the purpose of encouraging cooperation between its members.[46] SAARC's "Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia" is a "call for action to promote the realization of the rights of the child."[47] The SAARC Convention provides, in relevant part:

> Recognising the evolving capacities of the child, States Parties shall encourage and support administrative and judicial institutions to arrange for suitable mechanisms at appropriate levels and in accordance with local customs and traditions, to provide opportunities and access for the child to:
>
> a) Seek and receive information[;]
>
> b) Express views, directly or through a representative, and receive due weight and consideration for them, in accordance with age and maturity, in all matters affecting them[; and]
>
> c) Participate fully and without hindrance or discrimination in the school, family[,] and community life.[48]

The SAARC Convention further "reaffirmed" the member states' adherence to the CRC, thereby indicating these South Asian countries'

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[46] *See* South Asian Association for Regional Cooperation Charter, *available at* http://www.saarc-sec.org/SAARC-Charter/5/ (last visited Aug. 29, 2011). The members of SAARC include Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. *Id.*

[47] Peters, *supra* note 42 at 979.

[48] Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia at Article IV(4), *available at* www.saarc-sec.org/userfiles/conv-children.pdf (last visited Aug. 30, 2011).

commitment to the rights of children to be heard in legal proceedings affecting their futures.

4. The Second Arab Plan of Action on the Child.

The Second Arab Plan of Action was agreed upon by members of the League of Arab States in January 2004.[49] The Plan provides guidelines drawn from "a pool of international, regional, and native Arab-League agreements and initiatives."[50] Signatories to the Plan are urged to develop their own national plans for the implementation of the guidelines. The Plan further calls on member-states to enact legislation guaranteeing the rights of the child, "in keeping with the general principles of the UN Convention [on] the Rights of the Child."[51] Specifically, the Plan is in accord with Article 12 of the CRC in urging members to "upgrad[e] the judicial legal system with regard to children victims of all forms of maltreatment..., allocating legal rooms and sections to listen to children and hear their evidence[.]"[52] Jordan, Bahrain, Palestine, and Syria have all implemented national plans to enact these measures in their respective countries.[53]

The United Nations Charter on the Rights of the Child, along with several other regional agreements and treaties, make clear that the

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[49] Peters, *supra* note 42 at 980.

[50] *Id.*

[51] *Id.* at 981.

[52] *Id.*

[53] *Id.*

international community recognizes the need for a child's voice to be heard in legal proceedings determining their future.[54]

V. CONCLUSION

In order to be active participants in these critical legal proceedings, all children subject to TPR proceedings need independent legal representation to advance their individual interests. Washington should join other jurisdictions in the United States, the international community, the ABA, and other children's law organizations in recognizing that all children have a right to legal representation in TPR proceedings. By recognizing this constitutional right, Washington would finally provide this essential protection to its most vulnerable citizens.

DATED this 16th day of September, 2011.

Respectfully submitted,

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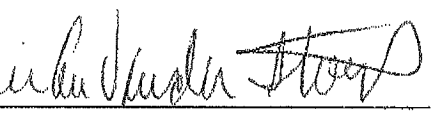
By 

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[54] Certain members of Washington's judiciary agree with this concept. *See, e.g.*, Washington State Center for Court Research, *Dependant Youth Interviews Pilot Program*, at 18 (Final Report Dec. 2010) ("In jurisdictions where a lawyer is provided for older youth, judges are uniformly convinced of the benefits of the practice, both to the youth and the court. Some judges and social workers believe there is a faster move to permanency when youth have an attorney.").

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