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Supreme Court No. 94798-8

Court of Appeals No. 48299-1-II

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Dependency of S.K-P., Minor Child,  
Appellant,

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AMENDED *AMICUS CURIAE* BRIEF OF CHILDREN'S RIGHTS, INC., ET AL.

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## I. INTRODUCTION

Roughly 6,000 Washington children are confirmed victims of child abuse or neglect each year; and most become the focus of dependency proceedings at issue here.<sup>1</sup> These proceedings directly impact children's physical liberty in the most dramatic of ways:<sup>2</sup> national data confirms that children removed from the home are at serious risk of further abuse or neglect while in state custody, unnecessary placement in restrictive institutions, traumatic instability in the form of multiple moves among homes and facilities, the administration of psychotropic medications, and a variety of poor long-term outcomes. Specific groups of children who are overrepresented in foster care systems nationally and in Washington State—including children of color and LGBTQ/TGNC youth<sup>3</sup>—are also disproportionately victimized by these risks. Given the complexity and risk inherent in dependency proceedings, Due Process requires that these

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<sup>1</sup> KIDS COUNT DATA CENTER, ANNIE E. CASEY FOUNDATION, CHILDREN WHO ARE CONFIRMED BY CHILD PROTECTIVE SERVICES AS VICTIMS OF MALTREATMENT, <http://datacenter.kidscount.org/data/tables/6221-children-who-are-confirmed-by-child-protective-services-as-victims-of-maltreatment?loc=49&loct=2#detailed/2/any/false/573,869,36,868,867/any/12943> (noting that there were 5,884 children confirmed as victims of maltreatment in 2015).

<sup>2</sup> *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (“In the foster home setting . . . the risk of harm to children is high [and] is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes . . . are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without [] investigation, supervision, and constant contact . . . a child placed in a foster home is at the mercy of the foster parents.”)

<sup>3</sup> “LGBTQ” means lesbian, gay, bisexual, transgender, queer. “TGNC” means transgender and nonconforming.

vulnerable children be given access to counsel to protect their rights and give voice to their needs.

*Amici*, a group of national advocacy and nonprofit legal aid organizations dedicated to the protection of children's rights, urge this Court to reaffirm that all dependency proceedings impact the fundamental physical liberty interests of all children who are subject to them. National experts, advocates, and academics in the child welfare community all support the right to counsel for children in dependency proceedings. Further, most states recognize a right to legal representation for children in dependency proceedings, and many have done so for decades, demonstrating that counsel is not only necessary but can be provided in a feasible and cost-effective manner.<sup>4</sup>

Rather than repeat the arguments of S.K-P., *Amici* focus on the physical liberty interests of S.K-P. and all children in dependency proceedings, which support a constitutional right to the appointment of counsel in all dependency proceedings. As a child's physical liberty is at risk, there is a presumption of counsel. Moreover, as all children are similarly situated in dependency proceedings, the *Mathews*<sup>5</sup> factors should

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<sup>4</sup> See, e.g., Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 445, 514 (1978) (stating that two dozen states provided for mandatory appointment of lawyers for children as long ago as 1978).

<sup>5</sup> *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The *Mathews* factors are: (1) the private interest to be affected; (2) the risk of an erroneous deprivation

be applied contextually, and support the conclusion that children have a universal right to the appointment of counsel in dependency proceedings. Accordingly, the Court should conclude that all children's liberty interests can only be fully protected by counsel in the courtroom in all circumstances and, critically, *before* they fall victim to known risks of harm.<sup>6</sup>

## II. IDENTITY AND INTERESTS OF *AMICI*

As more fully set forth in *Amici's* Motion for Leave to File *Amici Curiae* Brief, filed herewith, *Amici* are a group of national advocacy and nonprofit legal aid organizations dedicated to advocacy for children's rights and have extensive legal and practical experience in issues regarding the serious liberty interests at stake and the necessity for the appointment of legal counsel for children in dependency proceedings. *Amici* are unanimous in their conviction that without the assistance of counsel in all cases, children's legal rights cannot be fully protected.

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of such interest; and (3) the government's interest in providing the additional or substitute procedural requirement. *Bellevue School Dist. v. E.S.*, 171 Wn. 2d 695, 705, 257 P.3d 570 (2011); *Lassiter*, 42 U.S. at 26-27.

<sup>6</sup> See *Douglas et al. v. California*, 372 U.S. 353 (1963) (appointment of counsel for indigent defendant cannot depend on merits of appeal); see also *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 50 (1981) (Blackmun, dissenting) (right to counsel in termination proceeding cannot depend on retrospective review of merits of individual case); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (state must provide counsel to an indigent defendant in every felony prosecution, regardless of whether or not the defendant is ultimately incarcerated).

### III. STATEMENT OF THE CASE

*Amici* adopt Appellant's Statement of the Case.

### IV. DISCUSSION

#### A. Children have a presumptive right to counsel in all dependency proceedings.

It has long been recognized that a presumptive constitutional right to counsel exists in proceedings involving a risk to a litigant's physical liberty.<sup>7</sup> As set forth here, the presumption of a right to counsel unquestionably attaches to dependency proceedings in Washington and, further, the right to counsel must universally attach to all children in all dependency proceedings.

##### 1. National policy makers and courts recognize that children's physical liberty interests are at stake in dependency proceedings.

Dependency proceedings, during which the state has the power to remove a child from her home and place her without her consent in foster care, are inherently custodial in nature, and directly impact the child's physical liberty.<sup>8</sup> Dependency proceedings implicate the most central questions in a child's life: "Where is home? Who takes care of me? Will I

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<sup>7</sup> *Lassiter v. Dep't. of Social Servs. Of Durham Cnty., N.C.*, 452 U.S. 18, 26-27 (1981).

<sup>8</sup> *Ingraham*, 430 U.S. at 673-74 (providing that "the contours of this historic liberty interest . . . always have been thought to encompass freedom from bodily restraint"); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that liberty "denotes not merely freedom from bodily restraint but also the right . . . to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men").

be able to see my siblings or my extended family?”<sup>9</sup> Add to those profound questions others such as: “Will I be moved involuntarily among facilities and homes? Will I be safe while in state custody? Will I be institutionalized? Will I be administered psychotropic medications?”

These liberty concerns animate national child welfare policy and support the appointment of counsel. For example, at a federal level, the U.S. Department of Health and Human Services (“Department of Health”)<sup>10</sup> has three primary goals for child protection: safety, permanency, and well-being.<sup>11</sup> Each of these priorities emphasizes the child’s wellbeing as a product of her physical environment.<sup>12</sup> In a dependency proceeding, the court may allow the state to remove a child from her home, place her in foster care, institutionalize her, move her repeatedly, or require her to be administered psychotropic medications.<sup>13</sup>

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<sup>9</sup> Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005*, 6 NEV. L.J. 966, 967 (2006).

<sup>10</sup> The U.S. Department of Health and Human Services is a government agency that protects the health of all Americans and provides essential human services, especially for those least able to help themselves.

<sup>11</sup> SEE JILL GOLDMAN AND MARSHA K. SALUS, U.S. DEPT. OF HEALTH & HUMAN SERVS., OFFICE ON CHILD ABUSE & NEGLECT, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 7 (2003), <https://www.childwelfare.gov/pubPDFs/foundation.pdf>.

<sup>12</sup> *Id.* The Department of Health recognizes that children need counsel in dependency proceedings to adequately meet these goals. See CHILDREN’S BUREAU, U.S. DEPT. OF HEALTH & HUMAN SERVS., ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES INFORMATION MEMORANDUM ACYF-CB-IM-17-02, 1-2 (2017), <https://www.acf.hhs.gov/sites/default/files/cb/pi1702.pdf> [hereinafter, *Information Memorandum*].

<sup>13</sup> See generally *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (“foster children in state custody are subject to placement in a wide array of [. . .] foster

Of the myriad well-recognized risks to children in dependency proceedings, *Amici* highlight four—maltreatment, institutionalization, instability, and involuntary medication—to illustrate the physical liberty interests of children in state custody.

Sadly, the potential for abuse and neglect of children while in state custody in foster care is a well-documented phenomenon. The Department of Health produces an annual report to Congress that assesses the safety and rates of maltreatment in state care—a measure that every state tracks.<sup>14</sup> According to the annual report published in 2016, while the national rates of maltreatment of all children (regardless of custodial situation) declined from 2010-2013, the rates of confirmed maltreatment

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care placements, including institutional facilities where their physical liberty is greatly restricted”); *In re W.H.*, 25 A.3d 330, 336-37 (Pa. Super. Ct. 2011) (state agency may administer psychotropic drugs under statute providing that “the court may order the child to be examined . . . and may also order medical or surgical treatment of a child”). Moreover, the child’s failure to comply with the court’s orders may result in sanctions further affecting a child’s liberty. *In re Dependency of A.K.*, 162 Wn. 2d 632 (2007) (discussing use of civil contempt on foster children by courts).

<sup>14</sup> See, e.g., CHILDREN’S BUREAU, U.S. DEPT. OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2010-2013 REPORT TO CONGRESS (2016), [https://www.acf.hhs.gov/sites/default/files/cb/cwo10\\_13.pdf](https://www.acf.hhs.gov/sites/default/files/cb/cwo10_13.pdf). These federal reports identify key benchmarks, including: (1) reduction of recurrent child abuse and neglect; (2) reduction of child abuse and/or neglect *in foster care*; (3) increasing permanency for children in foster care; (4) reducing time in foster care; (5) increasing placement stability; and (6) reducing the placement of young children in group homes or institutions. *Id.* at 7.

of children in foster care did not.<sup>15</sup> In Washington, “[k]eeping children who are placed into out-of-home care safe is of paramount importance.”<sup>16</sup>

Nationally, more than fifty thousand children are taken into state care each year and placed in one of the most restrictive physical settings: an institution or group home.<sup>17</sup> While experts agree that children do best in family settings, “one in seven children under the care of the child welfare system is placed in a group setting—even though for more than 40 percent of these children, there is no documented clinical or behavioral need to do so.”<sup>18</sup> In Washington, hundreds of children find themselves in state institutions or group homes, and the number appears to be increasing.<sup>19</sup> According to the Department of Health, children nationwide are spending

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<sup>15</sup> *Id.* at 9; *see generally*, *M.D. v. Perry*, 294 F.R.D. 7, 57 (S.D. Tex. 2013) (describing the exacerbated risks of child-to-child abuse in the foster care group home setting)

<sup>16</sup> PARTNERS FOR OUR CHILDREN, 2015 ANNUAL REPORT OF CHILD WELFARE SYSTEM PERFORMANCE IN WASHINGTON STATE 17, [http://www.partnersforourchildren.org/sites/default/files/2015AnnualReport\\_POCLetter.pdf](http://www.partnersforourchildren.org/sites/default/files/2015AnnualReport_POCLetter.pdf) [hereinafter *2015 Annual Report of Child Welfare System*].

<sup>17</sup> *See* KIDS COUNT DATA CENTER, THE ANNIE E. CASEY FOUNDATION, CHILDREN IN FOSTER CARE BY PLACEMENT TYPE, <http://datacenter.kidscount.org/data/tables/6247-children-in-foster-care-by-placement-type?loc=1&loct=1#detailed/1/any/false/869,36,868,867,133/2622,2621,2623,2620,2625,2624,2626/12994,12995> (last visited Oct. 5, 2017) (reporting annual numbers of foster kids placed in state institutions or group homes) [hereinafter, *Children in Foster Care*].

<sup>18</sup> KIDS COUNT DATA CENTER, THE ANNIE E. CASEY FOUNDATION, EVERY KID NEEDS A FAMILY POLICY REPORT 1 (2015), <http://www.aecf.org/m/resourcedoc/aecf-EveryKidNeedsAFamily-2015.pdf> (last visited Oct. 5, 2017) [hereinafter, *Every Kid Needs a Family*].

<sup>19</sup> *Children in Foster Care*, *supra* note 17, Pg. 58 (reporting that the number of Washington children in institutions and group homes increased year over year from 2010-2014).

an average of eight to nine months in group placements, and more than a third of children remain in such settings even longer.<sup>20</sup>

Additionally, placement instability (moving children among homes and facilities) directly impacts the physical liberty of children in foster care. The federal government tracks placement stability<sup>21</sup> and Washington State recognizes the trauma of placement instability in its annual report.<sup>22</sup> The Washington Supreme Court in *MSR* expressly tied placement moves to children's physical liberty. *MSR*, 174 Wn. 2d at 19 (citing *Braam v. State*, 150 Wn. 2d 689, 699 (2003)) (recognizing that the prospective risk of harm implicates the substantive due process rights of children in foster care). Similarly, RCW 74.13.310 provides that “[p]lacement disruptions can be harmful to children by denying them consistent and nurturing support.” National policy and research recognize both the devastating emotional harm and the physical harm to children's brain development: instability can “fundamentally and permanently alter the functioning of key neural systems involved in learning, memory, and self-regulation and the complex networks of neuronal connectivity among these systems.”<sup>23</sup>

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<sup>20</sup> *Every Kid Needs a Family*, *supra* note 18 (citing federal data).

<sup>21</sup> *Every Kid Needs a Family*, *supra* note 18.

<sup>22</sup> *2015 Annual Report of Child Welfare System*, *supra* note 16.

<sup>23</sup> Fisher, P. A., Mannerling, A. M., Van Scoyoc, A., & Graham, A. M., *A translational neuroscience perspective on the importance of reducing placement instability among foster children*, 92(5) CHILD WELFARE 9-36 (2013). The *Braam* court noted that frequent movement may create or exacerbate existing psychological conditions, notably, reactive attachment disorder. 150 Wn.2d at 694.

A further risk to children in state custody is the escalating rate of use of psychotropic medication for youth in foster care.<sup>24</sup> National trends for medicating foster children are alarming: 37 to 52 percent of youth in foster care are subjected to psychotropic medications, compared to approximately 4 percent in the general population.<sup>25</sup>

Beyond these immediate risks to physical liberty that state foster care poses, the negative long term consequences for many children placed in foster care are grim:

According to the only national study of youth aging out of foster care, 38 percent had emotional problems, 50 percent had used illegal drugs, and 25 percent were involved with the legal system. . . . Only 48 percent of foster youth who had “aged out” of the system had graduated from high school at the time of discharge, and only 54 percent had graduated from high school two to four years after discharge. As adults, children who spent long periods of time in multiple foster care homes were more likely than other children to encounter problems such as unemployment, homelessness, and incarceration. . . .<sup>26</sup>

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<sup>24</sup> See Makie et al., *Psychotropic medication oversight for youth in foster care: A national perspective on state child welfare policy and practice guidelines*, 33 CHILDREN & YOUTH SERVS. REV. 2213, 2213 (2011).

<sup>25</sup> *Id.* at 2213 (citing variety of federal data sources). The law also permits the state to authorize evaluations of a “child’s physical or emotional condition, routine medical and dental examination and care, and all necessary emergency care” at the shelter care stage. RCW 13.34.060.

<sup>26</sup> See CHILD TRENDS DATABANK, FOSTER CARE: INDICATORS OF CHILD AND YOUTH WELL-BEING 2 (Dec. 2015), [https://www.childtrends.org/wp-content/uploads/2015/12/12\\_Foster\\_Care.pdf](https://www.childtrends.org/wp-content/uploads/2015/12/12_Foster_Care.pdf). Again, children of color and LGBTQ/TGNC youth are disproportionately represented in foster care, and disproportionately suffer negative outcomes. See, e.g., ORONDE MILLER ET AL., CENTER FOR THE STUDY OF SOCIAL POLICY, CHANGING COURSE: IMPROVING OUTCOMES FOR AFRICAN AMERICAN MALES INVOLVED WITH CHILD WELFARE SYSTEMS 4-5 (Mar. 2014), [https://www.cssp.org/publications/child-welfare/alliance/Changing-Course\\_Improving-Outcomes-for-African-American-Males-Involved-with-Child-Welfare-Systems.pdf](https://www.cssp.org/publications/child-welfare/alliance/Changing-Course_Improving-Outcomes-for-African-American-Males-Involved-with-Child-Welfare-Systems.pdf)

Each of these outcomes is strongly correlated with traumas suffered while in state care and should also be considered as part of the risks to physical liberty at stake in all dependency proceedings.

**2. Physical liberty interests are at stake with every change in the custodial circumstance of a child.**

The Washington Supreme Court has explicitly acknowledged that a child's physical liberty interest is threatened in dependency proceedings:

[T]he child in a dependency or termination proceeding may well face the loss of a physical liberty interest both because the child will be physically removed from the parent's home . . . or . . . put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another.<sup>27</sup>

Likewise, the Court of Appeals agreed that a dependency proceeding "may implicate a child's physical liberty interest."<sup>28</sup> The court erroneously concluded, however, that this interest was "insufficient to compel the appointment of counsel in every dependency proceeding."<sup>29</sup>

All children in dependency proceedings are subject to the same contextual

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(explaining that African American males in foster care are less likely to be placed with relatives and more likely to be placed in congregate care); SHANNAN WILBER, CAITLIN RYAN, & JODY MARKSAMER, CHILD WELFARE LEAGUE OF AMERICA, CWLA BEST PRACTICE GUIDELINES 5-8 (2006), <https://familyproject.sfsu.edu/sites/default/files/bestpracticeslgbtyouth.pdf> (explaining that LGBTQ/TGNC youth are often harassed and discriminated against while in foster care).

<sup>27</sup> *MSR*, 174 Wn. 2d at 16.

<sup>28</sup> Appellant's Petition for Review at 30; *In re the Dependency of S.K.-P.*, No. 94970-1, (September 7, 2017).

<sup>29</sup> *Id.*

risks to their liberty interests. Accordingly, this Court should conclude that the right to counsel attaches in all cases, regardless of their age, ability to direct counsel, outcomes, or the specific legal advocacy provided in their case.<sup>30</sup>

It is evident from jurisprudence across the United States that a change in custody implicates a child's physical and personal liberty interests. Courts have repeatedly held that children in state custody have liberty interests that must be protected during state-initiated changes to that custody.<sup>31</sup> In dependency proceedings, a child's physical liberty interest is at risk in all cases, and the Court should recognize that in this context, due process guarantees children access to counsel in all cases.

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<sup>30</sup> See Amici's argument further elaborating on this point in Section B(2)(b), *infra*. See also AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, FOSTERING JUSTICE, <https://www.youtube.com/watch?v=I-pVivPvrL4&feature=youtu.be>.

<sup>31</sup> *Taylor by and Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (the involuntary placement of a child in foster care is so analogous to a prisoner's placement in a penal institution that a child may bring a Section 1983 action for violation of her Fourteenth Amendment rights); *Schwartz v. Booker*, 702 F.3d 573, 580 (10th Cir. 2012); *Doe ex rel. Johnson v. South Carolina Dep't of Social Services*, 597 F.3d 163, 175 (4th Cir. 2010). See also *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (where the state removed a child from the custody of her parents, "it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause...than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered"); *Tamas v. Dept. of Social & Health Servs.*, 630 F.3d 833, 846 (9th Cir. 2010) (listing circuits affirming that foster children have a federal constitutional right to state protection once the state assumes custody).

**B. The *Mathews* factors also weigh in favor of the universal appointment of counsel to children in dependency proceedings.**

The U.S. Constitution supports a uniform *Mathews* analysis to all children in dependency proceedings. As all children are similarly situated, the Court should reject the Court of Appeals' conclusion that a case-by-case analysis for the appointment of counsel is constitutionally sufficient to protect the liberty interest of children in dependency proceedings. All three of the *Mathews* factors<sup>32</sup> weigh in favor of appointing counsel to children in all dependency cases.

**1. The child's private interest at stake is great.**

As set forth above, the child's interest in a dependency proceeding is substantial: the child faces the potential deprivation of physical liberty.<sup>33</sup> Further, "the child is at risk of not only losing a parent but also relationships with sibling[(s)], grandparents, aunts, uncles, and other extended family."<sup>34</sup> In dependency proceedings, the child also faces the risk of being returned by the State to an abusive or neglectful home.<sup>35</sup> Once in the State's custody, a child is subject to "placement in a wide array of different types of foster care placements, including institutional

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<sup>32</sup> The *Mathews* factors are: (1) the private interest to be affected; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in providing the additional or substitute procedural requirement. *Lassiter*, 42 U.S. at 26-27. The *Mathews* factors are weighed against the presumption that counsel is not a constitutional right where physical liberty interests are not at stake.

<sup>33</sup> *MSR*, 174 Wn.2d at 16.

<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.* at 17.

facilities where their physical liberty is greatly restricted.”<sup>36</sup> Thus, the first *Mathews* factor weighs heavily in favor of the right to counsel in dependency proceedings.

**2. Independent legal counsel is necessary to guard against the risk of erroneously depriving the child of her physical liberty interest.**

The United States Supreme Court and the Washington State Supreme Court have said that the second *Mathews* factor—risk of error—depends on the “legal and factual complexity of the situation and on the parties ability to present their cases.”<sup>37</sup> Thus, whether there is a constitutionally significant risk of the erroneous deprivation of rights may depend on whether there is “someone in the case who is able to represent the child’s interests, or whose interest aligns with the child’s.”<sup>38</sup>

In concluding *sua sponte* that the State’s interest is aligned with the child’s, the Court of Appeals failed to adequately address the issue.<sup>39</sup> While the state has an interest in protecting the child from harm,<sup>40</sup> the child has additional interests—such as maintaining family ties, remaining in her community, and remaining free from continuous disruptions and

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<sup>36</sup> *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360–61 (N.D. Ga. 2005).

<sup>37</sup> *MSR*, 174 Wn.2d at 18.

<sup>38</sup> *Id.* (citing *Lassiter*, 452 U.S. at 30).

<sup>39</sup> *See, Matter of Dependency of S.K.-P*, 401 P.3d 442, 457 (2017) .

<sup>40</sup> *Lassiter*, 452 U.S. at 19.

moves—which the State does not.<sup>41</sup> Further, despite their best intentions, child welfare agencies in many states are under court supervision as the result of lawsuits documenting extreme violations of federal and state laws in providing services to children.<sup>42</sup> State child welfare agencies are plagued with “budgetary constraints, large caseloads, public pressure, political loyalties, and bureaucratic inertia.”<sup>43</sup> Thus, a State’s ability to adequately investigate and to make decisions based on such investigation, and to adequately protect children’s safety once removed and placed into state foster care, is hampered by institutional impediments.

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<sup>41</sup> Courts have held that children have substantive and procedural due process rights to remain with their parents. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“the child and his parents share a vital interest in preventing [the] erroneous termination of their natural relationship.”) The integrity of the family unit has found protection in the due process clause of the Fourteenth Amendment, *Meyer v. Nebraska*, 262 U.S. 390, 399 43 S.Ct. 625 (1923), the equal protection clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, 541, and in the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

<sup>42</sup> Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 90 (2000) [hereinafter, Mandelbaum]; *L.J. v. Massinga*, 778 F. Supp. 253 (D. Md. 1991) (for modification of consent decree); *LaShawn v. Dixon*, 762 F. Supp. 959 (D. D.C. 1991), aff’d in part *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), cert. denied 510 U.S. 1044 (1994); *L.J. v. Massinga*, 699 F. Supp. 508 (D. Md. 1988) (discussing consent decree proposed by parties); S. Rep. No. 104-117, at 3 (1995), reprinted in 1996 U.S.C.C.A.N. 3490, 3492; see also Emily Buss, *Parents’ Rights and Parents Wronged*, 57 OHIO ST. L.J. 431 at 439 (1996) (declaring that the child welfare system “plays out abysmally for children” and that children’s treatment in this system “often constitutes abuse and neglect of its own”); Tracy Weber, *Twice Abused: Inside Orange County’s Child Welfare System*, L.A. TIMES, May 5, 1998, at A1 (describing the child welfare system as “antiquated” and “struggling under the weight of too many children and too little oversight”).

<sup>43</sup> Mandelbaum, 32 LOY. U. CHI. L.J. at 57; *Connor B. ex rel. Vigurs v. Patrick*, 985 F.Supp.2d 129 (D. Mass. 2013) (“financial and administrative constraints ... pose the greatest threat to children in the Massachusetts foster care system today”); see also *M.D. v. Abbott*, 152 F.Supp.3d 684, 806-807 (S.D. Tex. 2015).

Further, dependency proceedings are complex legal processes that often involve expert medical testimony, implicate numerous federal and state laws, and require an understanding of multiple service delivery systems.<sup>44</sup> A case-by-case analysis allows room for subjective determinations that magnify the risk of erroneous fact-finding.<sup>45</sup> This risk is heightened by the nature of dependency proceedings, which have no set end date and involve numerous diverse issues affecting the child’s life, constantly changing personnel, and many hearings.<sup>46</sup>

The Washington Supreme Court recognized more than forty years ago that the “nature of the rights in question” and “the relative powers of the antagonists” in a deprivation proceeding necessitates counsel for the parent.<sup>47</sup> Despite being the subject of the proceedings, in Washington, the child is the *only* party to a dependency proceeding without an absolute right to counsel, leaving “the most vulnerable” party “powerless and voiceless” in the courtroom.<sup>48</sup> This is in spite of the Washington legislature’s recognition that counsel may play an important role in dependency proceedings—which differs from that of a guardian ad litem:

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<sup>44</sup> See Donald N. Duquette & Ann M. Haralambie, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, 166-67 (2nd ed. 2010).

<sup>45</sup> *Santosky v. Kramer*, 455 U.S. 745, 762, 102 S.Ct. 1388 (1982).

<sup>46</sup> *Kenny A.*, 356 F. Supp. 2d at 1360-61.

<sup>47</sup> *In re Myricks’ Welfare*, 85 Wn. 2d 252, 255 (1975); see also RCW 13.34.090 (codifying this requirement).

<sup>48</sup> See *In re Parentage of L.B.*, 155 Wn. 2d at 712 n.29.

attorneys ... have different skills and obligations than guardians ad litem and court appointed special advocates... [they] can provide legal counsel to a child on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care.<sup>49</sup>

While the Court of Appeals (and the *MSR* Court) reasoned that children of different ages have different needs and abilities, this does not affect whether a child is entitled to representation—nor does it affect an attorney’s duties to the client.<sup>50</sup> Under the Supreme Court’s, jurisprudence a client’s diminished capabilities weigh *in favor* of greater protection.<sup>51</sup>

The Washington Rules of Professional Conduct recognize that children,

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<sup>49</sup> LAWS OF 2010, ch. 180, § 1 (legislative findings accompanying amendment to RCW 13.34.100). Many have criticized the ambiguity of the role of the guardian ad litem as well as the lack of training, oversight, and accountability. Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002); Raven C. Lidman, Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: the Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998); Dana E. Prescott, *The Guardian Ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee?* 22 U. ARK. LITTLE ROCK L. REV. 529 (2000); Amy Mulzer and Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. Rev. 1, 36-45, 58-69 (2016).

<sup>50</sup> This situation is no different than that of a mentally handicapped adult. The Rules of Professional conduct provide that when the mental capacity of a client is diminished, the lawyer shall “maintain a normal client-lawyer relationship with the client” as far as reasonably possible); Am. Bar Ass’n, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* § A-1 (1st ed. 1996) (“ABA Standards”) (child’s attorney “provides legal services for a child” and “owes the same duties...to the child as is due an adult client.”).

<sup>51</sup> *E.g.*, *Vitek v. Jones*, 445 U.S. 480, 497-98 (1980) (five justices agreed that an inmate threatened with institutionalization needs more Due Process protection because they are less likely to understand or be able to exercise their rights); *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973) (holding that counsel is more likely to be necessary when the case is complex and when the subject is incapable of “speaking effectively for himself”); *Turner v. Rogers*, 564 U.S. 431, 449 (2011) (suggesting that Due Process requires greater protection where the case is “complex” or the other parties are likely to be represented); *Halbert v. Michigan*, 545 U.S. 605, 125 S.Ct. 2582, 2593 (2005) (suggesting that Due Process requires greater protection for individuals “who have little education, learning disabilities, and mental impairments.”).

even as young as five or six, “are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”<sup>52</sup> Likewise, “[t]he vast majority of legal scholars and authorities who have addressed this issue recommend that a lawyer should take direction from his or her child client” as long as the child is able “to engage in reasoned decision making.”<sup>53</sup> If, in fact, the child is unable or unwilling to express a preference, the attorney must still make reasoned decisions of how to represent the legal interests of the child.<sup>54</sup>

Ultimately, appointment of counsel for a child allows for better decision-making, as the court will have a complete record upon which to make a fair decision:

[Courts in dependency proceedings] remain ultimately dependent on the information presented to them. Hearing

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<sup>52</sup> RPC 1.14 cmt. 1. The comment to the ABA Standards § B-3 expressly rejects that children of certain ages are “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation.

<sup>53</sup> Donald Duquette & Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 100 (2012). Washington provides that if an attorney is appointed to represent a minor in a dependency proceeding, the attorney will represent “the child’s position.” RCW 13.34.100(7)(a).

<sup>54</sup> The ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (“*ABA Model Act*”) provides that “when a child client has diminished capacity, the child’s lawyer shall make a good faith effort to determine the child’s needs and wishes ... where a normal client-lawyer relationship is not reasonably possible to maintain, the child’s lawyer shall make a substituted judgment determination,” which is “not the same as determining the child’s best interests.” American Bar Association, *ABA Model Act*, Section 7 (d) and Cmt (2011), [http://apps.americanbar.org/litigation/committees/childrights/docs/aba\\_model\\_act\\_2011.pdf](http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf) (last visited Jan. 19, 2018); see also Restatement (Third) of the Law Governing Lawyers § 24(A)(2) (same); and see Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 Fam. L.Q. 105, 121 (2003) (same).

from a child who wants to participate in his or her court case and who has had effective counsel to understand the legal issues involved, the impact of different decisions, and the scope of possibilities is imperative to sound decision-making by a court. . . .<sup>55</sup>

As the Court of Appeals noted, while data on the specific outcome of proceedings is not a prerequisite to supporting a right to counsel to protect children in all cases, at least one study has shown that a child with an attorney at the first dependency hearing is more likely to “to reside with parents, relatives, or other caring adults they know throughout their dependencies.”<sup>56</sup> Independent legal representation for the child—whose future safety and well-being is the very subject of the proceeding—is a necessary component of due process.<sup>57</sup> Moreover, an appellate court’s review of the right-to-counsel issue is hampered by the failure to have counsel below: a child without the aid of counsel will be unable to develop an adequate factual record.<sup>58</sup>

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<sup>55</sup> *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (3d ed. 2012) at 5 (hereinafter “*First Star Report*”); see also Lucy Johnston-Walsh, et al., *Assessing the Quality of Child Advocacy in Dependency Proceedings in Pennsylvania* 17-18 (2010).

<sup>56</sup> *supra* n. 28; A.E. ZINN & J. SLOWRIVER, CHAPIN HALL CTR. FOR CHILD. AT THE U. OF CHICAGO, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY, 1 (2008), [http://www.chapinhall.org/sites/default/files/old\\_reports/428.pdf](http://www.chapinhall.org/sites/default/files/old_reports/428.pdf).

<sup>57</sup> See *Kenny A.*, 356 F. Supp. 2d at 1361 (concluding that, given the liberty interests at stake, “only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and [termination] proceedings”).

<sup>58</sup> *In re T.M.*, 131 Haw. 419, 436, 319 P.3d 338, 355 (2014) (noting without the aid of counsel, the record may not be adequately developed to determine right-to-counsel issue on appeal); *Matter of K.L.J.*, 813 P.2d 276, 282-283 (Alaska 1991) (rejecting case-by-case approach to appointment of counsel based in part on concerns about reviewability).

Scholars, academics, and organizations such as the American Bar Association join *Amici* in advocating in favor of client-directed legal counsel for children in dependency proceedings.<sup>59</sup> Likewise, at least thirty-one states and the District of Columbia provide an automatic right to legal counsel, either by statute, rule, or regulation, and that number is steadily growing.<sup>60</sup> The fact that well over half of all states mandate that independent counsel be appointed for children in dependency proceedings is relevant in considering Washington's obligations to do the same.<sup>61</sup> The second *Mathews* factor thus weighs heavily in favor of appointing counsel to all children in dependency proceedings.

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<sup>59</sup> The *ABA Model Act* unequivocally declares that "providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." Section 7 (c), Cmt (2011). Likewise, the Children's Bureau advocates for child-directed representation. *Information Memorandum, supra* n. 12, at 11.

<sup>60</sup> These include Alabama; Arkansas; Colorado; Connecticut; Georgia; Iowa; Kansas; Kentucky; Louisiana; Maryland; Massachusetts; Michigan; Mississippi; Missouri; Nebraska; New Jersey; New Mexico; New York; North Carolina; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; West Virginia; and Wyoming. The District of Columbia also requires representation for children in dependency proceedings. The Children's Bureau "strongly encourages all jurisdictions to provide legal representation to all children and youth at all stages of child welfare proceedings." *Information Memorandum, supra* n. 12, at 11.

<sup>61</sup> See *In re Gault*, 387 U.S. at 25-27 (taking notice of the prevalence of states that passed laws providing for legal representation of children in juvenile court and the significant number of organizations advocating for the same); *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (due process clause of the fourteenth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

**3. The State's interest supports a decision to appoint counsel to all children in dependency proceedings.**

As a threshold matter, the State's *parens patriae* interest cannot be used to justify standards that harm the child's interests.<sup>62</sup> While the U.S. Supreme Court has confirmed that different standards can be applied to youth, such differences are tolerated only where they protect children's well-being.<sup>63</sup> The State's secondary interest—that the decision “be made as economically as possible”—may in fact be satisfied by appointing counsel to children in dependency proceedings.<sup>64</sup> In any event, as recognized in *Lassiter*, any negative pecuniary interest is “hardly significant enough to overcome the private interests as important as those here”: children's fundamental physical liberty interests.<sup>65</sup> In sum, all three

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<sup>62</sup> The state's role as *de facto* parent is safety driven. *Tamas v. Dep't of Social & Health Servs.*, 630 F.3d 833, 843 (9th Cir. 2010); *see also Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (en banc) (“The state's action in assuming the responsibility of finding and keeping the [foster] child in a safe environment placed an obligation in the state to ensure the continuing safety of that environment.”).

<sup>63</sup> *Kent v. United States*, 383 U.S. 541, 555 (1966) (cautioning against curtailing children's rights in the name of protectiveness); *In re Gault*, 387 U.S. at 16 (rejecting argument that depriving children of due process in the courtroom was justifiable as in their best interest); *Kenny A.*, 356 F. Supp. 2d at 1361 (because “the government's overriding interest is to ensure that a child's safety and well-being are protected,” children must be represented by counsel); *Perez-Funez v. Immigration & Naturalization Serv.*, 619 F. Supp. 656, 663 (C.D. Cal. 1985) (INS's “good intentions” regarding procedure for unaccompanied minors insufficient to abrogate children's due process rights).

<sup>64</sup> *See* n. 4, *supra*.

<sup>65</sup> *See MSR*, 174 Wn. 2d at 17-18 (“for the purposes of *Mathews*, the child's liberty interest in a dependency proceeding is very different from, but at least as great as, the parent's.”).

*Mathews* factors weigh heavily in favor of the litigant—in this case—the child.

## V. CONCLUSION

*Amici* present dispositive evidence that dependency proceedings pose risks to all children's fundamental physical liberty interests, mandating a universal constitutional right to counsel in all dependency proceedings.

Date: February 13, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 13<sup>th</sup> day of February 2018, a true and correct copy of the foregoing document was filed with the Clerk of Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record as follows:

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