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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In Re the Termination of M.S.R. and T.S.R.

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AMICUS CURIAE BRIEF  
OF THE MOCKINGBIRD SOCIETY

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FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2011 SEP 26 A 11:54  
BY RONALD R. CARPENTER  
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## I. INTRODUCTION

Children in Washington's foster care system have a fundamental right to be represented by legal counsel in termination of parental rights ("TPR") proceedings. Without counsel to advocate for their express interests and wishes, these youth are left with no voice at all. They feel alienated and powerless in decisions that affect every aspect of their lives, including their family integrity and their physical and psychological well-being. Without a voice in the legal process, foster youth often feel confused, overwhelmed, and disillusioned, and they disengage from the dependency process. This withdrawal can cause lasting harm not only to the youth involved but to society as a whole. While a majority of states have already recognized the importance of youth involvement in TPR proceedings by either legislatively creating or judicially recognizing a child's right to legal representation, Washington continues to leave the appointment of counsel to the inconsistently applied discretion of trial court judges. This case presents an opportunity for this Court to correct a legacy of harm.

In this case, twin boys, M.S.R. and T.S.R., lost their relationship with their mother. For years, these boys experienced the wrenching cycle of being removed from their mother's home, placed into foster care, and then being reunited with their mother. The long and traumatic dependency

and TPR processes resulted in the permanent severance of the relationship between the boys and their mother. Throughout this life-changing legal process, the doors to the courthouse were shut to these boys. They were denied any opportunity to express their feelings, either in person or through legal counsel, as the trial court sought to shield them from the proceedings.<sup>1</sup>

M.S.R.'s and T.S.R.'s story is not unique. Each year, The Mockingbird Society ("Mockingbird") observes children who find themselves entangled in dependency proceedings in which they are powerless, voiceless, and subject to decisions made by adults who neither seek their input nor make the effort to get to know them.

This Court has already recognized that children involved in TPR proceedings have fundamental interests at stake.<sup>2</sup> To protect these interests in a way that is consistent with the federal and state constitutions,

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<sup>1</sup> See Opening Brief for Appellant at 19, *In re the Dependency of M.S.R. and T.S.R.*, No. 64736-9-1 (Wash. Ct. App. Div. 1, 2010) ("The juvenile court denied M.S.R. and T.S.R. the opportunity to testify, reasoning that there was no need for them to come to the unhappy setting of the courthouse."). If they had been permitted to express their wishes, M.S.R. and T.S.R. would have stated a desire to remain with their mother. *Id.* ("The CASA worker stipulated that the boys do not want to lose their relationship with their mother.").

<sup>2</sup> See *Moore v. Burdman*, 84 Wn.2d 408, 411, 526 P.2d 893 (1974) ("A corollary interest [to that of the parents' right to custody and control] which has perhaps not received as much attention is that of the child in having the affection and care of his parents."). See also *State v. Santos*, 104 Wn.2d 142, 147, 702 P.2d 1179 (1985) (stating that children have a fundamental interest in maintaining and establishing familial bonds, including relationships with siblings). Other courts have also recognized that children have a fundamental interest in their safety, health, and well-being, as well as physical liberty interests. See *Kenny A. ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga. 2005).

this Court must hold that children involved in TPR proceedings have a fundamental right to counsel.

## **II. IDENTITY AND INTEREST OF AMICUS**

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

## **III. STATEMENT OF THE CASE**

Amicus Mockingbird adopts Appellant Nyakat Luak's statement of the case.

## **IV. ARGUMENT**

M.S.R. and T.S.R., like many children involved in TPR proceedings, were placed into foster care long before their mother's parental rights were legally terminated. Mockingbird is a leading advocate for foster care reform in Washington and works on a daily basis with children whose life stories are strikingly similar to those of M.S.R.'s and T.S.R.'s. Because of this ongoing interaction, Mockingbird is uniquely able to inform this Court of the impacts of providing counsel to children in TPR proceedings. Mockingbird submits this brief to provide this Court with real-world context about the undeniable consequences of denying foster youth the ability to speak through a trained legal advocate. Finally, Mockingbird provides its observation, shown by empirical data to

be an incontrovertible fact, that children of color, like M.S.R. and T.S.R.,<sup>3</sup> are disproportionately represented in the foster care system. As a result, they are disproportionately disadvantaged by the lack of legal representation in TPR proceedings.

**A. Depriving Foster Youth of Legal Representation in TPR Proceedings Harms the Youth.**

**1. Denying foster youth any 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, neglect, or abandonment at the hands of a parent or caregiver.<sup>4</sup> Once they are removed from their abusive or neglectful homes, these children may then be exposed to further maltreatment, emotional neglect, and lack of adequate services when placed into Washington's foster care system.<sup>5</sup>

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<sup>3</sup> While M.S.R. and T.S.R. were born in the United States, their mother is from Sudan, Africa.

<sup>4</sup> See Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* 9 (2004) ("[O]n 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 [http://www.pewtrusts.org/our\\_work\\_report\\_detail.aspx?id=22752](http://www.pewtrusts.org/our_work_report_detail.aspx?id=22752) (last visited Sept. 13, 2011). While M.S.R. and T.S.R. were never abused or neglected by their mother, her job and medical conditions sometimes forced her to leave her children with family members and other adults who did abuse and place M.S.R. and T.S.R. in harmful situations.

<sup>5</sup> Carolyn Kubitschek, *Holding Foster Care Agencies Responsible for Abuse and Neglect*, 2005 A.B.A. Sec. Individual Rights & Resp. 32 ("Throughout our country, foster children are placed in homes and institutions where they suffer horrendous abuse and neglect, and

Through no fault of their own, foster youth have been made to feel powerless and invisible.

By denying foster youth the ability to express their interests and actively participate in TPR proceedings, Washington continues to silence these vulnerable youth and perpetuate the feelings of abuse, neglect, and powerlessness.<sup>6</sup> The State's role in victimizing foster youth is easily remedied. Providing foster youth with legal counsel empowers these children by providing them with a way to express their fears and concerns and by placing them on equal footing with the other litigants in TPR proceedings.<sup>7</sup>

**2. It is fundamental that foster youth have a voice in the TPR proceedings because they are the ones most affected by its consequences.**

The ability of foster youth to express their fears and concerns through the appointment of trusted counsel is critical in TPR proceedings because it is the youth who bear the brunt of any decision in such

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sometimes even death, at the hands of their purported protectors."), available at <http://www.abanet.org/irr/hr/winter05/fostercare.html> (last visited Sept. 11, 2011).

<sup>6</sup> Jonathan Lahn, *Writing as Remedy: The Possibilities of Court-Generated Narrative in "Personal Status Litigation,"* 34 Vt. L. Rev. 121, 145 (2009) (stating that 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) (noting that 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").

<sup>7</sup> See *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed 158 (1932) ("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.").

proceedings, it is the youth whose most fundamental and physical liberty interests are at stake.<sup>8</sup>

If the parent-child relationship is terminated, it is the child who is exposed to the foster care system. It is the child who is often bounced from one foster home to another. It is the child who is forced to live in sometimes overcrowded and unsanitary conditions.<sup>9</sup> It is the child who may suffer from abuse and neglect at the hands of substitute guardians.<sup>10</sup> It is the child who is punished or detained in contempt for contacting the estranged biological parents. It is the child—not the State, not the parents,<sup>11</sup> not the judge, and not the guardian ad litem ("GAL") or court-appointed special advocate ("CASA")—who must cope with living in a strange and often daunting world that lacks any nurturing or stability.

Mockingbird has counseled many foster children who have suffered some or all of these misfortunes. In one instance, a young boy

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<sup>8</sup> See *Kenny A.*, 356 F. Supp. 2d at 1359-60 ("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-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.").

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

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

<sup>11</sup> *Id.* (noting that 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.") (emphasis added).

was trapped in a home where he experienced continual abuse at the hands of his foster parents. At the age of 12, after years of desperately trying without success to convince social workers of his mistreatment, this child felt that the only way he could be heard was to assault a police officer and be taken into custody rather than be returned to his foster home. Despite his extreme attempts to escape mistreatment and reach out for help, the child was placed back into the foster care system where he continued to experience abuse until the day he "aged out" of foster care.

In another instance, a 15-year-old foster child was detained because of her chronic pattern of running away. Each runaway attempt resulted in a failed foster home placement, a change in schools, the loss of friends, and the loss of any semblance of a normal life. After working with this child for a short period of time, Mockingbird quickly learned that the young girl, who had been removed from the care of her mentally ill mother, was not "running away" from her foster placements but rather was "running back" to care for her biological mom, someone who at times was too paranoid and psychotic to even recognize her. Eventually, the child revealed to Mockingbird that her CASA and social worker did not approve of the visitations, and so she needed to do it "this way."

Like the children in these stories, many other Washington foster youth have been uprooted, deprived of everything that was once familiar,

and then subjected to new distress and sadness. Their stories might well have ended differently if they had been appointed a legal representative, with whom they could speak in confidence and who could advocate for their express interests. Even if the appointment of counsel would not have altered the outcomes of these cases, the ability to speak to and through legal counsel would have given these youth a voice in the legal process. Central to the right to counsel is the opportunity to be heard and participate meaningfully in important decisions.

Both the State and the parents have an 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,<sup>12</sup> is not afforded the same protection. Children deserve the right to counsel at least as much as, if not more than, any other participant in the TPR process.

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<sup>12</sup> See *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) (noting that "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) (commenting that the distinction between the parent-child and child-parent relationships does not justify constitutional protection for one but not the other) *overruled on other grounds* by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) *Kenny A.*, 356 F. Supp. 2d at 1360 (stating that 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) (asserting that "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) (maintaining that both parents and their children have cognizable substantive due process rights to family integrity).

**3. Attorneys substantially decrease the risk of erroneous decisions in TPR proceedings, thereby avoiding further harm to the child.**

In addition to serving as a critical voice and advocate for foster 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, nor is it their role to do so, and the interests of the State and the parents not only conflict with each other, but often greatly differ from those of the child.<sup>13</sup> Foster children, therefore, need a trained legal advocate to advance their express interests and 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 and further harm to the child involved.

Lack of information serves neither the State's interest in finding a safe environment for the child nor the child's interest of preserving family integrity or protecting physical liberty. When deprived of pertinent facts,

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<sup>13</sup> 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. And the parents' interests usually diverge from those of their children when a dependency order is entered. *Id.* at 1358.

judges are likely to be "ill informed or even tragically mistaken."<sup>14</sup> If mistaken, the judge's decision can have traumatic, irreversible, and life-long impacts on the child.<sup>15</sup> 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."<sup>16</sup> 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. In fact, 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, such as the child's express interests, perspective, and legal rights. This Court should therefore find that foster youth are entitled to counsel, a safeguard that is likely to provide courts with information that may not otherwise be presented.

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<sup>14</sup> 106th Cong. (2000) (statement of Mark Hardin, Director, Child Welfare, Center on Children and the Law, A.B.A.).

<sup>15</sup> 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.").

<sup>16</sup> *Kenny A.*, 356 F. Supp. 2d at 1360.

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

**1. Legal representation reduces the risk that foster youth will become financial burdens on society.**

In weighing the interests of foster youth and the State, it is necessary to understand the financial costs associated with the maltreatment of children. Foster youth who suffer abuse or neglect are at a substantially higher risk of becoming homeless, unemployed, hospitalized, and incarcerated.<sup>17</sup> To cope with these misfortunes, Washington's citizens 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 members of society and financially dependent on the State.

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<sup>17</sup> 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) ("Children 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](http://www.dshs.wa.gov/pdf/ca/YouthAgingoutofFoster.pdf) (last visited Sept. 11, 2011).

The appointment of counsel to foster youth is one way to alleviate the societal and financial burdens that result from traumatic childhood experiences. When foster youth are deprived of a legal 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.

When children are allowed to express their interests and provided with a legal advocate to ensure that they are on equal footing with other stakeholders, Mockingbird has observed that they are more likely to accept the path that 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 the courts is not the end result but rather the extent to which the courts' decisions are made using fair procedures, such as the ability of litigants to express their views.<sup>18</sup>

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<sup>18</sup> See David B. Rottman, *What Californians Think About Their Courts*, Cal. Cts. Rev. 7 (2005), available at [http://www.courts.ca.gov/documents/CCR\\_05Fall\\_051031.pdf](http://www.courts.ca.gov/documents/CCR_05Fall_051031.pdf) (last visited Sept. 8, 2011).

Children who are allowed to voice their interests in TPR proceedings are better able to cope in a healthy way because they see themselves as having value in the process. One scholar has commented that when youth are permitted "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."<sup>19</sup>

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 giving the child the chance to have 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.

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

Legal representation is likely to generate additional revenue for Washington, thereby balancing the State's financial investment to ensure such representation. When an attorney represents a child in a TPR

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<sup>19</sup> Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Young Participation in Court Proceedings*, 6 Nev. L.J. 1302, 1307 (2006).

proceeding, he or she is more likely to achieve legal permanency, either through reunification with the parents or through adoption.<sup>20</sup> Permanent placement provides a safe and stable environment for the child, enhancing his or her overall well-being and potential for success later in life.<sup>21</sup> Studies have shown that children who are adopted are more likely to obtain steady employment and earn higher incomes.<sup>22</sup> The State benefits financially from these successes because these children will earn higher revenues and contribute more to the State's tax base.

Legal permanency also reduces government costs that are 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, adopted children typically save

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<sup>20</sup> 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 Sept. 11, 2011).

<sup>21</sup> See Taylor, *supra* note 15, at 615 (stating that "[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, (noting that "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 Sept. 8, 2011).

<sup>22</sup> 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 have lower participation in welfare programs, than those children in long-term foster care).

the government thousands of dollars in child welfare costs,<sup>23</sup> while freeing up thousands more that would have been spent on various services to aid these youth, such as special education and rehabilitative programs.<sup>24</sup>

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 for both the youth involved and all Washingtonians.

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

Although M.S.R. and T.S.R. were born in the United States, their mother is from Sudan, Africa. 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.<sup>25</sup> Washington has an interest in

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<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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 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](http://www.catalystforkids.org/KingCountyReportonRacialDisproportionality.pdf) (last visited Sept. 8, 2011). *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 overrepresented in the child welfare system

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 and inferior treatment of minority children who find themselves entangled in the judicial 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.<sup>26</sup> These characteristics include unemployment, poverty, domestic violence, incarceration, substance abuse, and mental illness.<sup>27</sup> Minority families are also more likely than non-minority families to live in communities that are plagued with high levels of unemployment, poverty, homelessness, greater needs for welfare assistance, and elevated risks of

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compared with White children), available at <http://www.wsipp.wa.gov/rptfiles/08-06-3901.pdf> (last visited Sept. 11, 2011).

<sup>26</sup> See Bartholet, *supra* note 17, at 315.

<sup>27</sup> *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 occur 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 among 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](http://www.f2f.ca.gov/res/pdf/RDDOtherRelated.pdf) (last visited Sept. 11, 2011).

crime and street violence.<sup>28</sup> Each of these factors makes minority communities more visible to the surveillance of public authorities<sup>29</sup> who, in turn, more quickly report child maltreatment or 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.<sup>30</sup> Each of these societal and systemic risk factors may influence the decisions 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, (3) place a child into foster care, (4) place a child with adoptive parents, and (5) place a child back into foster care.<sup>31</sup> Except for a child's reentry into care, studies show that race is one of the primary determinants at each of these stages.<sup>32</sup> Consequently, minority children are more likely

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<sup>28</sup> 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 <http://www.caseyfamilyservices.org/resources/pubdetail/266/> (last visited Sept. 11, 2011).

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

<sup>30</sup> *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").

<sup>31</sup> *Id.*, at 5, 9.

<sup>32</sup> *Id.* at 1, 8, 34.

to be reported as victims of maltreatment,<sup>33</sup> their cases are more likely to be accepted and designated as high risk,<sup>34</sup> they are more likely to be removed from their homes and placed into foster care,<sup>35</sup> and they are less likely to exit foster care, either through adoption or reunification with their families.<sup>36</sup> 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.

As highlighted above, 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

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<sup>33</sup> See Miller, *supra* note 25, 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 the disproportionality occurring at the point of referral. *Id.* at 8

<sup>34</sup> 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).

<sup>35</sup> *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).

<sup>36</sup> *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.

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."<sup>37</sup> The disproportionate percentage of minority children in the foster care system leaves no doubt that Washington's current practice unfairly targets children of color and not only perpetuates their marginalization but also subjects 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.

## 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."<sup>38</sup> Depriving children of counsel can have devastating consequences on the emotional and physical welfare of the children, as well as the social and financial welfare of the community. By withholding this right, Washington's most abused and

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<sup>37</sup> *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.).

<sup>38</sup> See Taylor, *supra* note 15, at 606.

vulnerable children continue to be ignored and left out of decisions that profoundly affect their lives. M.S.R.'s and T.S.R.'s experience with the legal system could have been very different had they been afforded their right to counsel. If an attorney had been appointed to represent and advocate for these young boys' express desire to remain with their mother, the court might not have terminated the parent-child relationship. At a minimum, by providing counsel the trial court would have sent a clear signal to the children that their voices have been heard and have value. This Court should join state and federal courts throughout the country in providing a legal voice to our most vulnerable population. To do so is not only fundamentally right and fair but is also consistent with the State's constitutional commitment.

DATED this 16<sup>th</sup> day of September, 2011.

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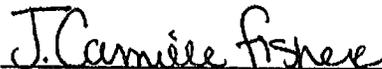
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