

No. 48299-1-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

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

**MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS
CURIAE***

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I. RELIEF REQUESTED

Pursuant to Rule of Appellate Procedure 10.6, the national organizations Children's Rights, Inc., Juvenile Law Center, National Association of Counsel for Children, Professor Michael J. Dale of the Nova Southeastern University Law Center Children and Families Clinic, First Star Institute, and Lawyers for Children respectfully request leave to participate in this appeal as *Amici* and to file the attached Amicus Curiae Brief in support of Appellant. *Amici* submit this brief on the grounds that it will assist the Court in its consideration of important issues arising in this case concerning the protection of the legal rights of children.

II. IDENTITY OF AMICI

Children's Rights Inc.

Children's Rights is a national advocacy organization dedicated to improving the lives of vulnerable children in government systems. Children's Rights uses civil rights litigation, policy expertise, and public education to create positive systems change, with a 20-year track record in the area of child welfare reform of raising accountability, protecting rights, and improving outcomes for children. Children's Rights has brought approximately 20 federal class action child welfare reform lawsuits against state and local child welfare agencies around the country, and has won significant legal victories that improved the child welfare systems for

thousands of children.

The *Kenny A.* lawsuit brought by Children's Rights resulted in a landmark decision in the Northern District of Georgia recognizing foster children's due process right to counsel under the Georgia constitution and statutes. The lawsuit also resulted in consent decrees transforming the delivery of legal representation for children in the major counties comprising metropolitan Atlanta.

Juvenile Law Center

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

National Association of Counsel for Children

Founded in 1977, the National Association of Counsel for Children ("NACC") is a 501(c)(3) non-profit child advocacy and professional

membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs that serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs addressing the legal interests of children and families in state and federal appellate courts and the Supreme Court of the United States.

Professor Michael J. Dale, Nova Southeastern University Law Center

Children and Families Clinic

Professor Michael J. Dale has been a member of the faculty at Nova Southeastern University Shepard Broad College of Law since 1985, teaching courses in family law, juvenile law, and in the family and juvenile clinic. He has been a practicing lawyer specializing in civil rights litigation for over 40 years. Professor Dale is the author of over seventy-five articles, focusing primarily on juvenile and children's law topics. He is also the author of the two volume text, *Representing the Child Client*,

published by Matthew Bender Co. He speaks regularly to professional groups on children's law and litigation topics. In 2009 Professor Dale received the Robert Oliphant Award from the National Institute for Trial Advocacy for his service to the organization focusing on programs concerning children, including trainings held in over a dozen states.

First Star Institute

First Star Institute is a non-profit corporation, organized in Maryland, that focuses on policy issues affecting abused and neglected children in the U.S. The Institute envisions a world where all children have the support they need to grow up to lead healthy, fulfilling and productive lives. The Institute actively seeks to develop and promote best practices in law, education, and policy. The Institute continues and builds on First Star, Inc.'s sixteen years of experience in providing assistance to courts through *amicus curiae* briefs and in researching and publishing reports that assess laws protecting children.

Lawyers for Children

Lawyers For Children ("LFC") is a not-for-profit legal corporation dedicated to protecting the rights of individual children in foster care and compelling system-wide child welfare reform in New York City. Since 1984, LFC has provided free legal and social work services to children in cases involving foster care, abuse, neglect, termination of parental rights,

adoption, guardianship, custody, and visitation. Currently, our attorney-social worker teams represent children and youth in more than 6,000 judicial proceedings in New York City Family Courts each year. In addition, LFC publishes guidebooks and other materials for children and legal practitioners, conducts professional training sessions, and works to reform systems affecting vulnerable children. LFC's insight into the issues raised in the instant case is borne of more than thirty years experience serving as court-appointed attorneys for children in judicial proceedings.

III. INTERESTS OF *AMICI*

Amici are unanimous in their conviction that to ensure fair and effective dependency proceedings, children should be provided counsel who can zealously advocate on their behalf, with undivided loyalty and the assurance of confidentiality in their interactions. Without the assistance of counsel, children's legal rights cannot be fully protected. As non-profit organizations advocating for the rights and interests of children across the nation, *Amici* seek to ensure enforcement of children's right to counsel where such results are at stake.

IV. FAMILIARITY WITH ISSUES

Amici are organizations dedicated to advocacy for children 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. They have reviewed the record and pleadings in this matter and are familiar with the facts and the legal issues in this case. They unite as *amici* because they are jointly committed to the issues raised by this appeal.

V. SPECIFIC ISSUES TO BE ADDRESSED

Amici support Appellant's argument that the Federal and state Constitutions mandate counsel for youth in dependency proceedings. The Brief of *Amici* focuses on the actual and substantial risks that dependency proceedings pose to children's physical liberty, and the national scholarship and trends in favor of recognizing children's constitutional rights to independent legal counsel in dependency matters. These topics address important additional information that this Court should consider in deciding this appeal.

VI. NEED FOR ADDITIONAL ARGUMENT

Amici's specific expertise and experience with national advocacy for children, the foster care system, and national child welfare scholarship will assist the Court in analyzing this case. For example, the Washington Supreme Court relied on *amici* for relevant statistics and studies in *In re Dependency of A.K.*, 162 Wn.2d 632, 635, 174 P.3d 11 (2007) (Madsen, J. concurring). *Amici* here are in the unique position of being

able to aid the Court with information pertaining to the national perspective on the issues presented.

VII. CONCLUSION

Amici request that the Court grant this motion and permit them to file the attached *Amici Curiae* Brief in support of Appellant.

Respectfully submitted this the 19th day of August 2016.

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ATTACHMENT

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**NATIONAL AMICI CURIAE BRIEF IN SUPPORT OF
S.K.-P'S RIGHT TO COUNSEL**

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I. INTRODUCTION

Every year in the United States, there are over 3 million reports of child abuse and neglect, and over half a million children are confirmed victims of maltreatment.¹ Where the state intervenes, the child may become the focus of a dependency proceeding, a legal process that will determine a child's physical custodial status, immediate living situation, and environment. Over 400,000 children will be in state custody through the foster care system at any given time every year.² Dependency proceedings directly impact children's physical liberty in the most dramatic of ways – determining where a child will sleep and who will be present in her daily life. These interests are paramount, and the risks to children while in state custody are severe: national data confirms that children removed from the home are at serious risk of further

¹ The Annie E. Casey Foundation, *Kids Count Data Center*, available at <http://datacenter.kidscount.org/data#USA/2/35/36,37,38,41,40/char/0report?loc=1&loct=1#detailed/1/any/false/869,36,868,867,133/any/12940,12955> (noting there were over 3 million investigated reports of maltreatment in 2014, with similar numbers for prior years); see also See Dept. Health and Human Servs., Children's Bureau, *Child Maltreatment 2014* at 9 (published January 2016) (reporting 679,000 confirmed maltreated children in 2013), available at https://www.acf.hhs.gov/sites/default/files/cb/cwo10_13.pdf#.

² On September 30, 2014, 415,129 children were in foster care, with numbers approximating 400,000 for the years 2010 through 2013, and 2014 is the most recent year for which complete data is available. *Kids Count*, <http://datacenter.kidscount.org/data/tables/6243-children-in-foster-care?loc=1&loct=1#detailed/1/any/false/869,36,868,867,133/any/12987>.

maltreatment, unnecessary placement in restrictive institutions, the administration of psychotropic medications, and a variety of poor long-term outcomes.

Amici urge this Court to find that all dependency proceedings impact the fundamental physical liberty interests of the children who are subject to them. These liberty interests can only be fully protected when children are represented by counsel in the courtroom. National experts, advocates, and academics in the child welfare community all support the right to counsel for children in dependency proceedings. Further, the majority of 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.³

Amici agree that the Federal and state Constitutions mandate counsel for all youth in all dependency proceedings – or at a minimum establish a presumption in favor of appointing counsel – for all the reasons S.K.-P presents. Rather than repeat S.K.-P.’s arguments, *Amici* focus on the overwhelming national evidence that dependency proceedings pose risks to all children’s fundamental physical liberty interests, and the

³ 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).

national trends that firmly support appointment of counsel in all dependency cases.

II. IDENTITY AND INTERESTS OF *AMICI*

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

III. STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case.

IV. DISCUSSION

A. Children's Physical Liberty Interests Are Always at Stake in Dependency Proceedings.

An individual's physical liberty interests are paramount in our constitutional system. It is well established that children also have physical liberty rights and an interest in avoiding the state's unnecessary intrusion on that liberty. *See In re Dependency of MSR*, 174 Wn. 2d 1, 16 (2012) (en banc) (hereinafter *MSR*); *see also Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (concluding that children's liberty interests must be protected by due process); *In re Gault*, 387 U.S. 1, 36 (1967) (holding that the potential restraint of a child's physical liberty entitles him to due process protections); *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding

that school children have a physical liberty interest in freedom from wrongful or excessive corporal punishment). Dependency proceedings, during which the state may involuntarily remove a child from her home and place her without her consent in foster care are inherently custodial proceedings that directly impact the child's physical liberty. *Ingraham*, 430 U.S. at 673-74 (providng that "the contours of this historic liberty interest ... always have been thought to encompass freedom from bodily restraint and punishment"); *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").

Dependency proceedings implicate the most central questions in a child's life: "Where is home? Who takes care of me? Who are my parents, my siblings, my extended family and my classmates?" 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). Add to those profound questions, others such as: "Will I be safe while in state custody? Will I be institutionalized? Will I be administered psychotropic medications? and Will I have an advocate in court who has been trained to protect my rights?" These liberty concerns animate national child welfare policy and support the appointment of counsel.

1. National policy makers and courts recognize that children’s physical liberty interests are impacted by dependency proceedings.

Nationally, there are three primary goals for child protection: safety, permanency, and wellbeing. *See A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, U.S. Dept. Health and Human Services, Office on Child Abuse and Neglect at 9.⁴ Each of these federal priorities emphasizes the child’s wellbeing as a product of her physical environment. *Id.* In a dependency proceeding, the court may allow the state to remove a child from her home, place her in foster care, institutionalize her, or require her to be administered psychotropic medications.⁵ *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 care placements, including institutional facilities where their physical liberty is greatly restricted”); *In re W.H.*, 25 A.3d 330, 336-37, 2011 PA Super 119 (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”). Of the myriad well recognized

⁴ Available at <https://www.childwelfare.gov/pubPDFs/foundation.pdf> (last visited on August 15, 2016).

⁵ 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).

risks to children in dependency proceedings, *Amici* highlight these three – maltreatment, institutionalization, and involuntary medication – to illustrate the physical liberty interests of children in state custody.

The potential for abuse and neglect of children while in state custody in foster care is a terrible and well-documented phenomenon. The U.S. Department of Health and Human Services produces an annual report to Congress that assesses the safety and rates of maltreatment in state care – a measure that every state tracks.⁶ The most recent Report⁷ found that, while the national rates of repeated maltreatment of all children (regardless of custodial situation) declined over a three year period, the rates of confirmed maltreatment of children in foster care did not.⁸ In Washington, “[k]eeping children who are placed into out-of-home care safe is of paramount importance.” *2015 Annual Report of Child Welfare System Performance*, at 17.⁹

⁶ See Dept. Health and Human Servs., Children’s Bureau, *available at* <http://www.acf.hhs.gov/cb/research-data-technology/statistics-research/cwo> (last visited August 15, 2016). 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.*, Executive Summary, at i.

⁷ Available at https://www.acf.hhs.gov/sites/default/files/cb/cwo10_13.pdf# (last visited August 15, 2016).

⁸ *Id.* at 9.

⁹ Available at http://www.partnersforourchildren.org/sites/default/files/2015AnnualReport_POC-letter.pdf (last visited August 18, 2016).

Every year, more than fifty thousand children are taken into state care and then placed in one of the most restrictive physical settings: an institution or group home.¹⁰ 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 that might warrant placing a child outside a family.”¹¹ In Washington, hundreds of children find themselves in state institutions or group homes, and the number appears to be increasing.¹² According to the U.S. Department of Health and Human Services, which tracks state data on the use of restrictive “congregate care” in detail, children are spending an average of eight to nine months in group placements, and more than a third of children remain in such settings even longer.¹³ This is not only an immediate restriction on physical liberty, but may have serious long term

¹⁰ See Kids Count, available at <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> (reporting annual numbers of foster kids placed in state institutions or group homes).

¹¹ *Every Kid Needs a Family*, Policy Report, The Annie E. Casey Foundation (2015), at 1. Available at <http://www.aecf.org/m/resourcedoc/aecf-EveryKidNeedsAFamily-2015.pdf>

¹² Kids Count, *supra* note 7 (reporting that the number of Washington children in institutions and group homes increased year over year from 2011-2014).

¹³ *Every Kid Needs a Family*, at 7 (citing federal data).

impacts: “group placements have been shown to be developmentally harmful when used as long-term living situation.”¹⁴

A further risk to children in state custody is the escalating rate of use of psychotropic medication for youth in foster care. See *Psychotropic medication oversight for youth in foster care: A national perspective on state child welfare policy and practice guidelines*, Makie et al, CHILDREN AND YOUTH SERVICES REVIEW 33 (2011).¹⁵ “[A] pressing issue confronting the United States child welfare and child protective services system,” national trends for medicating foster children are alarming: 37 to 52% of youth in foster care are subjected to psychotropic medications, compared to approximately 4% in the general population. *Id.* at 2013 (citing variety of federal data sources).¹⁶

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

¹⁴ *Too Many Teens: Preventing Unnecessary Out-of-Home Placements*, The Annie E. Casey Foundation (2015), available at <http://www.aecf.org/resources/too-many-teens/>.

¹⁵ Journal available at www.elsevier.com/locate/childyouth.

¹⁶ 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.

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, as well as to experience early pregnancy.

See *Foster Care: Indicators on Children and Youth*, at p. 2, Child Trends DATABANK (December 2015).¹⁷ While it may be impossible to state definitively that the trauma of foster care *causes* these outcomes, they are strongly correlated with home instability and should be considered as part of the liberty risks at stake in dependencies.

The State’s argument that S.K-P.’s physical liberty interests were not threatened in *her* dependency proceeding because “the dependency proceedings did not put S.K-P. in harm’s way,” State Resp. at 24, ignores the issues that trigger the right to counsel for all children. In addition to the risks posed by every dependency proceeding, the State acknowledges that S.K-P. was *actaully* removed from her home, placed with a relative, and that she was required to participate in visitation with a parent she did not know or want to see. These are all undisputedly actual direct infringements on her physical liberty, in addition to the risks presented by a variety of poor long-term outcomes facing children in state custody

¹⁷ Available at http://www.childtrends.org/wpcontent/uploads/2014/07/12_Foster_Care.pdf.

foster care. Whether – in hindsight – S.K-P. was ultimately harmed by these actions cannot be the test for whether they impacted her physical liberty interests. *See Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (in determining whether liberty interest is present “we must look not to the ‘weight’ but to the *nature* of the interest at stake.”) (emphasis in original); *Whorton v. Bockting*, 549 U.S. 406, 419 (2007) (state must provide counsel to an indigent defendant in every felony prosecution, regardless of whether or not the defendant is ultimately incarcerated); *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). Providing counsel for all children in dependency proceeding protects against known liberty risks *before* they occur.

2. Liberty interests are at stake with every change in the custodial circumstances for a child.

The Washington Supreme Court has explicitly acknowledged that a child’s physical liberty interest is at stake in dependency proceedings, noting:

the 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.

MSR, 174 Wn.2d at 16. Likewise, as it must, the State concedes that dependency proceedings directly impact a child's liberty interests. State Resp. at 21 (“[t]he State agrees that children sometimes have liberty interests at stake in dependency proceedings.”); *see also id.* at 24 (“...the State readily concedes that the physical liberty interests of some juveniles may be threatened in some dependencies ...”); *id.* 21 n.7 (same). The State suggests, however, that “moving a child into or out of [state] custody ... is not a direct threat to the child's physical liberty interest” because as a minor, “the child will be in custody regardless.” *Id.* at 22-23. This argument is misplaced.

As a threshold matter, the State's *parens patriae* duties and the special treatment of children cannot be used to justify standards that harm their interests. While the US Supreme Court has confirmed that different standards can be applied to youth, it has also underscored that such differences are tolerated because they protect children's well-being. *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. v. Perdue*,

356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (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 Service*, 619 F. Supp. 656, 663 (C.D. Cal. 1985) (INS’ “good intentions” regarding procedure for unaccompanied minors insufficient to abrogate children’s due process rights).

Further, the argument that a change in a custodial situation does not impact an individual child’s liberty interests is belied by U.S. Supreme Court jurisprudence. In other contexts, the Court has repeatedly held that individuals in state custody have liberty interests that must be protected during state-initiated changes to that custody. *See Vitek v. Jones*, 445 U.S. 480 (1980) (the involuntary transfer of a state prisoner to a mental hospital implicates a liberty interest, and those with diminished capacity have “a greater need for assistance [of counsel] in exercising their rights”); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (providing that revocation of parole impacts liberty interests); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (same with regard to revocation of probation). *See also Minson v. Austin*, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an “atypical and significant hardship” that impacts prisoner’s liberty interests).

Like the federal prison cases, in a dependency action the state may seek to change the kind and type of custodial situation in which a child is living, and it may only do so upon proof of particular circumstances (e.g., maltreatment). This Court should recognize that a child in a dependency proceeding has at least the same liberty interests at stake as a convicted felon facing involuntary changes to the circumstances of his state custody. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir.1987) (en banc) (“[A] child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a § 1983 action for violation of fourteenth amendment.”).

B. Independent Legal Counsel Is Necessary to Help Guard Against Potential Harm and Protect Children’s Interests in Dependency Proceedings.

1. National Experts Agree That Children in Dependency Matters Require Legal Counsel.

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. 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). Accordingly, the

state relies on counsel to represent its interests, and the Washington Supreme Court recognized more than forty years ago that the “nature of the rights in question” and “the relative power of the antagonists” in a deprivation proceeding necessitates counsel for the parent. *In re Myricks’ Welfare*, 85 Wn.2d 252, 255 (1975) (en banc); *see also* RCW § 13.34.090 (codifying this requirement). Despite being the subject of the proceedings, in Washington the child is the only party to a dependency proceeding without a complete statutory right to counsel, leaving “the most vulnerable” party “powerless and voiceless” in the courtroom. *See In re Parentage of L.B.*, 155 Wn.2d at 712 n.29.

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. The ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (*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.” American Bar Association, *ABA Model Act*, Section 7 (c), Cmt (2011).¹⁸ Likewise, “[t]he vast majority of legal scholars and authorities who have

¹⁸ Available at http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf (last visited August 19, 2016).

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.” Donald Duquette with Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 100 (2012).¹⁹

In dependency proceedings, a child requires “a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.” American Bar Association, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (“ABA Standards of Practice”) (1996),²⁰ Standard A-1. A child’s participation in the legal process can also assist the child in making better and more informed decisions. *See, e.g., Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 609 (2006); *Model Act* at 7 (citing ABA Model Rule 2.1) (providing that a “lawyer should, without unduly influencing the child, advise the child by providing options

¹⁹ 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(6)(f).

²⁰Available at
<http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AbuseNeglectStandards.pdf> (last visited August 19, 2016).

and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.”).²¹

Legal representation in dependency proceedings helps ensure the integrity of the system by fostering the child’s trust and understanding of the system that is making fundamental decisions about her life. “Many commentators have described the therapeutic nature of the attorney-client relationship for children involved in the child welfare system.” Duquette and Darwall, *supra*, at 92. The child who participates in decisions involving his or her own future is more likely to embrace those decisions. *See, e.g.*, ABA Model Act, Report at 21 (“Children who are represented by a lawyer often feel the process is fairer because they had a chance to participate and to be heard. Consequently, children are more likely to accept the court’s decision because of their own involvement in the process.”); *see also* Green and Appell, *supra*, 6 NEV. L.J. at 578 (“Children need lawyers not simply to promote fair processes and

²¹ The assistance of a Guardian ad Litem (GAL) cannot substitute for legal representation by counsel. GALs serve the court by assisting in determining the best interests of the child, and “are not trained to, nor is it their role to, protect the legal rights of the child.” MSR, 174 Wn.2d at 21; *see also* RCW § 26.44.100 (“The legislature finds ... children often are not aware of their due process rights when agencies are investigating allegations of child abuse and neglect.”).

outcomes, but to promote children’s autonomy - their right and need to have a say in what happens to them in legal proceedings.”).²²

Appointment of counsel also allows for better decisionmaking, 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 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....

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). 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. 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”).

²² Article 12 of the United Nations Convention on the Rights of the Child, adopted in 1989, is in accord, stating that a child shall “be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.”

2. The Majority of States Require Independent Legal Representation For Children’s Interests to be Adequately Represented in Dependency Proceedings

The United States Supreme Court has long recognized that children need counsel to effectively navigate complex legal proceedings. *See In re Gault*, 387 U.S. at 38 n.65 (even “[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.”) (holding children have a due process right to counsel in delinquency proceedings). Likewise, at least thirty-one states and the District of Columbia provide an automatic right to legal counsel for children in dependency proceedings, either by statute, regulation, or rule, and that number is steadily growing.²³ 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. *See In re Gault*, 387 U.S. at 38-41 (taking notice of the prevalence of states that had passed laws providing for legal representation of children in juvenile court and the significant number of

²³ 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.

organizations advocating for the same). The importance of providing legal representation to children in dependency proceedings is so great that in some states the child may not waive this right. *See, e.g.*, MCL § 712A.17c(8) (In a dependency proceeding, “child shall not waive the assistance of a [court-appointed] lawyer-guardian ad litem.”). Since 2007, over 33% of the states surveyed adopted new legislation mandating counsel be appointed for abused and neglected children in dependency proceedings.²⁴ Washington’s duties to its children are identical, and the Court should consider these national trends in evaluating the constitutional issues presented in this case.

V. CONCLUSION

Amici urge the Court to hold that all dependency proceedings directly impact every child’s liberty interests and that these interests require the appointment of legal counsel in all cases.

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Respectfully submitted,
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²⁴ In the most recent edition of the First Star Report, Washington state was one of only ten states to receive a failing grade on its record of protecting a child’s right to counsel in dependency cases. *See* First Star Report at 123–24 and The Children’s Advocacy Institute.