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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re Dependency of M.C.D.P.

***AMICI CURIAE* BRIEF OF JUVENILE LAW CENTER, THE BARTON
CHILD LAW & POLICY CENTER, THE CENTER ON CHILDREN
AND FAMILIES, THE CHILDREN'S ADVOCACY INSTITUTE, THE
CHILDREN'S LAW CENTER OF CALIFORNIA, THE NATIONAL
ASSOCIATION OF COUNSEL FOR CHILDREN, THE SUPPORT
CENTER FOR CHILD ADVOCATES, THE WOMEN'S LAW
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I. INTRODUCTION

To ensure fair and effective dependency proceedings for children, 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. Without separate counsel ethically obliged to keep communications confidential, the child does not have a trusted advocate to whom all information can be provided without fear of disclosure.

The majority of states have recognized a right to legal representation for children subject to dependency proceedings. Many states have done so for decades.¹ This demonstrates that counsel is not only necessary but can be provided in a feasible and cost-effective manner. Moreover, experts, advocates and academics in the child welfare community endorse the right to counsel for children in dependency proceedings. This appeal gives Washington the opportunity to join with these jurisdictions and other advocates in recognizing that the legal rights of dependent children are only fully

¹ See, e.g. Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 445, 514 n.294 (1978) (citing Georgia, Iowa, and New York as examples of states providing for the mandatory appointment of a lawyer to represent a child in dependency proceedings in 1978).

protected when their voices are heard in the very matters that affect their most basic rights and interests: those of health, safety, and family. Such a holding also recognizes that the emotional and cognitive immaturity of children make the need for the assistance of counsel acute given the interests at stake and the complexity of the proceedings.

Amici agree with M.C.D.P.'s persuasive argument that the Federal and state Constitutions mandate counsel for youth in dependency proceedings. *See* Sections B and C in the Opening Brief of M.C.D.P., at pp. 14-48. *Amici* will not repeat those arguments. Instead, *Amici* argue that providing children a constitutional right to counsel in dependency matters is consistent with national trends and best practices, and is solidly supported by state and federal constitutional law.

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 the Statement of the Case set forth by Appellant.

IV. ARGUMENT

A. Washington State Law Fails To Guarantee a Child's Right to Independent Legal Representation in Dependency Proceedings

Under Washington's statutory scheme, children subject to dependency proceedings have no affirmative right to independent counsel. Instead, the statutory scheme makes a child's right to counsel dependent on the child's age, the opinion of a non-attorney advocate, and the court. *See* RCW 13.34.100(6)(f). The protection of a child's right to counsel in dependency matters must be unqualified if the fundamental rights of children are to be truly respected.

Pursuant to the Washington law, a court *may* appoint an attorney to a child in a dependency proceeding *only if* (1) the child requests counsel and is twelve or more years of age; (2) the non-attorney guardian ad litem ("GAL") determines that the child needs to be independently represented by counsel; or (3) the court determines that the child should be independently represented by counsel. RCW 13.34.100(6)(f); *see also* Wash. Juv. Ct. R. 9.2(c)(1).² There is also no express requirement for legal representation on appeal. *Id.* Even if a twelve-year-old child requests a

² Wash. Juv. Ct. R. 9.2(c)(1) states that "[u]pon request of a party or on the court's own initiative, the court shall appoint a lawyer for a juvenile who has no [GAL] and who is financially unable to obtain a lawyer" This requirement is inadequate to ensure the right to counsel because it permits a court to refrain from appointing an attorney if the child is represented by a non-attorney GAL or if neither the court nor a party raises the issue of attorney appointment.

court-appointed lawyer, or the GAL determines that the child needs to be independently represented by counsel, appointment of counsel for the child remains within the court's discretion. RCW 13.34.100(6)(f). As of July 2010, the Washington statute obliges courts to make an initial inquiry into whether a child age twelve or older has received notice of his or her right to request legal counsel. *See* RCW 13.34.100(6)(e)(iii). However, the court is not required to request the child's preference for an attorney until the first hearing after the child turns fifteen. *Id.* The conditional and discretionary nature of the Washington statute fails to protect children's fundamental rights, and fails to allow for their interests to be heard.

B. The Majority of States Recognize that Children in Dependency Matters Require Independent Legal Representation For Their Interests to be Adequately Protected

In the most recent edition of First Star's³ *National Report Card on Legal Representation for Abused & Neglected Children*, 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* The Children's Advocacy Institute (CAI) and First Star, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* 123–24 (3rd ed. May 10, 2012) [hereinafter *First Star*

³ First Star is a national children's rights organization that is dedicated to improving life for child victims of abuse and neglect. *See* <http://www.firststar.org/about-first-star.aspx>.

Report].

Well over one-half of all states have recognized the importance of legal rights for children who are a part of a dependency proceeding.⁴ Twenty-seven states and the District of Columbia provide an automatic right to legal representation for children in dependency proceedings, either by statute, regulation, or rule.⁵ The majority of states require that

⁴ Those states are: Alabama; Arkansas; Colorado; Connecticut; Iowa; Kentucky; Louisiana; Maryland; Massachusetts; Michigan; Mississippi; Nebraska; New Jersey; New Mexico; New York; 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.

⁵ See, e.g., ALA. CODE §§ 12-15-102(10), 12-15-304(a) (providing a mandatory right to a guardian ad litem, which is defined as a licensed attorney under section 12-15-102(10)); A.C.A. § 9-27-316(f)(1) (requiring the court to appoint an attorney ad litem “when a dependency-neglect petition is filed or when an emergency ex parte order is entered in a dependency-neglect case”); COLO. REV. STAT. ANN. §§ 19-1-103(59), 19-3-203(1) (providing for the appointment of a guardian ad litem who is qualified to practice law); CONN. GEN. STAT. ANN. § 46b-129a(2); D.C. CODE § 16-2304(b)(5) (2005) (mandating appointment of attorney guardian ad litem in all judicial proceedings involving child neglect); IOWA CODE ANN. § 232.89(2) (requiring appointment of counsel upon the filing of a petition); KAN. STAT. ANN. § 38-2205(a) (same); KY. REV. STAT. ANN. § 620.100(1)(a) (requiring appointment of counsel for full adjudicatory hearings); LA. CHILD. CODE ANN. art. 106 (requiring appointment of qualified, independent counsel); MD. CODE ANN., CTS. & JUD. PROC. § 3-813(d)(1) (requiring, unless it is not in the child’s best interests, appointing as counsel those who have contracts to do so with the state government); MASS. GEN. LAWS ANN. ch. 119, § 29 (requiring child to be informed of the right to counsel and appointing counsel for child if child cannot retain counsel); MICH. COMP. LAWS ANN. § 722.630 (appointing lawyer-guardian ad litem in all cases requiring judicial proceedings); MISS. CODE ANN. § 43-21-201, MISS. UNIF. RULES OF YOUTH CT. PRAC., Rule 13(a) (same); § 210.160(1) R.S.Mo. (same); NEB. REV. STAT. §§ 43-272(1)-(3) (“The court shall appoint an attorney as guardian ad litem. A guardian ad litem shall act as his or her own counsel and as counsel for the juvenile . . .”); N.J. STAT. ANN. § 9:6-8.23 (any minor who is the subject of an abuse or neglect proceeding must be represented by a law guardian; however, minors in dependency proceedings are not guaranteed representation on appeal, though most recent it anyway); N.M. STAT. ANN. § 32A-4-10(C) (providing for appointment of an attorney for children over the age of 14 and an attorney guardian ad litem for children 14 or younger); N.Y. CLS FAMILY CT ACT § 249(a) (mandating appointment of counsel); N.C. GEN. STAT. ANN. § 7B-601(a) (mandating the appointment of a guardian ad litem, or, if the guardian is not an attorney,

appointed counsel express the wishes and preferences of their children clients during the engagement.⁶

an attorney); OHIO REV. CODE ANN. § 2151.352 (requiring appointment of counsel at all stages of the proceedings); Okla. Stat. Tit. 10A, § 1-4-306(A)(5) (same); 42 PA. CONS. STAT. § 6311(a) (requiring appointment of an attorney guardian ad litem); R.I. GEN. LAWS § 40-11-7.1(b)(3) (mandating the same within 7 days of the filing of a dependency proceeding); S.D. CODIFIED LAWS § 26-8A-18 (requiring legal representation for child); TENN. CODE ANN. § 37-1-126(a)(1), Tenn. Rules of Juv. Proc., Rule 2 § 7 (same); TEX. FAM. CODE ANN. § 107.012 (requiring appointment of counsel before full adversarial proceeding); UTAH CODE ANN. § 78A-6-317(4), 78A-6-902(2) (requiring counsel in every case involving minor children); VT. STAT. ANN. TIT. 33, § 5112(a) (same); VA. CODE ANN. § 16.1-266(A) (same); W. VA. CODE ANN. § 49-6-2(a) (same); WYO. STAT. ANN. § 14-3-211(a).

⁶ See, e.g., CONN. GEN. STAT. ANN. § 46b-129a(2) (“[A] child shall be represented by counsel . . . [whose] primary role . . . shall be to advocate for the child”); While Georgia does not require that an attorney represent only the child's preferences, counsel must at least express the child's desires to the court, even if these desires conflict with the best interests of the child. App'x B: DeKalb County Child Advocacy Center Performance Standards for Juvenile Advocacy Representation, Performance Standard 3.1, in *Kenny A. v. Perdue*, 1:02-CV-1686-MHS (N.D.Ga. Mar. 23, 2006) (Consent Decree between Plaintiffs and DeKalb Cty., GA); IOWA CODE ANN. § 232.89(2), (4) (“[T]he court may appoint a separate guardian ad litem, if the same person cannot properly represent the legal interests of the child as legal counsel”); LA SUP. CT. R. XXXIII, Part II, Subpart II, Standard 4, #6-7 (“Counsel for a child should . . . [d]etermine the client's desires and preferences in a developmentally appropriate and culturally sensitive manner; [and] . . . [a]dvocate for the desires and expressed preferences of the child and follow the child's direction throughout the case in a developmentally appropriate and culturally sensitive manner”); MD. CODE ANN., CTS. & JUD. PROC. § 3-813(d)(1), Maryland Court Rules, Appendix: Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access 2.2 (“If a Child's Advocate Attorney determines that the child has considered judgment, the attorney advances the child's wishes and desires in the pending matter.”); MASS. GEN. LAWS ANN. ch. 119, § 29, Mass. Comm. for Pub. Counsel Services, Children and Family Law Div., *Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases*, at 1.6(b) (2005), available at http://www.publiccounsel.net/Private_Counsel_Manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civilltrial_panel_standards.pdf (“If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter.”); MINN. STAT. §§ 260C.163(3)(e) (if a child “is not represented by an attorney, the court shall determine the child's preferences regarding the proceedings, if the child is of suitable age to express a preference.”); MISS. UNIF. RULES OF YOUTH CT. PRAC., Rules 13(a), (f) (noting that the role of the child's attorney is to “represent the child's preferences”); N.J. STAT. ANN. § 9:6-8.21(d), 9:6-8.23 (any minor “must be represented by a law guardian to help protect his interests and

While the U.S. Supreme Court has not addressed the issue of whether legal representation of children is constitutionally required, many states do mandate legal representation for children when certain conditions are met.⁷ Other states have no express statutory requirements but provide

to help him express his wishes to the court”); N.Y. CT. RULES, § 7.2(d)(1)-(2) (“the attorney for the child must zealously advocate the child’s position”); OHIO JUV. R. 4(a) (“When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child.”); OKLA. STAT. tit. 10A § 1-4-306 (A)(2)(c) (“The attorney shall represent the child and any expressed interests of the child.”); 42 PA. CONS. STAT. ANN. § 6311(a), (b)(9); TENN. R. OF JUV. P. 2(7) (“In a dependency, neglect, or abuse case the guardian ad litem must . . . ensure that the child’s concerns and preferences are effectively advocated.”); TEX. FAM. CODE ANN. § 107.001(2) (attorney ad litem means “an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and undivided representation.”), § 107.004(a)(2) (attorney ad litem “shall represent the child’s expressed objectives of representation and follow the child’s expressed objectives of representation during the course of litigation”); Vt. Admin. Order No. 32, § 2 (“It is the duty of assigned counsel to represent the interests of clients to the full measure of their professional responsibility,” although the attorney may advocate for the best interests of the child instead of the child’s desired interests depending on the child’s age and decision-making capacity); W. VA. CODE ANN. § 49-6-2(a) (“Any attorney appointed pursuant to this section shall perform all duties required as an attorney licensed to practice law in the State of West Virginia.”); WIS. STAT. §§ 48.23(1g), (1m)(b)(2) (although children under age 12 may be represented by a guardian ad litem instead of counsel). Interestingly, Washington provides that *if* an attorney is appointed to represent a minor in a dependency proceeding, the attorney represents “the child’s position.” RCW 13.34.100(6)(f).

⁷ See, e.g., Alaska: The court shall appoint counsel “for a child when the court determines that the interests of justice require the appointment of an attorney to represent the child’s expressed interests.” AK CINA Rule 12(b)(3); Arizona: “In all juvenile court proceedings in which the dependency petition includes an allegation that the juvenile is abused or neglected, the court shall appoint a guardian ad litem to protect the juvenile’s best interests. This guardian may be an attorney or a court appointed special advocate.” A.R.S. § 8-221(I); California: “If a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel.” CAL. WEL. & INST. CODE §317(c); Georgia: Although Georgia’s statutes entitle a child to legal representation at all stages of the proceedings, separate counsel is only specifically required for proceedings terminating parental rights. O.C.G.A. § 15-11-98(a). Georgia case law has established that in all other proceedings, when children are placed in the custody of the Department of Human Resources and the Department is represented by counsel, such representation “also constitute[s] representation by counsel on behalf of the children.” *Williams v. Dep’t of Human Res.*,

a *de facto* right to counsel for children.⁸

The commitment of so many states to provide counsel for children in dependency proceedings stands in stark contrast to Washington's limited options for the appointment of legal representation in such cases. The fact that so many states accord children counsel is relevant in considering Washington's obligation to children. *See In re Gault*, 387 U.S. 1, 38-41 (1967) (taking notice of the prevalence of states that had passed laws providing for legal representation of children in juvenile court when this right was formally recognized and the significant number of organizations that have advocated for the same). The importance of providing legal representation to children in dependency proceedings is so

150 Ga. App. 610, 611 (1979); Illinois: Illinois law clearly provides that if there is a conflict between the child and the guardian ad litem, the court shall appoint an attorney for the minor child in order to represent the child's interests. IL ST CH 705 § 405/1-5(1); Minnesota: The court must appoint counsel for children 10 years and older, but legal representation for children under age 10 is discretionary. MINN. STAT. § 260C.163(3)(a)-(b); MINN. JUV. PROT. PROC. R 25.02; Montana: The appointment of counsel for children involved in dependency proceedings is only mandatory if a guardian ad litem is not appointed for the child. MONT. CODE ANN. § 41-3-425(2)(b); Oregon: An attorney must be appointed but only upon request. ORS § 419B.195; Wisconsin: Courts require appointment of counsel, but children younger than 12 may be represented by a guardian ad litem instead. WIS. STAT. § 48.23(1m)(b).

⁸ One example of this *de facto* representation is in Delaware. Though the appointment of attorneys for children in dependency proceedings is not mandatory, Delaware's Office of the Child Advocate provides an attorney to children whenever the child makes such a request. In practice, the child's expressed wishes are an integral part of the best interest determination. When a guardian ad litem's assessment of the child's best wishes conflict with the child's stated wishes, the attorney is required to make the child's wishes known to the Court. If the Court then concludes that a conflict exists, the practice of the Court is to appoint an attorney to advocate for the child's expressed wishes. *See* 13 DEL. C. § 2504(f); 29 DEL. C. § 9007A(b)(1), (c) (describing the appointment of counsel in dependency proceedings).

great that, in some instances, the child may be prohibited from waiving the right to counsel. *See, e.g.*, MCL § 712A.17c(7) (prohibiting waiver in dependency matters). The decades-long practice of providing children with legal representation in some states further demonstrates its importance.⁹ The importance of this right has even been affirmed for very young children.

Indeed, the number of states that guarantee legal representation for children in dependency proceedings is growing. Between 2007 and 2009, there was a 33% increase of the states adopting legislation,¹⁰ and this number has continued to grow. Despite this legislative trend, Washington has failed to correct its flawed scheme, leaving its children involved in dependency proceedings without the due process protections children in so many other jurisdictions now enjoy. The legislature's failure to act makes the need for this Court to resolve this issue of constitutional importance urgent.

⁹ In 1962, for example, the New York State Legislature authorized the state family law courts to appoint attorneys to represent children in child protective proceedings, finding that "counsel [for children] is often indispensable to a practical realization of due process." Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOUROL. REV.* 745, 752 (2006).

¹⁰ The Children's Advocacy Institute (CAI) and First Star, *A NATIONAL REPORT CARD OF LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN* (2nd ed. 2009)

C. National Experts Agree That Children in Dependency Matters Require Client-Directed Legal Counsel

National experts agree that children require legal counsel in dependency proceedings to adequately protect their rights. Organizations such as the American Bar Association, First Star, and the Children's Advocacy Institute of the University of San Diego Law School have advocated strenuously in favor of client-directed legal counsel for children in dependency proceedings. In adopting the ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, the ABA declared that “providing the child with an independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected.” ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (“Model Act”) (adopted by the ABA in August 2011), Section 7(c), Commentary, available at http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf.

In dependency proceedings, a child's attorney “means 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.” ABA Standards of Practice for Lawyers

who Represent Children in Abuse and Neglect Cases (adopted by the ABA in 1996) [hereinafter, “ABA Standards of Practice”],¹¹ Standard A-1; *see also id.*, Standard A-1, Commentary (“To ensure that the child’s independent voice is heard, the child’s attorney must advocate the child’s articulated position. Consequently, the child’s attorney owes traditional duties to the child as client consistent with” the Model Rules of Professional Conduct).

A child-directed attorney-client relationship “is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent legal advice.” *Id.* (citing to Model Act, *supra*, Section 7(c), Commentary). In performing these duties, the child’s attorney “helps to make the child’s wishes and voice heard but is not merely the child’s mouthpiece.” *Id.* Rather, the attorney “is both an advocate and a counselor for the client.” *Id.* “Without unduly influencing the child, the lawyer should advise the child by providing options 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

¹¹ The ABA Standards of Practice are available at <http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AbuseNeglectStandards.pdf>

arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.” *Id.*; Model Act, *supra*, Section 7(c), Commentary (citing to ABA Model Rule of Professional Responsibility 2.1).¹² The ABA has certainly recognized that the lawyer serves a clearly beneficial and important role to the child. Without the guidance of a lawyer, the child risks proceeding in an uninformed and reckless manner.

The child-directed attorney-client relationship has far-reaching and longstanding support. *See, e.g.*, Donald Duquette with Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 FAM. L.Q. 87, 100 (2012) (“The 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 if the child is determined to have developed the cognitive capacity to engage in reasoned decision making.”).¹³ Two significant conferences of distinguished professionals and experts also endorsed the child-directed model. The first, held in 1995 at Fordham Law School (the “Fordham

¹² *See also* ABA Standards of Practice, Standard B-4, Commentary (a lawyer has the duty to explain to a child in a “developmentally appropriate way” information that will assist the child in determining his or her position, including relevant facts, applicable law, and ramifications of various positions; a lawyer may express his or her assessment of the case, best position to take, and reasons for the recommendation).

¹³ *See also id.* at 105 (Model Act was the product of “many years of debate, development, and consensus building”).

Conference”), was attended by over 70 judges, lawyers, scholars, and other professionals.¹⁴ The Fordham Conference concluded, *inter alia*, that “the lawyer must let the child determine the goals of the representation.” Bruce Green and Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L.REV. 1281, 1295 (1996).¹⁵

The second conference, convened in 2006 at the William S. Boyd School of Law at the University of Nevada, Las Vegas (the “UNLV Conference”), was attended by 100 invited lawyers, advocates, professors, judges, and mental health professionals, and was intended to build on the work of the Fordham Conference. *See* Bruce Green and Annette Appell, *Representing Children in Families - Foreword*, 6 NEV. L.J. 571, 573-74 (2006).¹⁶ Finding a “strong consensus” (*Id.* at 572) in favor of the child-directed model, the UNLV Conference concluded,¹⁷ “[w]hen children are able to do so, they should be allowed to direct the representation as would

¹⁴ Among the sponsors of the Fordham Conference were seven ABA entities: Center on Children and the Law, Center for Professional Responsibility, Section of Criminal Justice, Section of Family Law, Section of Individual Rights and Responsibilities, Section of Litigation, Task Force on Children, and Steering Committee on the Unmet Legal Needs of Children. Information on each entity's work in the field of children's rights is available on the ABA website.

¹⁵ The reports produced by the Fordham Conference and related papers were published in Volume 64 (1996) of the Fordham Law Review.

¹⁶ Co-sponsors of the UNLV Conference included a number of ABA entities: Center on Children and the Law, Young Lawyers Division, Center for Professional Responsibility, Child Custody and Adoption Pro Bono Project, Section of Family Law, and Section of Litigation.

¹⁷ The reports produced by the UNLV Conference and related papers were published in Volume 6 (2006) of the Nevada Law Journal.

any other client, and in such cases, lawyers should advocate for their clients' objectives.” *Id.* at 584.¹⁸

Not only does the child-directed model best protect a child's legal rights and interests, the child's participation in the process can also assist the child in making informed decisions during the proceedings and improve decision making skills in general. *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) (helping child to formulate a position not only enhanced the child's ability to direct representation, but also helped “teach the child to advocate for him or herself when the attorney is not present.”).

Client-directed representation helps ensure the integrity of the system by fostering the child's trust and understanding of the child welfare system that is making fundamental decisions about the child's 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

¹⁸ To guide representation of very young children who are unable to direct representation, the ABA Model Act Governing the Representation of Children in Abuse and Neglect Proceedings recommends that lawyers representing these children “must truly *see* the world through the child's eyes and formulate their approach from that perspective, gathering information and gaining insight into the child's experiences to inform advocacy related to placement, services, treatment and permanency.” Model Act, commentary to Section 7(d).

involving his or her own future is more likely to embrace those decisions. *See, e.g.*, ABA Model Act, Report at 4 (“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 outcomes, but to promote children's autonomy - their right and need to have a say in what happens to them in legal proceedings.”).

Most significantly, the child's participation helps ensure that the court will make accurate and fair decisions based on a full record:

[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....

First Star Report at 5. The child's participation and voice in the proceedings increases the chances that the court will be able to discern the most relevant facts and provide a reminder that the child should be the focal point of the proceedings. This is a powerful tool for assuring accountability in the system.

D. Research on Child Development Supports a Child's Right to Counsel

Scientific research concerning child development provides further support that due process protections, including the right to counsel in dependency matters, are constitutionally required, not just because important legal interests are at stake, but also because of the special characteristics and limitations of children. The Supreme Court has consistently held that children and youth have a unique place in society that deserves an equally unique place in the law. *See Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979). The Court has repeatedly recognized that constitutional doctrines are informed by juvenile status. *Id.* at 633-639 (explaining how the Court has taken youth into account in its jurisprudence). The Court has accepted and relied upon findings that youth are categorically less mature, more impulsive, and more vulnerable to the influence of authority figures than are adults. In light of these findings, the Supreme Court required that governmental power and due process protections, including the right to counsel, be calibrated to the developmental characteristics of youth. *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398-99 (2011) (“It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason

for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis"). *See also Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010) (noting that a court's analysis of a youth's culpability is affected by the fact that youth generally lack maturity and responsibility, are vulnerable and more susceptible to peer pressure, and their characters are unformed).

As Appellant argues, children who are subject to child welfare proceedings have significant legal interests at stake that require, as a matter of due process, appointment of independent counsel. Recent research related to child development also supports the appointment of counsel as a matter of fundamental fairness for children so that they are adequately equipped to navigate and understand the system which has so much control over many aspects of their future. The Supreme Court has cited these research findings as relevant to the legal analysis, noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 130 S. Ct. at 2026.

Children are not only the subject of child welfare proceedings, they are also participants. Their voices and interests are crucial, their rights and interests are central. While under state care, youth are required to make

decisions that will have great impact on their futures, but are generally not well-equipped to make such important decisions. Not only do children lack the experiences of adults that help cultivate decision-making capacities, but children also lack the degree of brain development that would allow them to process information and consider consequences in the same fashion as adults. In addition, psychosocial factors influence adolescents' perceptions, judgment, and decision-making, and limit their capacity for autonomous choice.¹⁹ As a result, children tend to make more impulsive decisions than adults²⁰ and be less likely to perceive the long-term consequences of their decisions without guidance.²¹ These findings

¹⁹ Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325 (Thomas Grisso & Robert G. Schwartz eds., 2000); Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences in Delinquency*, 32 L. & Hum. Behav. 78, 79–80 (2008); Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 Temp. L. Rev. 1763, 1774–80 (1995) (describing the impact of psychosocial factors and social context on adolescent decision-making). Importantly, one of the factors that assists youth development of good decision making skills is the presence of a caring, supportive, and consistent adult. *Id.*

²⁰ Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. See Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764, 1774–76 (2008).

²¹ As youth mature, so do their skills in self-management, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). Research shows that adolescents are generally less aware of risks because they have less knowledge and experience than adults, and they typically discount the long-term consequences of their decisions because of a developmental difference in temporal perspective. See Elizabeth S. Scott, et al., *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 L. & Hum. Behav. 221, 222 (1995). See generally Elizabeth S. Scott, *Criminal Responsibility in Adolescence*:

are consistent with neuroscientific research, showing that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood.²²

Because children have some limitations in decision-making capacities, yet have important interests to protect, independent legal counsel is indispensable in protecting the rights and welfare of children. Young people typically lack certain cognitive and emotional capacities that are necessary to meaningfully participate in the legal system. In addition, juveniles' responses to stress, such as being removed and in court, heighten their inability to consider a range of options. *Id.*²³

Children's limited decision-making skills have a far-reaching impact in judicial proceedings where important rights are at stake. Having the assistance of counsel to more fully understand the proceedings and the consequences of decisions may be even more important for children than adults precisely because of these limitations that are characteristic of

Lessons from Developmental Psychology, in Youth on Trial: A Developmental Perspective on Juvenile Justice 304 (2000).

²² Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, 46–68 (2008).

²³ It is also important to note that a youth's involvement with dependency or delinquency court is generally precipitated by a traumatic event or events, and that the very removal from the home and placement in substitute care is traumatic. Research has shown that these youth "often show increased susceptibility to stress, an inability to regulate emotions without outside support...." Jim Casey Youth Opportunities Initiative, *The Adolescent Brain: New Research and Its Implications for Young People Transitioning from Foster Care* 1, 26 (2011).

youth. As Appellant argues, children in child welfare matters have similar interests at stake as youth in juvenile justice matters. In addition to the potential restriction on physical liberty that removal from the home and placement in the child welfare system effect, the child's interest in family integrity is also at stake. The "guiding hand" of counsel is as necessary in child welfare matters as in juvenile justice matters. *See In re Gault*, 387 U.S. 1, 36 (1967) ("The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.") Developmental research supports the right to independent counsel for children in dependency proceedings, as well as underscores its value.

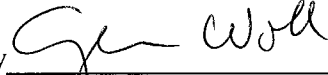
V. CONCLUSION

WHEREFORE, *Amici* urge this Court to reverse the trial court's holding and recognize a state and Federal Constitutional right to client-directed counsel for children in dependency proceedings.

Date: January 24, 2013

Respectfully submitted,

BAKER & McKENZIE LLP

By 

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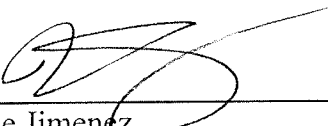
Julie Jimenez, certifies and states:

On January 24, 2013, I served a true and correct copy of the foregoing document on the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated January 24, 2013, at Palo Alto, California.


Julie Jimenez