No.102729-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE DEPENDENCY OF
Z.A., S.A.A., & S.M.A
Minor Children.

MEMORANDUM OF AMICI CURIAE ACLU OF WASHINGTON AND CIVIL RIGHTS CORPS

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I. IDENTITIES AND INTERESTS OF *AMICI*

Per RAP 10.3(e), the identities and interests of Amici are found in the accompanying motion for leave.

II. INTRODUCTION

Abbas, Duni, and their children have faced extraordinary challenges. Abbas fled from war in Somalia and sought asylum in the United States. He faced deportation proceedings, housing insecurity, and now a dependency proceeding. The challenges were constant, but Abbas did not abandon his children despite these obstacles. On the contrary, he's attempted to remain a parent through some of the most extraordinary circumstances. At the dispositional hearing, the State contested at home placement of the children with Abbas. Instead of relying on RCW 13.34.130(6)(c) which requires a showing that there is clear, cogent, and convincing evidence of manifest danger of abuse or neglect in the home, the State relied on RCW 13.34.130(6)(a) which permits the State to remove a child from their parent when a parent is "unavailable." As other Amici argue, this portion of

the statute is for parents who are absent and/or have abandoned their children. This is not the case for Abbas. Permitting the State to proceed as if a Black father is absent, when he clearly is not, is unconstitutional, perpetuates racial tropes, and disproportionately impacts marginalized families.

Amici write out of concern that the State's position would inadequately protect the right to family integrity. The right to family integrity is one of this nation's oldest and most well-articulated constitutional rights. *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S. Ct. 625, 67 L.Ed. 1042 (1923); *Zablocki v. Redhail,* 434 U.S. 374, 384, 98 S. Ct. 673, 54 L.Ed.2d 618 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S. Ct. 2094, 53 L.Ed.2d 14 (1977). Stemming from this right is another long-standing right to parent one's child. *In re Custody of Smith*, 137 Wn.2d 1, 20, 969 P.2d 21, 30–31 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 , 147 L. Ed. 2d 49 (2000). These rights belong to both the parent and the children and do not evaporate simply because there is a finding

of neglect or abuse. *See* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 556 HARV. C.R.-CIV. LIB. L. REV. 267, 282 (2021); *Santsoky v. Kramer* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State"). Permitting the State to rely on a "preponderance of evidence" standard when separating or continuing to separate a parent from their child is unconstitutional. This is particularly true when the State seeks to invoke this standard based on vague notions of "unavailability."

The critical question for disposition when parents are present is not "availability" but rather, "Is there a manifest danger to the child such that State separation is justified and no other orders can be put in place to mitigate the government intrusion into this family?" That question properly includes an

as-applied analysis of the Constitution's fundamental right to family integrity that considers the individual circumstances of the parent-child relationship.

III. ARGUMENT

United States Supreme Court caselaw clearly identifies the rights to family relationships as "fundamental" within the meaning of the Fourteenth Amendment. "[P]erhaps the oldest of the fundamental liberty interests recognized by the Court," *Troxel*, 530 U.S. at 65 (plurality opinion), the right to parent one's children is rooted in "[t]he history and culture of Western civilizations" and has long been "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). For more than a century, the Court has repeatedly reaffirmed this fundamental familial right, deeming rights to parent-child relationships "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533, 73 S. Ct. 840, 97 L. Ed. 1221 (1953), and "essential to the orderly pursuit of happiness by free men,"

Meyer, 262 U.S. at 399, and recognizing "on numerous occasions" that "the relationship between parent and child is constitutionally protected," *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed. 2d 511 (1978). In recent years, the Court has suggested that the fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment are limited to those "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772 (1997)). But the right to a parent-child relationship unquestionably falls within this category, as it was broadly embraced in the common law even before the Court began discussing substantive due process. *See also*, *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005). This long-established and enduring right to family relationships is as fundamental for children as for parents. The reciprocal fundamental right of children to maintain a

relationship with their parents has also been recognized by this Court and lower federal courts. *See, e.g., Matter of Welfare of M.B.*, 195 Wn.2d 859, 869, 467 P.3d 969, 974–75 (2020) (recognizing the child's right to their family as "enormous") ; *In re Dependency of MSR*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012), as corrected (May 8, 2012) ("[C]hildren have fundamental liberty interests at stake...in being free from unreasonable risks of harm and a right to reasonable safety; in maintaining the integrity of the family relationships, including the child's parents, siblings, and other familiar relationships[.]"); *See also, Berman v. Young*, 291 F.3d 976, 983 (7th Cir. 2002), as amended on denial of reh'g (June 26, 2022) ("Parents have a fundamental due process right to care for and raise their children, and children enjoy the corresponding familial right to be raised and nurtured by their parents."); *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc) ("[T]he constitutional interest in familial companionship and society

logically extends to protect children from unwarranted State interference with their relationships with their parents."); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("Th[e] right to the preservation of family integrity encompasses the reciprocal rights of both parent and children."). Like their parents, children's rights to their families do not evaporate simply because there is an adjudication of neglect or abuse. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 [1982] State intervention, and perhaps State removal has fundamentally altered their lives and often traumatized the child. *See* Shanta Trivedi, *The Harm of Child Removal*, 43 New York University Review of Law & Social Change 523 (2019); Ranch Vivek S. Sankaran, Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. Pa. J.L. & Soc. Change 207 (2016). Children have a right to be heard, to participate and to contest the State's intervention in their right to

their parent and family integrity. *Matter of Dependency of E.H.*, 191 Wn. 2d 872, 427 P.3d 587, 596 (2018)

The State's expansive reading of the word "available" combined with the improper reliance on a "best interests" and "preponderance of the evidence" standard abridges the fundamental right to family integrity: (A) without a compelling reason or narrowly tailored order, (B) inadequate procedural safeguards, and (C) disproportionately harms Black and other marginalized families.

A. The State's Interpretation of RCW 13.34.130(6)(a) Violates Parents and Children's Fundamental Rights to Family Integrity Without a Compelling Reason and is Not Narrowly Tailored.

Substantive due process guarantees that the State may only intervene in the family and parental relationships when there is a compelling State interest, and the intervention in that interest must be narrowly tailored. *Smith*, 137 Wn. 2d at 15, 969 P.2d 21. It is widely accepted that protecting juveniles from harm is a compelling State interest. *Id.* at 20 (holding that "preventing harm to the child" is the only compelling State interest sufficient

to overrule a parent's fundamental rights); *C.A.M.A.*, 154 Wn.2d at 66. This is precisely why RCW 13.34.130(6)(c) is the appropriate standard for a dispositional hearing when a parent is present and available because it balances the right to family integrity, with the compelling State interest of juvenile protection.

The State impermissibly and unconstitutionally argues that it can rely on its vague notion of "availability" to keep children in State custody. This definition does not articulate a compelling interest, nor does it permit the orders to be narrowly tailored.

For example, in this case, the state argues that the father was not available because, quoting the trial court: "he was 'simply not prepared to be the sole caretaker' and did not have the skills necessary to care for the children." (DCYF Br. at 8 (quoting CP 2328)). Yet no one disputed that he was present and engaged. The trial court's subjective sense that he was not

"prepared," or lacked some undefined skill, is not a narrowly tailored justification for continued out-of-home placement.

Such a standard permits family separation in situations where a child can be adequately protected in the home with court ordered supports and services and puts many more families at risk of family separation.

B. The Construction Adopted By the Court Violates Procedural Due Process.

Before the government can lawfully make decisions that impact an individual's liberty interest, such as their familial ties, it is required to meet certain constitutional minimum standards. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In other words, due process requires the State to take certain steps before it can lawfully interfere with familial bonds. The statutory construction argument offered by the State falls short of the due process protections afforded by the Constitution for two reasons. First, the legal standard for family separation would be unconstitutionally vague. Second, the State

seeks to impermissibly lower the burden of proof below the constitutional floor.

1. Vagueness

"A statute is void for vagueness if it is framed in terms so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Mays v. State*, 116 Wn. App. 864, 868-869, 68 P.3d 1114, 1117 (2003) (citations omitted). The State's proposed standard would permit family separation based on subjective views of parenting. Unlike the carefully crafted language in RCW 13.34.130(6)(c), parents, social workers, attorneys, and judicial officers would be forced to guess what "available" might mean in this context.

Consider the father in this case and other immigrant parents, parents of color, and parents who practice a minority religion – how does a court measure emotional, psychological, or psychosocial availability without violating the rights of parents and families to raise their children according to constitutionally protected, unique traditions or values? *See* e.g.,

Yoder, 406 U.S. at 224, 92 S. Ct. 1526 (recognizing that, in the context of religious practices, "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.").

In this case the trial court found the father "unavailable" because he valued the children's ability to maintain a relationship with their mother. The state also argues that a parent who "has substance abuse and mental health deficiencies that impact their ability to meet their child's needs" are also unavailable under RCW 13.34.130(6)(a). DCYF Br. at 21. In doing so, the state insinuates that Mr. Abbas currently has either a substance abuse problem and/or mental health deficiencies and is thus not suited to care for his children. This is an example of how the vagueness of the term "available" not only fails to provide clear standards for family separation, but also and fails to give sufficient notice of what conduct will result in child removal. If the mere allegation that a war refugee may struggle with alcoholism is enough to make them 'unavailable,' then the state has lawful

authority to deem an innumerable amount of people 'unavailable' to care for their children.

2. Burden of Proof

Holding the state to a strict burden of proof is one of the many minimum standards the government must meet before it may lawfully make decisions that affect an individual's liberty interests. *M.B.*, 195 Wn.2d at 867, 467 P.3d 969 (addressing procedural due process in the context of the termination of parental rights); *Addington v. Texas*, 441 U.S. at 425, 99 S. Ct. 1804 (1979) (noting, in the context of civil commitment, that "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty."). Children, too, have a heightened interest in decisions that impact where they live, especially regarding placement. *E.H.*, 191 Wn.2d at 895, 427 P.3d 587 (recognizing that questions of placement raise heightened due process concerns).

In Washington, the legislature adopted a "clear, cogent and convincing evidence" burden of proof when courts are

deciding whether to separate a family at disposition. RCW 13.34.130(6)(c). This is the same standard required by the Indian Child Welfare Act and it's Washington State equivalent. 25 U.S.C. 1912(e); RCW 13.38.130(2). The State's suggestion that it can opt for the less stringent burden of proof to remove a child from the custody of their parent upends the purpose of procedural due process protections altogether.

At this point in the case, the State does not need the benefit of a low burden of proof. The State has tremendous advantages when presenting their case at a disposition hearing. By the time of a disposition hearing the State will have had months to gather evidence about a family, to obtain records, to interview members of the family, including the children, and other collateral witnesses. If, as in this case, the child was removed at the initial shelter care hearing, they will also have had physical custody of the child for months. The State also has professional caseworkers who will testify in support of their position. Those caseworkers will have prepared a detailed report of the family, describing the

precise nature of their concerns for child safety. RCW 13.34.130; RCW 13.34.430.

On the other hand, it is the parent and child who risk the loss of the fundamental right to family integrity, who will necessary be at a disadvantage when compared with the power and resources of a state agency. Parents, like the father here, who are struggling with poverty and housing instability, among other things, have fewer resources to present their case, more obstacles to telling their story, and are less likely to be believed than professional government employees.

As such, the burden of proof must protect their fundamental constitutional right and minimize the high risk of error present in these highly subjective assessments. Only a clear, cogent and convincing evidence burden would achieve these goals.

C. Independent of Federal Jurisprudence, Washingtonians Are Entitled to Robust Substantive and Procedural Due Process Protections Through The State Constitution.

Washington courts are not beholden to federal

jurisprudence as it relates to this court's interpreting the Washington state Constitution's due process clause. *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d A. 5 1079 (1984). *See also*, *Yim v. City of Seattle*, 194 Wn.2d 682, 690, 451 P.3d 694, 698-9 (2019), as amended (Jan. 9, 2020). ("[T]his court has a duty to recognize heightened constitutional protections as a matter of independent state law[.]"). *Id*. To determine whether the preservation of fundamental rights guaranteed under Washington's Constitution compels an independent state constitutional analysis, courts look to six nonexclusive factors identified in *State v. Gunwall*, 106 Wn. 2d 54, 58, 720 P.2d 808, 811 (1986). On balance, the six factors support the premise that Article I, Section 3 of Washington's Constitution provides greater procedural and substantive due process protection for family protection than even the federal constitution.

1. The First Two Factors Do Not Support Independent Analysis

Generally, courts evaluate the initial two Gunwall factors together "because they are closely related." *State v. Jorgenson*,

179 Wn. 2d 145, 152, 312 P.3d 960, 962 (2013). Washington's due process clause provides that "[N]o person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3. In comparison, the federal Constitution's Due Process Clause pertinently holds that "[N]o state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Given that there are no significant differences between two provisions, these factors likely do not support an independent state constitutional analysis.

2. Factor Three: State Constitutional History

The third factor requires an examination of state constitutional history. Like other states, the Washington Constitution begins with a Declaration of Rights. The Washington Constitution "concludes its Declaration of Rights by reaffirming the paramount purpose- protecting individual rights." Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 676

(1992). Section 32 posits that a "frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." In doing so, framers of the Washington State Constitution sought to make clear their "commitment to the protection of individual rights" as applied to the State of Washington specifically. *Id*.

It is now commonplace to note that the "state constitutions were originally intended as the primary devices to protect individual rights, and the United States Bill of Rights was intended as a secondary layer of protection." Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 SEATTLE U. L. REV. 491 (1984). As this court previously recognized, "the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our

sovereignty. By turning to our own Constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties." *State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353, 359 (1984). As such, our state's Constitutional history supports not just an independent interpretation, but favors more robust protection of individual rights – like the individual right to family integrity.

3. Fourth Factor: Preexisting State Law

The goal of protecting the right to familial integrity has a long history in Washington. At the turn of the 20th century, this court held that "[I]t is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent." *State v. Rasch*, 24 Wn2d. 332, 335, 64 P. 531 (1901). In fact, both Washington courts have already enshrined deeper procedural protections for familial integrity than in the federal system. For instance, in 1981 the United States Supreme Court held that the federal constitution does not require court-appointed counsel for parental termination

proceedings. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 31, 101 S. Ct. 2153, 2161, 68 L. Ed. 2d 640 (1981). In contrast, this Court held that "the nature of the rights in question and the relative powers of the antagonist, necessitate the appointment of counsel" in a dependency and child neglect proceeding five years before *Lassitter*. *In re Myricks' Welfare*, 85 Wn. 2d 252, 253, 533 P.2d 841, 841 (1975), abrogated by *Lassiter,* 452 U.S. at 33. Despite the federal constitutional underpinnings of *Myricks* being abrogated by Lassiter, Washington courts "have recognized their continued validity on state constitutional grounds." *Matter of Dependency of S.K-P.*, 200 Wn. App. 86, 97, 401 P.3d 442, 449 (2017), *aff'd sub nom. Matter of Dependency of E.H.*, 191 Wn. 2d 872, 427 P.3d 587 (2018). Thus, preexisting state law points toward not only an independent state constitutional analysis, but also broader due process protections parents in contested child welfare matters.

4. Factor Five: Structural Differences Between State and Federal Constitutions

The Fifth Gunwall factor requires an examination of the differences in structures between the state and federal constitutions. *Gunwall*, 106 Wn.2d at 66, 720 P.2d 808. Accordingly, "an analysis of the differences in structure (factor 5 of the *Gunwall* criteria) supports an independent state constitutional analysis in every case." *State v. Foster*, 135 Wn. 2d 441, 458, 957 P.2d 712, 721 (1998)

5. Factor Six: Matters of Particular State Interest or Local Concern

The Sixth *Gunwall* factor supports independent analysis because questions concerning family integrity are inherently matters of state and local concern. Per the United States Supreme Court, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus,* 136 U.S. 586, 593–594, 10 S.Ct. 850, 852–853, 34 L.Ed. 500 (1890); *Rose v.*

Rose, 481 U.S. 619, 625, 107 S. Ct. 2029, 2033, 95 L. Ed. 2d 599 (1987).

Taken together, the six *Gunwall* factors support an independent state constitutional analysis. Further, these factors dictate that Article I, Section 3 is more protective than the Fourteenth Amendment. Thus, as laid out in section A, substantive due process requires that this court apply strict scrutiny to deny the state's request that a physically present parent is somehow 'unavailable.' Imprecise rules and vague standards invite bias and prejudice to influence a judges' decision making. As this Court recognized in 1899, the "fact that the children might be better educated, and better clothed, and have a more pleasant home with some one else than the parent can have no weight with the court as against the natural rights of the parent." *In re Neff*, 20 Wash. 652, 655, 56 P. 383, 384 (1899). This is especially true for families of color. As this Court recently recognized, "[D]ecisions in child welfare proceedings are often vulnerable to judgments based on cultural or class bias,' given

that poor families and families of Color are disproportionately impacted by child welfare proceedings." *Matter of Dependency of K.W.*, 199 Wn.2d 131, 155–56, 504 P.3d 207, 220 (2022) (citing *Santosky v. Kramer*, 455 U.S. 745, 763, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (plurality opinion)) (noting that, in King County, the Black population is approximately 14 percent of the overall population but made up 36 percent of the dependency caseload in 2020).

Moreover, this court should also hold that procedural due process under the Washington constitution requires the implementation of a higher burden of proof found in RCW 13.34.130(6)(c).

D. The Court of Appeals Decision Remains Unworkable Due to its Constitutional Deficiencies.

RCW 13.34.130(6)(c) provides that a child may be barred from living in the home of their parent only upon a finding "by clear, cogent, and convincing evidence" that "a manifest danger exists that the child will suffer serious abuse or neglect". In contrast, RCW 13.34.130(6)(a) allows for a child to be removed

from a parent's home if "there is no parent or guardian available to care for such child". Remarkably, Division I created a third standard by which a youth can be removed from their families. In doing so, Division One relied on an amalgamation of RCW 13.34.020, RCW 13.34.130(6)(a), RCW 13.34.130(6)(c), and *In re Dependency of W.W.S.*, 14 Wn. App. 2d 342, 469 P.3d 1190 (2020) to obfuscates what was once a clear rule.

The appellate court held that the DCYF now has the burden to "prove by clear, cogent, and convincing evidence that a parent's deficiency poses a manifest danger to the child that jeopardizes the child's rights of basic nurture, physical and mental health, and safety, before the child can be placed outside the parent's home, following a finding of dependency". *Matter of Dependency of Z.A.*, 540 P.3d 173, 178 (Wn. Ct. App. 2023). Division I impermissibly relies on the malleability of the word "available" as the source for its standard of choice. Given that the word 'available' remains undefined in RCW 13.34.030, the Court implausibly pieced together a meaning to fit its own

agenda. Such an exercise is precisely what the vagueness avoidance tenant seeks to avoid. *Kashem v. Barr*, 941 F.3d 358, 364 (9th Cir. 2019).

To avoid further confusion, this Court should explicitly hold that the proper standard to homing a child away from a parent is RCW 13.34.130(6)(c).

E. The State's Position Disproportionately Harms Black Families.

This country's history of permitting, endorsing, and actively facilitating that repugnant practice of separating Black parents from BIPOC (Black, Indigenous, and people of color) children predates the own nation's founding. Although the bonds of slavery were cast mostly aside[1], the dangerous logic of family separation has become so ingrained in our country's psyche that it persists in our modern-day institutions, especially the child welfare system. Contrary to the many efforts recently undertake by the state legislature, and by this Court, the State's argument

[1] Through the Thirteenth Amendment, slavery and involuntary servitude were made unconstitutional in the United States "except as punishment for crime."

would move the needle away from repair and instead widen the net for more Black families to be separated.

The State's argument removes the constitutional protections for family integrity and places Black families at even greater risk for family separation. The Washington Department of Youth and Family Services has a documented history of treating Black and Indigenous children differently from other racial groups. Miller, Marna, *Racial Disproportionality in Washington State's Child Welfare System, Washington State Institute for Public Policy*, Document No. 08-06-3901, 7-9 (2008) (Black and Indigenous children more likely than white children to be referred to CPS; to be removed from their homes after CPS got involved in their family; and to remain in care for more than two years). As recently as last year, the Department committed to "combat the institutional and systemic racism … that result in disproportionate separation of families of color …"like the family Abbas wishes to unify. Washington State Department of Children, Youth & Families (DCYF), 2024

Annual Progress and Service Report 43 (2023)[2]. Given the state's arguments in this present controversy, that commitment appears hollow.

Many of the challenges Abbas faced stemmed from structural causes beyond his control. He fled Somalia as a refugee and when he came to this country, he struggled to find a place for himself and his family, contending with immigration systems, poverty and homelessness. Yet, at a disposition hearing the dependency court could offer – and could order the State to offer – support: assistance in finding housing, securing childcare, accessing transportation, and navigating other state systems. If the father does lack particular "skills" or if he was insufficiently "prepared," there are services he could participate in, including family preservation services, to help fill in those gaps. Family separation should not be the first, or the only, response considered.

[2] Found online as of 5-20-2024 at: https://www.dcyf.wa.gov/sites/default/files/pdf/reports/APSR-2023.pdf

Indeed, it seems clear that the State could not have met the burden to establish family separation under RCW 13.34.130(6)(c) and so needed to argue that a lesser standard applies. But that lesser standard was then used to fault Abbas for the very challenges the State should have, instead, offered to help him overcome. Allowing the Department to justify the separation of Black families because of a word as malleable as "available" is an apt illustration of how institutional and systemic racism works in our country. As Stokley Carmichael and Charles V. Hamilton initially put it in *Black Power; The Politics of Liberation in America*:

> "Racism is both overt and covert. It takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individual racism and institutional racism.... When white terrorists bomb a black church and kill five black children, that is an act of individual racism, widely deplored by most segments of society. But when in that same city--Birmingham, Alabama--five hundred black babies die each year because of the lack of proper food, shelter and medical facilities...that is a function of institutional racism."

Instead of offering Abbas support to care for his family, the state instead sought to separate them – compounding the harms of institutional racism.

Division I explicitly argued that under its reading of the word "available," a child can be housed away from their parent "for reasons that may not necessarily be considered abuse or neglect under subsection (c)." Such an argument creates a paradigm where superior court judges may surpass the narrow and explicit requirements under RCW 13.34.130(6)(c) to justify rehoming children with little constraint. The trial court in Z.A. did just that. Others will likely follow suit. The end result will likely allow for more racial disparity within Washington's family welfare system.

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IV. CONCLUSION

For the reasons stated above, Amici ask this Court to order the disclosure of the complete OPA investigations.

This document contains 4,896 words per RAP 18.17(c)(6), excluding the parts of the document exempted from the word count by RAP 18.17(c).

RESPECTFULLY SUBMITTED this 21st day of May, 2024.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of May, 2024, I caused a true and correct copy of this document to be served on all parties by electronically filing this document through the Washington State Appellate Courts Secure Portal.

Signed this 21st day of May, 2024 at Seattle, Washington.

/s/ Tori Harris
Tori Harris, Paralegal