

IN THE SUPREME COURT OF OHIO

CASE NO. 2021-1172

IN RE J.F. AND J.A.F.

On Appeal from the
Jackson County Court of Appeals,
Fourth Appellate District

Court of Appeals Case Nos.
21CA2, 21CA3

Trial Court
Case No. 2018 C 10

**BRIEF OF AMICUS CURIAE GEN JUSTICE
IN SUPPORT OF APPELLANT**

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- Washington State Center for Court Research, *Evaluation of the Washington State Dependent Child Legal Representation Program 2021*,
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STATEMENT OF INTEREST

Gen Justice works in legislatures and courtrooms nationwide to advance and protect the constitutional rights of abused, neglected, and abandoned children. Gen Justice has been instrumental in shepherding numerous reforms through state legislatures to improve child welfare systems, including landmark legislation in Arizona to guarantee independent, client-directed legal counsel for every child in foster care throughout their dependency proceedings, replacing Arizona’s system where attorneys served as guardian ad litem (GALs). And through its children’s law clinic, Gen Justice provides *pro bono* legal assistance to hundreds of children and families annually, including direct representation and legal training regarding the dependency process and the rights of children and families involved in foster care. This case is of special importance to Gen Justice, as it implicates a core mission of the organization—to strengthen children’s constitutional right to legal counsel throughout their abuse, neglect, and dependency proceedings.

STATEMENT OF THE CASE AND FACTS

Gen Justice accepts and adopts the Statement of the Case and Facts set forth in Appellant’s Merit Brief regarding the lower court proceedings. Here, Amicus lays out Ohio’s framework governing the appointment of lawyers for children who have been abused, neglected, or found dependent under Ohio Revised Code Sections 2151.03, 2151.31, or 2151.04.

By statute, in cases involving abused, neglected, and dependent children, “[a] child, the child’s parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of proceedings[.]” R.C. 2151.352. That statute continues, in relevant part, to say that “[c]ounsel must be provided for a child not represented by the child’s parents, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.”¹ *Id.* By rule in juvenile cases, “[e]very party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent.” Juv.R. 4(A). However, “[t]his rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.” *Id.* And the Rules of Superintendence state that “[a] court shall appoint a separate attorney to represent a child in abuse, neglect,

¹ This brief argues all abused, neglected, and dependent children have a Due Process right to their own lawyer. A strong argument could be made, however, that the majority, if not all, of such children are already entitled to representation under R.C. 2151.352, based on this conflict language. When, for example, a child has been abused at the hands of a parent and reunification is not in a child’s best interests, the conflict is clear. But even in cases where reunification is likely, legal conflicts arise between a parent and child. To reunify, parents must meet numerous court-ordered requirements to demonstrate their ability to safely parent. Children, on the other hand, are victims of abuse and/or neglect and require separate services to overcome their trauma, often caused by the person with whom the State is working to reunify the children. While a parent may have met the requirements necessary to reunify, children may need additional time to transition. Timeframes, services, and legal arguments will differ for parents and children in reunifying families and, per R.C. 2151.352, children should thus be appointed legal counsel.

dependency, unruly, and delinquency cases in which the wishes of the child differ from the recommendations of the guardian ad litem.” Sup.R. 48.02(D)(1). The Rules of Juvenile Procedure implement that rule by stating “[i]f a person is serving as Guardian ad litem for a child or ward, and the court finds a conflict exists between the role of the Guardian ad litem and the interest or wishes of the child of the ward, the court shall appoint counsel for the child or ward.”² Juv.R. 4(C).

Practically speaking, based on this Court’s opinions interpreting these statutes and rules, what this means is that the determination of when a child is appointed independent legal counsel in Ohio is made on a case-by-case basis. *See In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, ¶ 29 (holding that children are parties to their juvenile cases and are thus entitled to independent counsel “in certain circumstances”). However, the decision in *In re*

² There are significant differences between an attorney-GAL and client-directed counsel. *See generally* Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 Fam.Ct.Rev. 605, 617-20 (2009). For example, GALs do not owe children duties of loyalty or confidentiality. Nor are GALs required to advocate for a child’s expressed desires. And there is no duty imposed upon a GAL to advocate for a child’s legal rights. The GAL’s duty is to advise the court regarding the GAL’s subjective beliefs regarding the child’s best interests. Children who have independent legal counsel are protected by the attorney-client privilege, are owed the duty of loyalty, and can expect their legal advocate to file motions and pleadings advocating for the child’s legal and constitutional rights. Rule 4(C), Rules of Juvenile Procedure, as written, is in accord with Amicus’s assessment that attorney-GALs are not advocates with a duty to protect a child’s due process rights to be heard and to participate in their own cases. Hence the need to appoint lawyers when children’s views diverge from that of their GAL.

Williams did not lay out a specific test for determining when a child’s right to independent counsel is triggered, which is the question at issue here. See *In re J.F. and J.A.F.*, 4th Dist. Jackson, Nos. 21CA2, 21CA3, 2021-Ohio-2713, ¶ 22 (finding that a child was not entitled to independent counsel because he had not “consistently and repeatedly expressed a strong desire that differs and is otherwise inconsistent with the guardian ad litem’s recommendations”).

While Amicus agrees the standard applied by the Fourth District violated the child’s due process rights, as argued below, Amicus believes it is the case-by-case determination itself that violates due process and that the constitutions of the United States and Ohio require the appointment of counsel for children who have been abused, neglected, or determined to be dependent.

ARGUMENT

When state action threatens to deprive an individual of a constitutionally protectable right or liberty interest, then that individual—even if that individual is a child—is entitled to procedural due process.³ *In re Gault*, 387 U.S. 1, 13, 87 S.Ct.

³ The Fourteenth Amendment to the U.S. Constitution guarantees the state shall not “deprive any person of life, liberty, or property without due process of law.” And Article I, Section 16 of the Ohio Constitution states, “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” Though the constitutional texts use slightly different language, and though the state provision may have broader applicability, they provide “the same guarantee.” *In re Adoption H.N.R.*, 145 Ohio St.3d. 144, 2015-Ohio-5476, 47 N.E.3d 803, ¶ 24.

1428, 18 L.Ed.2d 527 (1967) (stating that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone” and concluding that due process requires indigent children facing incarceration be appointed legal counsel); *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 10, 399 N.E.2d 66 (1980) (acknowledging children “have substantial, protected rights in their family relationship under the due process clause” of the Ohio constitution). Children who have come into state care risk injury to protectable rights and liberty interests, such as family integrity, safety, security, and permanency. *See Santosky v. Kramer*, 455 U.S. 745, 760, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (recognizing that “the child and his parents share a vital interest in preventing erroneous termination of their natural relationship”).

When the government’s existing procedural safeguards are alleged to be inadequate the United States Supreme Court and the Ohio Supreme Court, *see Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶ 28, apply the three-factor test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to determine if the existing procedures satisfy due process or if more is necessary to ensure a fair hearing. The *Mathews* test examines (1) the private rights and liberty interests at stake, (2) the risk of an erroneous deprivation of such rights and interests through the existing procedures, and the probable value of additional or substitute safeguards, and (3) the

government's interests, including the fiscal and administrative burdens of providing heightened procedural safeguards. *Matthews*, 424 U.S. at 335, 96 S.Ct. 893, 47 L.Ed.2d 18.

Amicus's argument—that application of the *Matthews* test leads to the conclusion that due process requires all children who have been found to be abused, neglected, or dependent to be afforded independent, client-directed legal counsel—proceeds in three parts.

First, Amicus addresses the elephant in the room: *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), which applied the *Matthews* factors and concluded that indigent parents facing termination of their parental rights do not have a *per se* right to appointed counsel. It is easy to assume that because parents are not automatically entitled to legal counsel, that the same must be true for children. But when read in light of the very different rights and liberty interests children possess, and the unique concerns facing children that adults do not face, *Lassiter* actually bolsters the conclusion that due process requires the appointment of legal counsel for children.

Second, Amicus discusses the Ohio Supreme Court's interpretation of the Ohio Constitution's Due Process Clause, and its unique application of the *Matthews* factors in similar contexts and shows that the Ohio Constitution protects

children’s vital and vulnerable rights and liberty interests independent and distinct from the federal Constitution.

Finally, Amicus walks step-by-step through the *Matthews* factors and shows how they, in contrast to the decision in *Lassiter*, lead to the conclusion that all abused, neglected, and dependent children must be afforded independent, client-directed legal counsel throughout the entirety of their cases in the juvenile court.

I. The U.S. Supreme Court’s decision in *Lassiter* does not foreclose, and in fact supports, a determination that abused, neglected, and dependent children have a right to independent, client-directed legal counsel under the U.S. Constitution.

The most obvious barrier to concluding that due process requires abused, neglected, or dependent children to be appointed independent legal counsel is the U.S. Supreme Court’s decision in *Lassiter v. Department of Social Services*. In *Lassiter*, after applying the *Matthews* factors, the Court could not “say that the Constitution requires the appointment of counsel [for parents] in every parental termination proceeding.” *Lassiter*, 452 U.S. at 31, 101 S.Ct. 2153, 68 L.Ed.2d 640. Instead, the determination of whether parents need appointed counsel must “be answered in the first instance by the trial court, subject, of course, to appellate review.” *Id.* at 32. *Lassiter* also held that there was a “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty,” *id.* at 26-27, and applied this presumption against parents, whose physical liberty is not at stake in termination of parental rights cases.

If parents' constitutional right to counsel must be decided on a case-by-case basis, one might assume that a child's right to counsel must also be conditional. *Accord In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, at ¶ 29 (holding that "a child who is the subject of a juvenile court proceeding . . . is entitled to independent legal counsel *in certain circumstances*") (emphasis added).

Such an assumption would be incorrect because children possess rights and liberty interests separate and distinct from their biological parents—rights and interests that differ in both degree and kind. When these differences are considered, the best reading of *Lassiter* supports the conclusion that the *Matthews* test requires the appointment of counsel for children in juvenile court proceedings. While the full application of the *Matthews* test is reserved for Part III, *infra*, a brief consideration of how different it is for parents and children to exercise their basic due process right to be heard and to participate in their case suffices for now to demonstrate why *Lassiter* does not foreclose Amicus's argument.

In *Lassiter*, the Supreme Court held that termination proceedings are not so inherently complex, from the perspective of a parent, that lack of counsel results in a parent's inability to present their case, call or cross-examine witnesses, or object to the State's case to such a degree that it creates an undue risk of an erroneous decision. 452 U.S. at 29-30, 101 S.Ct. 2153, 68 L.Ed.2d 640. While Amicus believes this assessment is incorrect, "one need not determine that *Lassiter* was

wrongly decided to find that the risk of erroneous decisions in dependency cases is so high that due process requires providing counsel for children.” Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 Temp.Pol.&Civ.Rts.L.Rev. 663, 683 (2006). After all, unlike parents, “children cannot call witnesses, cannot cross-examine others’ witnesses—[they] cannot do *anything* that the Supreme Court seemed to think that Ms. Lassiter had been competent to do in the absence of counsel.” *Id.* (emphasis added). Children simply cannot be expected to handle their case without a lawyer. *Lassiter* held that parents might be entitled to appointed counsel in situations where the “risks of error were at their peak.” *Lassiter*, 452 U.S. at 31, 101 S.Ct. 2153, 68 L.Ed.2d 640. But *no* children are equipped to represent themselves *pro se* in *any* situation. To all children, every aspect of the case is foreign and beyond the scope of their ability to properly litigate.

Lassiter is thus no bar to the argument that due process requires all abused, neglected, and dependent children to be appointed client-directed legal counsel. In fact, as will be shown in more detail in Part III, *infra*, when the *Matthews* factors are applied to children, the most compelling conclusion is that all children do, in fact, require the help of a lawyer to advocate for their desires, rights, and liberty interests in their juvenile cases.

II. The Ohio Constitution’s Due Process Clause provides greater protection to abused, neglected, and dependent children than the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

“The Ohio Constitution is a document of independent force.” *Arnold v. Cleveland*, 67 Ohio St.3d 35, 35, 616 N.E.2d 163 (1993). This Court may therefore conclude that Ohio’s Due Process Clause provides Ohioans “greater civil liberties and protection” than the Fourteenth Amendment. *Id.* So, should this Court disagree the Fourteenth Amendment requires the appointment of counsel for abused, neglected, and dependent children in juvenile proceedings, it could still conclude Article I, Section 16 demands these children be afforded independent legal counsel. Indeed, this Court’s application of the *Matthews* factors to the Ohio Constitution’s Due Process Clause in other contexts suggests that Ohio’s Due Process Clause provides broader protection to Ohio citizens than does its federal counterpart. And while this Court has warned it must be “cautious” in giving the Ohio Constitution a broader reading “when the provision in the Ohio Constitution is akin to a provision in the U.S. Constitution that has been reasonably interpreted by the [U.S.] Supreme Court,” *State v. Gardner*, 118 Ohio St.3d 420, 2008 Ohio 2787, 889 N.E.2d 995, ¶ 76, there is no such concern here because the U.S. Supreme Court has never had occasion to address the right to counsel for children in this context.

In fact, in the most analogous case to this one, this Court did part ways with the U.S. Supreme Court by recognizing that parents do have a right to appointed counsel in termination of parental rights proceedings. *See State ex rel. Heller*, 61 Ohio St.2d 6, 13-14, 399 N.E.2d 66 (1980). *Heller* predated the U.S. Supreme Court’s decision in *Lassiter*, and relied on both the federal and State constitutions, but this Court reaffirmed *Heller* shortly after the decision in *Lassiter*, making *Heller* a clear state constitutional ruling. *See In re Baby Girl Baxter*, 17 Ohio St.3d 229, 232, 479 N.E.2d 257 (1985) (“[T]his court has held that the state must appoint counsel for indigent parents at parental termination proceedings”) (citing *Heller*).⁴

It is also significant that in *State ex rel. Cody v. Toner*, 8 Ohio St.3d 22, 24, 456 N.E.2d 813 (1983), a case decided after *Lassiter*, this Court relied on the *Mathews v. Eldridge* test to weigh due process claims but did not apply or even mention *Lassiter*’s presumption against a right to counsel where physical liberty is not at stake. *See Lassiter*, 452 U.S. at 26-27. Instead, relying solely on the interests at stake and the risk of error, this Court recognized a right to counsel for defendants in State-initiated paternity proceedings although no loss-of-physical-

⁴ *See also In re W.W.E. W.E.*, 2016-Ohio-4552, 67 N.E.3d 159, ¶ 34 (10th Dist.) (“[C]onsidering *Lassiter*’s acknowledgement of Ohio’s constitutional right pursuant to *Heller*, as well as [our] application of *Heller* post-*Lassiter*, we shall continue to apply *Heller* and find that under the Ohio Constitution a right exists for an indigent parent to be appointed counsel as of right in a permanent custody proceeding.”); *but see Liming*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, at ¶ 29 (citing *Lassiter* for the proposition that an “indigent parent’s right to counsel diminishes as his interest in personal liberty also diminishes”).

liberty interest was immediately at stake. This strongly suggests that the Ohio Constitution's Due Process Clause—and this Court's test for determining when the Clause is violated—is broader and more protective of a litigants' due process rights than is the U.S. Constitution.

This Court has called termination of parental rights “the family law equivalent of the death penalty in a criminal case.” *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). That statement is not melodrama, particularly for children: termination of the parent-child relationship ends the life the child once knew. And every child who has been found to be abused, neglected, or dependent, and thus subject to the jurisdiction of the juvenile court, faces the possible loss of the life they knew before that finding. Children need legal expertise to navigate the child welfare system if they are to protect their rights to family integrity and a legal advocate to fight for their rights to safety, security, permanency, and healing from the trauma they endured before coming into State care and the trauma they will endure over the course of their case.

For these reasons, regardless of what is or is not required by the Fourteenth Amendment, Article I, Section 16 of the Ohio Constitution should be construed to require that children involved in abuse, neglect, and dependency proceedings be afforded independent legal counsel.

III. Application of the three-factor *Matthews* test shows why Due Process requires abused, neglected, and dependent children to be appointed independent, client-directed legal counsel in all phases of the proceedings.

The three-factor *Matthews v. Eldridge* test is used to determine whether the government’s existing procedures designed to prevent the erroneous deprivation of liberty are constitutionally adequate under both the federal and Ohio Constitutions.

This Court has described the *Matthews* factors as follows:

(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of that interest through the procedures used and the probable value of additional or different procedural safeguards, and (3) the government’s interest, including the fiscal or administrative burdens of providing additional or substitute procedural requirements.

Liming, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, at ¶ 28 (citing *Matthews*, 424 U.S. at 335, 96 S.Ct. 893, 47 L.Ed.2d 18). The *Matthews* factors tip sharply in favor of appointing counsel to represent abused, neglected, and dependent children throughout the duration of their juvenile court proceedings.⁵

⁵ Indeed, lower federal and state courts have reached the conclusion that due process entitles children in foster care to independent legal counsel during certain phases of their time in state care. *See Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1359 (N.D.Ga. 2005) (“Even if there were not a statutory right to counsel for children in deprivation cases and TPR proceedings . . . such a right is guaranteed under the Due Process Clause of the Georgia Constitution[.]”); *Roe v. Conn.*, 417 F.Supp. 769, 780 (M.D.Ala. 1976) (holding that a challenged Alabama child custody procedure “violates the due process clause of the [federal] Constitution because that procedure does not provide for the appointment of independent

A. The rights and liberty interests children have at stake are of the highest magnitude. They are also distinct from the rights and interests of parents in both degree and kind.

The first *Matthews* factor examines the private interests that will be affected by state action. In *Lassiter*, the Supreme Court had no trouble finding that “the State has an urgent interest in the welfare of the child.” 452 U.S. at 27, 101 S.Ct. 2153, 68 L.Ed.2d 640. *Lassiter* also found the parent’s interests to be “commanding” and “extremely important.” *Id.* at 28, 31. Even so, children have even more interests at stake than do parents, and children are utterly helpless to protect those interests in court, which explains why all children must be afforded legal counsel in juvenile court proceedings.

An exhaustive discussion of every right and liberty interest at stake for children in these proceedings is not necessary to establish their due process right to counsel. It should be sufficient to discuss (1) their right to be heard, (2) the restrictions on their physical liberty, (3) their interests in safety and security, and (4) their interests in permanency. Amicus will also briefly discuss how children

counsel to represent a child in a neglect proceedings . . .”); *In re Jammie T.T.*, 599 N.Y.S.2d 892, 894, 191 A.D.2d 132 (1993) (holding that “[in addition to a statutory right,] [w]e are also of the view . . . that the Due Process Clauses of the Federal and State Constitutions mandate that there be *some form* of legal representation of [the child’s] interests in the proceedings on the petition,” because the child’s “liberty interest was clearly at stake”) (citations omitted)); *N.J. Div. of Youth & Fam. Servs. v. Wandell*, 155 N.J.Super 302, 306, 382 A.2d 711 (1978) (“Surely if due process required that a mature adult subjected to these proceedings requires the assistance of able counsel, no less should be required to protect the interests of a minor incapable of speaking for himself.”).

experience each of these rights and liberty interests in a manner that is qualitatively different than parents.

First, as parties to the proceedings, children have the right to be heard as much as adults do. In *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, at ¶ 23, this Court held that children are parties to their juvenile cases. As parties to the proceedings, they are entitled to the “essential” elements of due process, namely, “the right to appear and be heard.” *Ownbey v. Morgan*, 256 U.S. 94, 102, 41 S.Ct. 433, 65 L.Ed. 837 (1921).

But as the U.S. Supreme Court said in *Powell v. Alabama*, “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932). That statement could hardly be more true for abused, neglected, and dependent children. They are not able to exercise this right without counsel with an ethical duty to keep them informed about the timing and nature of hearings and to advise them of their legal rights and options.⁶ Children cannot get themselves to court. They do not receive copies of pleadings and court documents. A lot of people report to the court

⁶ One often overlooked right of any party to a legal proceeding is the right to appeal. GALs are under no obligation to explain a child’s legal rights and options after significant decisions are made affecting the child’s life, rights, and liberty interests. But a client-directed lawyer would be obligated to explain the meaning of rulings in an age-appropriate fashion and advise the child of their legal rights and options, including their right to appeal adverse decisions. *See generally* Goodgame, *Best to Be Seen and Heard: A Child’s Right to Appeal Termination of Parental Rights*, 50 Ga.L.Rev. 1269 (2016).

about the child—but those thoughts are filtered through the lens of caseworkers, agency workers, therapists, parents’ counsel, and foster parents. There is no one advocating directly for the child’s desires. And no other party to the proceedings can adequately protect the child.

A child’s position throughout the duration of their juvenile case is likely to be emotionally charged and nuanced. A child may believe that termination is in his or her best interests, but not want to completely sever the relationship. Or they may want the parent’s rights to remain intact, yet not want to go home quite yet. Or they may want to go home eventually, but only under conditions designed to afford them additional protections and visibility and that hold their parents accountable. It is virtually certain that neither the State nor the child’s parents will be able to devote the time or attention to the child’s wishes and present them fairly and accurately to the juvenile court. *See In re Adoption of J.L.*, 2001 Pa.Super 63, ¶ 9, 769 A.2d 1182 (2001) (“Implicit in this appointment of counsel is a recognition that the interests of the child may be very different than or diverge from the interests of the other parties to the proceedings.”).

Second, a child’s physical liberty is restricted the moment he or she is made a ward of the State. One of the driving factors in the *Lassiter* decision’s determination that not all parents are entitled to counsel is that parents do not face the potential loss of physical liberty as part of the juvenile case. *Lassiter*, 452 U.S.

at 26, 101 S.Ct. 2153, 68 L.Ed.2d 640. As noted in Part II, the *Lassiter* presumption against a right to counsel where physical liberty is not at stake is arguably not applicable to Article I, Section 16 of the Ohio Constitution. But regardless, children do lose their physical liberty as soon as they are made a ward of the state—even if they are initially left at home with a safety plan in place.

“[F]oster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted.” *Kenny A.*, 356 F.Supp.2d 1353, 1360-61 (N.D.Ga.2005). Indeed, in 2019, there were 2,024 Ohio children in group homes and institutions. Annie E. Casey Foundation, Kids Count Data Center, *Children in foster care by placement type in Ohio*, <https://tinyurl.com/3ttze76p> (accessed Jan. 9, 2022) (analysis of Adoption and Foster Care Analysis and Reporting System, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau).⁷

The argument that wards of the court lose their physical liberty “has power and salience not because these children are at risk of inappropriate placements in

⁷ Of course, if only children threatened with placement in restricted living conditions lost their physical liberty, the state could just provide those children with attorneys. *See, e.g., M.W. v. Davis*, 756 So. 2d 90, 109 (Fla. 2000) (holding that children in foster care facing involuntary mental health commitment to restricted living facilities have a due process right to be heard, including the right to appointed counsel). However, as explained here, all children who are wards of the State lose their physical liberty.

restricted settings, but because all children in state custody are at the whim of state officials to decide where they will live at any given moment.” Pitchal, 15 Temp.Pol.&Civ.Rts.L.Rev. at 681. In other words, children have a physical liberty interest *not* because they may end up in a highly restrictive placement, but because they may be moved to any legal placement at any time without their consent and with little to no notice. Children may, and often do, bounce from placement-to-placement, including licensed foster homes and group homes, may be cut off from relationships with friends and extended family, may be forced to change schools, and might be cut off from their church and local community. Children without an advocate in their corner are entirely at the mercy of State caseworkers, agency officials, and judges as to where they will live and how long they will live there.

Third, children have protectable liberty interests in their own safety and security. These interests are not experienced in the same manner by parents because the parent’s actions have led to the need to remove the child from an unsafe or unhealthy environment. Children also have an interest in being safe and secure while in out-of-home placements. The circumstances leading to, and the time spent in, foster care often traumatize children. Children experience injuries to their mental and emotional health, which can take its toll on their overall well-being. *See Nicholson v. Williams*, 181 F.Supp.2d 182, 185 (E.D.N.Y.2002) (noting that “even relatively short separations may hinder parent-child bonding, interfere

with a child’s ability to relate well to others, and deprive the child of the essential loving affection critical to emotional maturity”). While parents and children will both struggle with the trauma resulting from being separated, “the depth and pain of this trauma is arguably more acute, and the damage longer lasting, for the child.” Pitchal, 15 Temp.Pol.&Civ.Rts.L.Rev. at 676. Adults possess a better understanding of the proceedings and that gives them the tools to better cope with the trauma. “Their children, by contrast, suffer confusion and anxiety on top of everything else.” *Id.* at 677.

Finally, children have an interest in achieving permanency—again, an interest that parents do not share in the same way as children. When a child enters the foster care system, there is the sad reality that some of them will spend a lifetime in substitute care without a meaningful relationship with a permanent adoptive family. *See Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 837, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (recognizing that not all children whose parental ties are terminated will achieve “a stable home life through . . . adoption into a new permanent family”). In 2019, 1,127 children aged-out of the Ohio foster care system without ever finding a permanent home. Annie E. Casey Foundation, Kids Count Data Center, *Children in foster care by exit reason in Ohio*, <https://tinyurl.com/bdencyux> (accessed Jan. 9, 2022) (analysis of Adoption and Foster Care Analysis and Reporting System, U.S. Department of

Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau). There are myriad reasons why some children linger in state care and others do not. But, as explained next, the limited studies that have been done suggest that children who are represented by counsel exit the foster care system and achieve permanency faster than those who are not represented.

B. Appointing legal counsel for children will significantly mitigate the risk of erroneous deprivations of their rights and liberty interests.

The second *Matthews* factor requires this Court to examine the risks that children face of an erroneous deprivation of their rights and liberty interests, absent independent legal counsel, and the probable value that appointed counsel might lower those risks.

In *Santosky v. Kramer*, decided several years after *Lassiter*, the Supreme Court required States to prove allegations of parental unfitness by “clear and convincing evidence” because of the “risk of erroneous factfinding” by juvenile courts. 455 U.S. at 762, 102 S.Ct. 1388, 71 L.Ed.2d 599. The Supreme Court raised concerns that “[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.” *Id.* (citing *Smith*, 431 U.S. at 835, n.36, 97 S.Ct. 2094, 53 L.Ed.2d 14). The Court also owned up to the reality that because the individuals “subject to termination proceedings are often poor, uneducated, or members of

minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.” *Id.* at 763 (citation omitted). These concerns are just as true regarding other aspects of juvenile court proceedings as they are for termination proceedings, with the additional factor that children are much less able to protect their interests than are adults. Conversely, research shows that children who are represented by counsel fare better than those who are not. Children with counsel have shorter durations in state care and achieve permanency quicker, while reunification rates generally remained stable, which indicates that providing lawyers for children do not increase the likelihood that parental rights will be terminated.

The first study examined Palm Beach County’s Foster Children’s Project, which provides lawyers to children in foster care. The study found cases where the children were represented by counsel involved increase motion practice—with no increase in the proportion of denied motions, indicating that the increased motions had merit. Zinn and Peters, *Expressed-Interest Legal Representation for Children in Substitute Care: Evaluation of the Impact of Representation on Children’s Permanency Outcomes*, 53 Fam.Ct.Rev. 589, 593 (2015). The number of status checks for represented children was also found to be 49.6 percent higher for represented children. *Id.* The lawyers were found to be strong advocates for services, including services intended to ensure placement stability. *Id.* at 595. Child

lawyers even advocated for parental services. *Id.* But perhaps most meaningful of all, children represented by counsel “exit to permanency at a rate 1.59 times higher than comparison children.” *Id.* at 596. These results are due to higher rates of adoption and guardianships. *Id.* The authors noted that “where a permanency plan has been established . . . child representatives have the ability to expedite dependency cases by monitoring compliance, presenting evidence, and requesting judgment by the court.” *Id.* at 598. The study’s overall conclusion was that “providing legal representation for children under an expressed-interest model accelerates their transition to legal permanence.” *Id.* at 599.

Recently a second, similar study was released examining Washington State’s Dependent Child Legal Representation Program, which provided lawyers to children in state care in two counties. This study found “the likelihood of experiencing reunification was about 45% higher” for children represented by counsel, and there was a 30% reduction in the rate of placement moves. Washington State Center for Court Research, *Evaluation of the Washington State Dependent Child Legal Representation Program 2021*, 10, <https://tinyurl.com/2p87b9ba> (Jan. 1, 2022). Children with counsel were more likely to experience stable placements while in care and experience fewer school transitions. *Id.* at 11-12. Attorneys for children in care undertook work to prevent placement changes, advocated in court for their clients’ desired placement or placement with a relative,

and brought educational concerns to the attention of the juvenile court. *Id.* at 26. These are all activities no child could have accomplished alone. These are also activities that place the child in opposition to state actors, which demonstrates how the state, which has a broad, generalized interest in the welfare of the children in its care, does not always act in the best interests of every individual child.

While there is not extensive research and data regarding the effectiveness and impact of providing legal representation to children in foster care, the above-cited studies show without doubt that providing children with lawyers to represent their interests in their juvenile cases—cases to which the children are parties and which will have a profound impact on their lives—will, in all probability, protect children from being erroneously deprived of their rights and liberty interests. It will most certainly ensure that children can exercise their constitutional right to participate and be heard.

C. The state’s interests in appointing children legal counsel, including the state’s fiscal and administrative interests, align with the rights and liberty interests of children.

The final *Matthews* factor looks at the government’s interest, including the financial and administrative costs of providing additional procedural requirements to protect the private interests at stake in the proceedings. Here, the government’s interests and the children’s interests are closely aligned. “[T]he government’s overriding interest is to ensure that a child’s safety and well-being are protected.”

Kenny A., 356 F.Supp.2d at 1361. The government and the children also share an interest in “a correct decision.” *Lassiter*, 452 U.S. at 31, 101 S.Ct. 2153, 68 L.Ed.2d 640.

Amicus submits that the government also has an interest in judicial efficiency, including an interest in avoiding appealable errors and finality. *See In re Marriage of King*, 162 Wash.2d 378, 390, n.11, 174 P.3d 659 (2007) (rejecting a case-by-case approach to appointment of counsel in dissolution proceedings because it would be time-consuming and costly). Appointing an attorney for all children promotes judicial efficiency by (1) eliminating the need for individualized determinations in each case, (2) eliminating the uncertainty of who is responsible for requesting an attorney appointment, and (3) eliminating an appealable issue that risks reversals, remands, and delays in permanency. *See In re T.M.H.*, 1980 Okla. 92, ¶ 3, 613 P.2d 468 (1980) (finding juvenile court’s denial of appointment of counsel for child to be grounds for reversal).

The government also has an interest in providing court participants with access to justice and affording parties—including children—with the dignity to voice their own opinions, concerns, and desires. *See Pitchal*, 15 Temp.Pol.&Civ.Rts.L.Rev. at 689 (noting that while society has “an interest in preserving the dignity of the parties that come before the governmental decision maker[;] [t]his social interest is completely unrepresented by the state’s attorney,

whose client is the agency, not society”). Providing children with legal counsel is the only process to effectuate this societal interest. A child’s “views might be rejected by the court for any number of reasons, but to refuse the child the opportunity to express them, and the opportunity to be told why they have been rejected, is callous, cruel, and completely inconsistent with American values.” *Id.* at 693.

Finally, as *Lassiter* held, the government’s pecuniary interest is “relatively weak.” 452 U.S. at 31, 101 S.Ct. 2153, 68 L.Ed.2d 640; *see also Kenny A.*, 356 F.Supp.2d at 1361 (holding the government’s interest in children’s safety and well-being “far outweighs any fiscal or administrative burden that a right to appointed counsel may entail”). The Washington study discussed above found a potential cost-savings of over \$1.2 million to the state’s foster care system in the counties where children were appointed lawyers, which it considered “conservative.” Washington State Center for Court Research at 16; *see also Taylor*, 47 Fam.Ct.Rev. at 616-17 (discussing potential cost savings associated with appointing counsel for children as a result of increased and quicker transitions to permanency). But, even if appointing counsel for all children did not result in cost savings, any cost to the State would be negligible because appointment of counsel would negate the need to appoint a guardian ad litem (GAL) in every case. Considering that non-attorney GALs may, by rule, be appointed counsel,

Juv.R.4(B)(9), reducing the number of GALs could either completely offset the cost of appointed counsel or at least keep costs from rising.

The *Matthews* factors point to clear answers to the questions raised by whether due process requires abused, neglected, and dependent children to be appointed legal counsel. These children have significant rights and liberty interests at stake in the proceedings. They face a high risk of erroneous deprivation of those rights and interests. Appointed counsel can significantly reduce the risk of being deprived of their rights and liberties. And the State's interests in protecting children's rights and liberties are also high, with no outweighing fiscal or administrative concerns. Due process requires that these children be appointed independent, client-directed legal counsel to protect and advocate for their rights.

CONCLUSION

In *In re Williams*, this Court held that children are parties to termination proceedings. This Court concluded its opinion in *Williams* by saying “a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, therefore, is entitled to independent legal counsel *in certain circumstances.*” *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, 805 N.E.2d 1110, at ¶ 29 (emphasis added). But this Court declined to elaborate on what those “certain circumstances” were or adopt a test for lower courts to apply when

considering whether, in any given case, counsel should be (or should have been) appointed. For the reasons laid out herein, the Due Process Clauses of the United States and Ohio Constitutions require more than the case-by-case approach of R.C. 2151.352 as interpreted by *In re Williams*. All children in Ohio who have been adjudicated to be abused, neglected, or dependent should be appointed independent, client-directed legal counsel to represent their interests in their juvenile cases.

Respectfully submitted this 11th day of January 2022.

GEN JUSTICE

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CERTIFICATE OF SERVICE

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