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No. 99301-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

In Re Dependency of K.W., a Minor Child,

State of Washington/Department of Children, Youth, and Families,
Respondent,

v.

K.W.,
Petitioner.

MEMORANDUM OF AMICI CURIAE WDA, NAACP-SEATTLE
KING COUNTY, SMITH LAW LLC, ACLU-WA, KOREMATSU
CENTER, THE MOCKINGBIRD SOCIETY, LCYC, TREEHOUSE,
AND KING COUNTY EQUITY NOW IN SUPPORT OF CHILD-
PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Dennis Ichikawa, Commissioner
The Honorable Annette Messitt, Judge

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TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICI CURIAE 1

II. INTRODUCTION..... 1

III. ISSUES OF AMICI CURIAE..... 3

IV. ARGUMENT 4

 A. The lower court’s decision constitutes probable error and substantially alters the status quo under RAP 2.3(b)(2) and 13.5(b)(2) because it affirms the operation of anti-Black racial bias in DCYF decision-making. 4

 1. DCYF’s disregard of this Black child’s body, life, and well-being and its failure to preserve this loving Black family demonstrated probable error. 4

 2. DCYF’s failure to follow the statutory preference for placing a child with his own family demonstrated anti-Black racial bias in DCYF decision-making and probable error. 7

 3. DCYF’s reliance on meritless reasons to reject K.W.’s extended family members as caregivers demonstrated its anti-Black racial bias and probable error..... 8

V. CONCLUSION..... 10

TABLE OF AUTHORITIES

Washington State Cases

In Re Dependency of M.S.R., 174 Wn.2d 1, 20, 271 P.3d 234, 245 (2012)
 6

Statutes

RCW 13.34.065(5)(b) 8
 RCW 13.34.130 (3)..... 7
 RCW 13.34.130(1)(a)..... 7
 RCW 13.34.130(6)..... 7
 RCW 26.44.020(28)..... 10

Court Rules

GR 37 (h)(i)-(iv) 9
 RAP 13.5(b)(2) 1, 3, 4
 RAP 2.3(b)(2) 1, 3, 4

Other Authorities

Bonnie T. Zima et al., *Behavior Problems, Academic Skill Delays and School Failure among School-Aged Children in Foster Care: Their Relationship to Placement Characteristics*, 9(1) J. Child Fam. Stud. 87–103 (2000)..... 5
 Children’s Administration, Department of Social & Health Services, State of Washington, Annual Progress and Services Report 2018 at p. 26 (2017)..... 7
 Christian M. Connell et al., *Changes in Placement among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 (3) Soc. Serv. Rev. 398-418 (2006) 5, 7
 Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families*, 1 Nw. J. L. & Soc. Pol’y. 303, 304-305 (2006)..... 1
 DCYF Racial Disparity Indices Report 2018..... 1
 Holden, Vanessa M., *Slavery and America’s Legacy of Family Separation*. African American Intellectual History Society (July 25, 2018) 1, 2

https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Racial%20Disproportionality%20in%20WA%20State_1ab0b5ee-4ce0-4bc7-9454-662e99f602b5.pdf 8

<https://chronicleofsocialchange.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616> 10

<https://www.dcyf.wa.gov/practice/practice-improvement/ffpsa/prevention/disproportionality#:~:text=Children%20of%20color%20are%20represented%20disproportionately%20in%20the,and%20achieving%20good%20outcomes%20for%20all%20young%20children> 1

<https://www.dcyf.wa.gov/sites/default/files/pdf/reports/CWRacialDisparityIndices2019.pdf>)..... 9

https://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf.....8, 9

Kashyap, Monika Batra, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System.*, 46 Fordham Urb. L. J. 548 (2019) 2

Marc Winokur et al., *Systematic review of kinship care effects on safety, permanency, and well-being outcomes*, v. 28 n.1 Research on Social Work Practice 19-32 (2018)..... 6, 7

Miller, Marna. *Racial Disproportionality in Washington State's Child Welfare System*. Olympia, Washington: Washington State Institute for Public Policy, Document No. 08-06-3901 (2008)8, 9

Robert B. Hill, Ph.D., Zelma S .Smith, and Jacqueline Bailey Kidd, *Kinship Care Position Paper*, National Association of Black Social Workers (2002) 3

Testa, Mark F., *The Quality of Permanence-Lasting or Binding - Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 Va. J. Soc. Pol'y & L. 499 (2004-2005).....6, 7

The Chronicle of Social Change, *Children and Youth, Front and Center. The Nation's First Family Separation Policy* (October 9, 2018)..... 2

Vivek Sankaran. *With Child Welfare, Racism is Hiding in the Discretion*. The Chronicle of Social Change (June 21, 2020) 8, 10

Washington State Department of Children, Youth & Families (DCYF), *2019 Washington State Child Welfare Racial Disparity Indices Report* 5-10 (2019)..... 9

I. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interests of Amici are set forth in the motion for leave to file amici curiae memorandum separately filed.

II. INTRODUCTION

There are strong public interests at stake and a need for the Court's guidance on the issues presented by this case, supporting review under RAP 2.3(b)(2) and 13.5(b)(2) whether or not the case is considered moot. The racial disparity in Washington's child welfare system is longstanding¹, and this case illustrates all too well the resulting harm to Black children and their families. History confirms the harm and the urgent need for this Court's review. Forced family separation—of which the foster care system is the most recent iteration—is a relic of slavery, wherein the State used the courts to rip Black families apart and ignored their pleas of reunification.² Family separation is also a continuation of the

¹ “Children of color are represented disproportionately in the child welfare system[.] In Washington this is particularly true for American Indian/Alaska Native and African American populations (see DCYF Racial Disparity Indices Report 2018).” Quoting the DCYF website at <https://www.dcyf.wa.gov/practice/practice-improvement/ffpsa/prevention/disproportionality#:~:text=Children%20of%20color%20are%20represented%20disproportionately%20in%20the,and%20achieving%20good%20outcomes%20for%20all%20young%20children>; Disparity Indices Report with data showing the disparity for Black children at https://www.dcyf.wa.gov/sites/default/files/pdf/reports/Washington_State_DCYF_Racial_Disparity_Indices_Report_2018.pdf.

² Holden, Vanessa M., *Slavery and America's Legacy of Family Separation*. African American Intellectual History Society (July 25, 2018) (<https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/>). Cf. Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families*, 1 Nw. J. L. & Soc. Pol'y. 303, 304-305 (2006).

devastating and genocidal legacy of colonization.³ Historically, just as the missionary and settler purported to control Indigenous people to take their land, colonists (once the land was acquired) purported to control the bodies of people of African descent to extract the value of their labor, both the fruits thereof and the value of ownership of their bodies.⁴ Today, the State continues to seek to control the bodies of Black and Indigenous people and to remove their autonomy in school systems, health systems, carceral systems, and the foster care system.⁵ These systemic defects in Washington’s foster care system manifested themselves in this case when a 6-year-old Black child was traumatized by being ripped from the custody of his loving Black family and placed with white strangers, then numerous biased barriers to reunification were erected as well. These defects will be perpetuated if the lower court ruling here is allowed to stand.

Moreover, “[k]inship care is a viable component of family preservation, reunification and permanency for African American

(<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1003&context=njls>).

³ Kashyap, Monika Batra, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 Fordham Urb. L. J. 548 (2019).

⁴ The Chronicle of Social Change, Children and Youth, Front and Center. *The Nation’s First Family Separation Policy* (October 9, 2018) (<https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act>).

⁵ Holden, Vanessa M., *Slavery and America’s Legacy of Family Separation*, *supra*, (<https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/>).

children[,]”⁶ while a governmental preference for a white nuclear family as a placement for a Black child raises serious questions about racial bias. The role this played in removing K.W., in spite of both his and his biological family’s pleas for reunification, also supports review.

III. ISSUES OF AMICI CURIAE

This case raises important concerns about the preservation of families, particularly Black families, ensnared in the State’s family regulation system. The decision of the superior court constitutes “probable error” and “substantially alters the status quo,” RAP 2.3(b)(2) and 13.5(b)(2), justifying review to stop the operation of anti-Black racial bias in DCYF decision-making.

DCYF’s actions manifested impermissible anti-black bias in this case, and the lower court in effect approved that bias, when: (1) a Black child’s right to be raised in his own family and the harm of having his loving caregiving bond severed was disregarded; (2) DCYF failed to follow state law’s preference for keeping a child with his own family and its own policies and procedures regarding placement; (3) DCYF failed to preserve this loving Black family and visited devastating harm upon this

⁶ Robert B. Hill, Ph.D., Zelma S .Smith, and Jacqueline Bailey Kidd, Kinship Care Position Paper, National Association of Black Social Workers (2002). (https://cdn.ymaws.com/www.nabsw.org/resource/collection/E1582D77-E4CD-4104-996A-D42D08F9CA7D/Kinship_Care_Position_Paper_Developers_and_Conveners.pdf .)

Black child; and (4) DCYF relied on meritless criteria to reject K.W.'s extended family members as caregivers.

When the state acts against its laws, its policies, and its procedures in order to disadvantage Black caregivers and to privilege white ones, and those actions are affirmed by the court, anti-Black racial bias becomes evident; the wrongful removal of Black children⁷ from their loving Black families occurs;⁸ and Black families are destroyed.

IV. ARGUMENT

A. The lower court's decision constitutes probable error and substantially alters the status quo under RAP 2.3(b)(2) and 13.5(b)(2) because it affirms the operation of anti-Black racial bias in DCYF decision-making.

1. DCYF's disregard of this Black child's body, life, and well-being and its failure to preserve this loving Black family demonstrated probable error.

For Black children, family separation erases their opportunity to experience unconditional love as members of their own families and acceptance in their cultural communities. It undermines their opportunity to thrive in life through, in part, the development of healthy and supported racial identity. In this racist society, the development of a healthy and

⁷ References in this brief to Black child or Black children includes all children, labeled and tracked by DCYF as "Black alone" or "Black and other races."

⁸ The references to Black family, Black relatives, and Black parents or caregivers refers to the racial group of the primary caregiver.

supported racial identity is essential to a Black child's lifelong socio-emotional wellbeing. As a result, Black children experience compounded traumas, from which many do not recover. The case at bar is a perfect example.

When the court removes *any* child from his home, the experience is profoundly traumatic for the child. Christian M. Connell et al., *Changes in Placement among Children in Foster Care: A Longitudinal Study of Child and Case Influences*, 80 (3) Soc. Serv. Rev. 398-418 (2006) (<http://europepmc.org/article/PMC/4204626>). The negative impact affects that child's developmental trajectories and long-term well-being. Connell, et al., *supra*, at 398-399. A child's educational success suffers when the child moves, and can result in behavioral problems in school, academic skill delays, and school failure. Connell, et al., *supra*, at 399 (multiple moves of children also associated with socio-emotional harm and increased levels of mental health service use); Bonnie T. Zima et al., *Behavior Problems, Academic Skill Delays and School Failure among School-Aged Children in Foster Care: Their Relationship to Placement Characteristics*, 9(1) J. Child Fam. Stud. 87-103 (2000).

K.W.'s Motion in this Court and in briefing in the lower courts shows probable error; when K.W. was placed in licensed care, his white foster placement kept him away from his Black family, failed to allow him

to participate in events central to his Black, ethnic, and familial identity, and failed to provide other opportunities for him to do so. K.W. knew that DCYF was aware of his desire to be with his family, and his family's desire to care for him, yet DCYF demonstrated its disregard for his wants, needs, and best interest, taking those decisions from him and his family. He learned from the state's mistreatment of him that he is not a full person, but an object to be removed and displaced, whenever the state deems appropriate, contrary to the law. *See In Re Dependency of M.S.R.*, 174 Wn.2d 1, 20, 271 P.3d 234, 245 (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;”). K.W., and children like him, should be able to be loved and supported by his family. *See Testa, infra* at fn. 10, at 499; *Winokur, et al., infra* at fn. 10, at 19-32. DCYF's disregard of this Black child's body, life, and well-being and its failure to preserve this loving Black family demonstrated anti-Black racial bias justifying review; even the appellate court recognized “the institutional racism that has undoubtedly infected the Department historically and even particularly in this case.” Mot. For Discr. Rev., App. A, p. 4.

2. DCYF’s failure to follow the statutory preference for placing a child with his own family demonstrated anti-Black racial bias in DCYF decision-making and probable error.

The Washington State Legislature created a statutory framework that does not require the removal of children from their families at all in order to be “served” by DCYF. RCW 13.34.130 (3), (6);⁹ *see* RCW 13.34.130(1)(a) (parental placement receives first preference; placement with other nurturing family and loved ones is second). These statutory protections are designed to be protective of the child consistent with social science research that shows that relative placements are safer, longer lasting, and more stable, than non-relative placements.¹⁰ The statutory

⁹ RCW 13.34.130(6) provides: “Placement of the child with a relative or other suitable person as described in subsection (1)(b) of this section shall be given preference by the court.

RCW 13.34.130(3) provides:

“The department may only place a child with a person not related to the child when the court finds both that such placement is in the best interest of the child and that there is reasonable cause to believe that the health, safety, or welfare of the child would be jeopardized or that efforts to reunite the parent and child will be hindered.” The court must also “consider the child's existing relationships and attachments when determining placement.” *Id.*

¹⁰ Testa, Mark F., *The Quality of Permanence-Lasting or Binding - Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 Va. J. Soc. Pol’y & L. 499 (2004-2005); Marc Winokur et al., *Systematic review of kinship care effects on safety, permanency, and well-being outcomes*, v. 28 n.1 Research on Social Work Practice 19-32 (2018) (“children in kinship care experience better outcomes in regard to behavior problems, adaptive behaviors, psychiatric disorders, well-being, placement stability (placement settings, number of placements, and placement disruption), guardianship, and institutional abuse than do children in foster care”). Further, relative placement preference is empirically supported by the State’s own studies as well as by other sources.. Connell et al., *supra*, at. 398-399; Children’s Administration, Department of Social & Health Services, State of Washington, Annual Progress and Services Report 2018 at p. 26 (2017) (<https://www.dcyf.wa.gov/sites/default/files/pdf/reports/APSR-2018.pdf>).

preference for relative caregivers aims to preserve the child’s well-being and benefits children by prioritizing relative placements from the earliest point of a case. RCW 13.34.065(5)(b).¹¹ Thus, the trial court’s failure to apply the relative placement preference set forth in Chapter 13.34 RCW constitutes probable error.

3. DCYF’s reliance on meritless reasons to reject K.W.’s extended family members as caregivers demonstrated its anti-Black racial bias and probable error.

When it comes to how children are treated in Washington’s foster care system, race matters. 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).¹² More than a decade ago, the state agency discovered they were treating Black and Indigenous children differently from children assigned to other racial groups.¹³ *Id.* (Black and Indigenous children more likely than white

¹¹ RCW 13.34.065 (5)(b).provides:

If the court does not release the child to his or her parent, guardian, or legal custodian, the court shall order placement with a relative or other suitable person as described in RCW 13.34.130(1)(b), unless there is reasonable cause to believe the health, safety, or welfare of the child would be jeopardized or that the efforts to reunite the parent and child will be hindered.”

¹² https://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf.

¹³ https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Racial%20Disproportionality%20in%20WA%20State_1ab0b5ee-4ce0-4bc7-9454-662e99f602b5.pdf. The Washington State Racial Disproportionality Advisory Committee (“WSRDAC”) recommended that a remediation plan be developed and pursued, and DCYF now files annual reports reporting progress toward implementing that remediation plan.

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). Specifically, Black caregivers are also twice as likely to be referred to CPS for no good reason. *See Miller, supra*, at 7. These same differences in treatment persist. Washington State Department of Children, Youth & Families (DCYF), *2019 Washington State Child Welfare Racial Disparity Indices Report 5-10* (2019).¹⁴

Here, DCYF pointed to unfounded referrals to CPS, associating with Black people who have criminal convictions, and associating with formerly incarcerated Black people as reasons why his own Black family cannot care for K.W. All of these asserted reasons are associated with racial bias. *Cf.* GR 37 (h)(i)-(iv).¹⁵ Using a Black parent or caregiver's unfounded¹⁶ CPS referral history and associations with Black people, who

¹⁴ Found online as of 12/18/20 at: <https://www.dcyf.wa.gov/sites/default/files/pdf/reports/CWRacialDisparityIndices2019.pdf>.

¹⁵ GR 37 (h)(i)-(iv) states in relevant part: Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood[.]

¹⁶ "Unfounded" means the determination following an investigation by the department that available information indicates that, more likely than not, child abuse or neglect did not occur, or that there is insufficient evidence for the

have either been convicted or been to prison can rightly be viewed as raising a strong inference of racial bias. See Vivek Sankaran, *With Child Welfare, Racism is Hiding in the Discretion*, Chronicle of Social Change (June 21, 2020) (noting in foster care system “when such wide discretion exists, we know that both implicit and explicit bias can significantly affect the decisions that are made”).¹⁷ None of these reasons, taken alone or together, are legitimate bases for removing this Black child from the loving home of his Black family. Additionally, the stark lack of evidence of harm to this child in his family’s care strongly suggests that the meritless reasons put forward were proxies for or a manifestation of anti-Black racial bias on the part of DCYF. DCYF’s reliance on meritless reasons to reject K.W.’s extended family members as caregivers in the absence of legitimate concerns demonstrates probable error.

V. CONCLUSION

For the reasons stated above, amici respectfully support K.W.’s request that discretionary review be granted.

Respectfully submitted this 6th day of January, 2021.

department to determine whether the alleged child abuse did or did not occur. RCW 26.44.020(28).

¹⁷ Available at: <https://chronicleofsocialchange.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616>.

Electronically signed by Counsel for Amici curiae listed below

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on January 6, 2021, I caused a true and correct copy of the Amici curiae memorandum in support of Petitioner of WDA, NAACP Seattle-King County, Smith Law LLC, ACLU-WA, the Korematsu Center, The Mockingbird Society, LCYC, Treehouse, and King County Equity Now to be served as follows:

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DATED this 6th day of January, 2021.

Electronically Signed _____ */s/ Tracie Wells*

ACLU-WA FOUNDATION

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