

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/12/2023 1:12 PM  
BY ERIN L. LENNON  
CLERK

No. 101477-5

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IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

Bruce Wolf, as Personal Representative of the  
Estate of Timothy Jones, Deceased, Petitioner,

v.

State of Washington, Respondent.

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*AMICI CURIAE* BRIEF OF WASHINGTON DEFENDER  
ASSOCIATION, FAMILY VIOLENCE APPELLATE  
PROJECT, SEXUAL VIOLENCE LAW CENTER, & LEGAL  
VOICE IN SUPPORT OF PETITIONER

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## **I. IDENTITY AND INTEREST OF AMICI CURIAE**

Washington Defender Association (WDA), Family Violence Appellate Project (FVAP), Sexual Violence Law Center (SVLC), and Legal Voice are *amici curiae* in this matter. The identities and interests of each, filed under separate cover in the motion for leave to file brief of *amici curiae*, are incorporated herein by reference.

## **II. ISSUE TO BE ADDRESSED BY AMICI**

*Whether this Court should restore to survivors of childhood sexual abuse in foster care the broad avenues of civil redress under RCW 4.16.340 as the Legislature intended.*

## **III. STATEMENT OF THE CASE**

*Amici* adopt the facts as stated in the Petition for Review and supplemental briefing of the Petitioner.

## IV. ARGUMENT

### A. Introduction

*Amici curiae* have grave concerns that the lower court’s majority ruling places untenable burdens upon Black and Indigenous<sup>1</sup> cis-female survivors, who are at higher risk than their white and/or cis-male peers of experiencing abuse in foster care generally and sexual abuse in particular.<sup>2</sup> The ruling also erects unreasonable procedural barriers for survivors of

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<sup>1</sup> *Amici* recognize that authors cited here use differently defined terms for race and ethnicity. In this brief, the term “Black” includes people labelled Black and multiracial Black. The term “Indigenous” is intended to be inclusive to capture people who self-identify as such as well as those labelled “Native American” by government agencies. No disrespect is meant by use of any of these terms.

<sup>2</sup> *Amici* recognize that transgender, nonbinary and nonconforming people and individuals with disabilities are also at heightened risk of sexual violence in their lifetime. See U.S. TRANS SURVEY, *Executive Summary: The Report of the 2015 U.S. Transgender Survey* 3 (2017), <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf> (last visited 5/11/2023) (“[N]early half (47%) were sexually assaulted at some point in their lifetime.”); RCW 7.105.900(3)(b) (“Individuals with disabilities; black and indigenous communities; and lesbian, gay, bisexual, transgender, queer, and other individuals experience a higher rate of sexual violence.”).

childhood sexual abuse by requiring that before their 21<sup>st</sup> birthday they: (1) discern and disclose all injuries flowing from their abuse—even those they could not possibly know about or recognize; (2) investigate all possible legal tort claims against abuser and third parties alike; and (3) bring all legal claims into court.

In severely limiting RCW 4.16.340(1)(c), the lower court's majority ruling works unique injustice against this group by contravening the Legislature's intent and Washington's public policy to provide broad avenues for redress in these situations to survivors of childhood sexual abuse. Any interpretation of RCW 4.16.340(1)(c) that, as a practical matter, immunizes the acts of or injuries caused by third parties as to survivors of childhood sexual abuse should not stand.

**B. The majority's ruling places untenable burdens on Black and Indigenous survivors of child sexual abuse in foster care, especially Black and Indigenous women and girls.**

Black<sup>3</sup> and Indigenous<sup>4</sup> families have historically been over-reported into and harmed by Washington’s family regulation system. See Marna Miller, *Racial Disproportionality in Washington State’s Child Welfare System*. WASH. ST. INST. FOR PUBLIC POLICY 29 (2008), [https://www.wsipp.wa.gov/ReportFile/1018/Wsipp\\_Racial-Disproportionality-in-Washington-States-Child-Welfare-System\\_Full-Report.pdf](https://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf) (last visited 5/11/2023). Research documents Black and Indigenous dependent children and

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<sup>3</sup> See U.S. GENERAL ACCOUNTING OFFICE, *Appendix II in African American Children in Foster Care: Report to the Chairman Committee on Ways and Means, House of Representatives* 75 (2007), <https://www.gao.gov/products/gao-07-816> (last visited 5/9/023)(reporting that African American children in foster care were overrepresented more than three times in Washington state as compared to white children in foster care).

<sup>4</sup> See also *Matter of Dependency of Z.J.G.*, 196 Wn.2d 152, 165, 471 P.3d 853, 860 (2020) (“This history of centuries of policies of removal and assimilation predates ICWA; the removal of children from their families and tribal communities and placement in foster care or adoption is but one of the many atrocious governmental policies intended to destabilize Native communities and ultimately end them.”).



youth, both nationally and in Washington, continue to endure harms from being forcibly separated from their families, such as placement into stranger foster care<sup>5</sup> and institutional foster settings.<sup>6</sup> When they are placed in foster care, Black and Indigenous dependent children and youth stay for longer

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<sup>5</sup> See D. Klinman and J.C. Graham, *Examination of the Racial Disparities Present in the Child Welfare Assessment of Safety*, OFF. OF INNOVATION, ALIGNMENT, & ACCOUNTABILITY DCYF 2 (2022),

<https://www.dcyf.wa.gov/sites/default/files/pdf/reports/RacialDisparities-CWSafetyAssess2022.pdf> (last visited on 5/2/2023) (once investigated by DCYF, Black and Indigenous children more likely to be forced to live in foster care than white peers).

<sup>6</sup>See OFF. OF INNOVATION, ALIGNMENT, AND ACCOUNTABILITY DCYF, *Figures 5-7 in DCYF Equity Metrics Overview 6-8* (2023), available at:

<https://www.dcyf.wa.gov/sites/default/files/pdf/reports/EquityMetricOverview2023.pdf> (last visited on 5/2/2023) (Black and Native American families are still over-reported to the state; once referred, still more likely to be removed from their families; once in foster care, still more likely to be there for longer periods and be living in institutional settings).

periods,<sup>7</sup> move more often,<sup>8</sup> and, in Washington, find themselves without a place to stay at all<sup>9</sup> at higher rates than their white peers.

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<sup>7</sup> See Laws of 2021, ch. 210, § 4 (“...black and indigenous children and youth and other youth of color are much more likely to be removed from their parents' care, placed into foster care, and remain in the child welfare system longer than white children.”), available at: <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/House/1219-S2.SL.pdf#page=1> (last visited 5/9/2023).

<sup>8</sup> See e.g., Frank Edwards, et al, *American Indian and Alaska Native overexposure to foster care and family surveillance in the U.S.: a quantitative overview of contemporary system*, 149 Child. & Youth Svcs. Rev. (2023), <https://osf.io/preprints/socarxiv/fcz5p/download> (last visited 5/11/2023) (noting even after the passage of the Indian Child Welfare Act, Native American children are still far more likely to be separated from their families, remain out-of-home longer, and experience more moves than white children in part because of states' non-compliance with the law).

<sup>9</sup> See e.g., WASH. ST. OFF. OF FAM. & CHILD.'S OMBUDS, *DCYF Use of Hotels and Offices as Placement* (2022) [https://ofco.wa.gov/sites/default/files/2022-10/Placement\\_Exceptions\\_Dashboard\\_August\\_2022x.pdf](https://ofco.wa.gov/sites/default/files/2022-10/Placement_Exceptions_Dashboard_August_2022x.pdf) (reporting Black children were nearly fourteen percent of DCYF's 4,692 emergency placements of dependent children in hotels or offices in 2022; yet make up only 9 percent of children in foster care in same time frame, multiracial children excluded from numbers).

Black and Indigenous dependent children and youth also endure other harms because of their heightened risk of being abused in foster care. *See e.g.*, Sarah A. Font, *Child Protection Investigations in Out-of-Home Care: Perpetrators, Victims, and Contexts*, 20 *Child Maltreat.* 251, 257 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4632842/pdf/nihms730425.pdf> (last visited 5/11/2023) (stating that Black children had over twice the odds of out-of-home caregiver maltreatment as compared to white children).

Dependent children and youth in foster care generally are at heightened risk of sexual abuse and sexual violence than children in other types of out of home arrangements.<sup>10</sup> *See*

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<sup>10</sup>*See e.g.*, *M.D. bnf Stukenberg v. Abbot*, 509 F. Supp. 3d 683, 794 (S.D. Tex. 2020) (holding Texas agency in contempt for pervasive failure to investigate and protect children in foster care from sexual and other abuse claims); Julie L. Rogers, Office of Inspector General of Nebraska's Child Welfare, SUMMARY REPORT OF INVESTIGATION, SEXUAL ABUSE OF STATE WARDS, YOUTH IN ADOPTIVE OR GUARDIAN HOMES, & YOUTH IN RESIDENTIAL PLACEMENT, REPORTED JULY 2013 - OCTOBER 2016, at 3 (2017),

Mary Benedict & Susan Zuravin, TYPES AND FREQUENCY OF CHILD MALTREATMENT BY FAMILY FOSTER CARE PROVIDERS IN URBAN POPULATION, 18 Child Abuse & Neglect 577 (1994) (noting that the risk of having a substantiated report of maltreatment was much higher in foster care settings); Nina Biehal & Elizabeth Parry, MALTREATMENT AND ALLEGATIONS OF MALTREATMENT IN FOSTER CARE. A REVIEW OF EVIDENCE (Soc. Pol'y Res. Unit, Working Paper No. 2437, 2010), <https://www.york.ac.uk/inst/spru/research/pdf/FCabuse.pdf>

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[https://nebraskalegislature.gov/pdf/reports/public\\_counsel/OIG\\_summary\\_report-child\\_sexual\\_abuse.pdf](https://nebraskalegislature.gov/pdf/reports/public_counsel/OIG_summary_report-child_sexual_abuse.pdf) (last visited 5/11/2023)(investigating widespread disregard of child sexual abuse complaints reported by children and youth in Nebraska's foster care system).

(last visited 5/11/2023) (finding that sexual abuse was more likely in foster care). Black<sup>11</sup> and Indigenous<sup>12</sup> girls in foster care are specifically at heightened risk of childhood sexual abuse and sexual violence.<sup>13</sup> See Kathleen C. Basile, et al.,

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<sup>11</sup> See NAT'L BLACK WOMEN'S JUSTICE INST., *Black Women, Sexual Assault, and Criminalization* (April 11, 2021), <https://www.nbwji.org/post/black-women-sexual-assault-criminalization> (last visited 5/11/2023) (“Black women are disproportionately at risk of sexual violence. Nearly 1 in 5 Black women are survivors of rape, and 41% of Black women experience sexual coercion and other forms of unwanted sexual contact. For every Black woman who reports rape, at least 15 do not report.”).

<sup>12</sup> See URBAN INDIAN HEALTH INSTITUTE, *Our Bodies, Our Stories: Sexual Violence Among Native Women in Seattle, WA*, A DIVISION OF THE SEATTLE INDIAN HEALTH BOARD 4 (2018) <https://www.uihi.org/download/our-bodies-our-stories/?wpdmdl=12904&refresh=645ab29da06071683665565> (last visited 5/9/2023)(94 percent of surveyed Native women reported being raped or sexually coerced at some point in their lives).

<sup>13</sup>See also Nancy J. Thompson, et al., *Race, Ethnicity, Substance Use, and Unwanted Sexual Intercourse among Adolescent Females in the United States*, 13 WEST J EMERG MED. 283 (2012), <https://westjem.com/original-research/race-ethnicity-substance-use-and-unwanted-sexual-intercourse-among-adolescent-female-in-the-united-states.html> (last visited 5/11/2023)(finding “greatest likelihood” of “forced sexual intercourse” or rape was reported by African Americans girls.).

THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE  
SURVEY: 2016-2017 REPORT ON SEXUAL VIOLENCE, Centers for  
Disease Control and Prevention 6 (2022),  
[https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReport  
onSexualViolence.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf) (last visited 5/9/2023)(More than one in  
four non-Hispanic Black women and more than two in four  
non-Hispanic American Indian/Alaska Native women have  
been raped in their lifetime.). Additionally, as a direct result of  
childhood sexual abuse and sexual violence, Black<sup>14</sup> and

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<sup>14</sup> See J. Barbara Mack (ret.) & Dana Raigrodski, LLB, SJD,  
CHAPTER 10 COMMERCIAL SEX AND EXPLOITATION IN 2021  
GENDER JUSTICE STUDY 506 (Wash. St. Gender & Justice  
Commission 2021) (internal footnotes and quotations omitted),  
[https://www.courts.wa.gov/subsite/gjc/documents/26\\_GJS\\_Ch  
apter10.pdf](https://www.courts.wa.gov/subsite/gjc/documents/26_GJS_Chapter10.pdf) (last visited 5/9/2023) (“The history of sexual  
violence against Black women is well documented, going back  
centuries in this country beginning with the transatlantic  
voyages that brought slaves here. Commercial sexual  
exploitation in the 1800s included using enslaved Black women  
to produce a perpetual labor force. The resulting historical,  
inter-generational trauma, together with risk factors that apply  
to other targeted populations, increases the risk of sexual  
exploitation of Black women.”).

Indigenous<sup>15</sup> girls are at heightened risk of being sexually trafficked during childhood, again in adulthood,<sup>16</sup> and then later criminalized.<sup>17</sup>

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<sup>15</sup>“Experts have found that traffickers are targeting Native Americans nationally. Washington is no different.” See J. Barbara Mack (ret.) & Dana Raigrodski, LLB, SJD, CHAPTER 10 COMMERCIAL SEX AND EXPLOITATION IN 2021 GENDER JUSTICE STUDY 503 (Wash. St. Gender & Justice Commission 2021), [https://www.courts.wa.gov/subsite/gjc/documents/26\\_GJS\\_Chapter10.pdf](https://www.courts.wa.gov/subsite/gjc/documents/26_GJS_Chapter10.pdf) (last visited 5/10/2023).

<sup>16</sup> See Kym R. Ahrens, et.al., *Association Between Childhood Sexual Abuse and Transactional Sex in Youth Aging Out of Foster Care*, 36 Child Abuse Negl. 75 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3322618/pdf/nihms351623.pdf> (last visited 5/9/2023) (girls in foster care with history of childhood sexual abuse were at increased risk of transactional sex when transitioning to adulthood); Alexei Koseff, *Sex-trafficking sting highlights of vulnerability of foster children*, L.A. TIMES (July 29, 2013, 12:00 a.m. P.T.), <https://www.latimes.com/nation/la-xpm-2013-jul-29-la-na-child-sex-20130730-story.html> (last visited 5/10/2023) (stating that 60% of sex-trafficking victims had been in the custody of social services and foster care); Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, NATIONAL ONLINE RESOURCE CENTER ON VIOLENCE AGAINST WOMEN 5 (March 2013), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_SVAAWomenRevised.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf) (last visited 5/11/2023)

These heightened risks are rooted in U.S. history and institutionalized racism—as sexual violence against Black and Indigenous women and girls has been “rationalized through...narratives framing [them] as inherently sexually deviant, hypersexual, and inviolable.” Andrea J. Ritchie, *Expanding our Frame*, NAT’L BLACK WOMEN’S JUSTICE INST. 3 (2019), <https://incite-national.org/wp-content/uploads/2019/07/ritchie-Expanding-Our-Frame-Deepening-our-Demands-for-Safety-and-Healing-for-Black->

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(Black “[childhood sex abuse] victims were at increased risk of being sexually victimized as adolescents and adults.”).<sup>17</sup> “[T]rafficked girls often become caught up in the system and that 73 percent of girls in the system “had past histories of physical and sexual abuse.” Vafa & Epstein, *Criminalized Survivors*, at 18 (internal quotations omitted), [https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2023/04/Criminalized-Survivors\\_Georgetown-Gender-Justice.pdf](https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2023/04/Criminalized-Survivors_Georgetown-Gender-Justice.pdf) (last visited 5/10/2023); Kayla Patrick & Neena Chaudhry, *Let her Learn - Stopping School Pushout for Girls in Foster Care* 4 (2017), [https://nwlc.org/wp-content/uploads/2017/04/Final\\_nwlc\\_Gates\\_FosterCare.pdf](https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_FosterCare.pdf) (last visited 5/10/2023) (stating rate of incarceration for girls with foster care history is three times the rate of girls who have never been involved in child welfare system).



[Survivors-of-Sexual-Violence.pdf](#) (last visited 5/11/2023). In general, “there is also a reluctance to acknowledge that sexual violence is systematically perpetrated by people, institutions, systems, and networks advanced as sources of safety and solutions to sexual violence.” *Id.* at 4.

By requiring that victims of sexual abuse draw the causal connection between their injuries and the intentional perpetrator’s actions, *see infra* at Section C, the majority’s ruling affords de facto immunity to the state (and other potential third-party actors, such as churches). Because Black and Indigenous youth in general are disproportionately represented in foster care, and because Black and Indigenous girls more often are the victims of sexual abuse, the majority’s holding places untenable burdens on Black and Indigenous youth in foster care, particularly Black and Indigenous girls, as compared to their white peers in the foster care.

**C. Washington law provides great flexibility to survivors of child sexual abuse to bring claims against negligent third parties.**

1. Survivors of child sexual abuse are supposed to be able to recover from negligent third parties later in life.

The Washington Legislature intended RCW 4.16.340 to provide survivors the flexibility to bring these tort actions later in life because often they do not discover injuries caused by the childhood sexual abuse until that time:

[C]hildhood sexual abuse is a pervasive problem and causes long lasting damage; that victims of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until the statute of limitations has run; that victims may be unable to understand or make the connection between the abuse and the emotional damages it causes; that even though victims may be aware of injuries related to the abuse, more serious injuries may be discovered many years later.

*See C.J.C. v. Corp. of Cath. Bishop of Yakima*, 138 Wn.2d 699, 712–13, 985 P.2d 262, 269 (1999), *as amended* (Sept. 8, 1999) (noting Legislature’s intent to provide broad avenue for redress under RCW 4.16.340). The lower court majority’s ruling

undermines that intent. *See Wolf v. State*, 24 Wn. App. 2d 290, 304, 519 P.3d 608, 618 (2022), *review granted*, 200 Wn.2d 1031, 525 P.3d 154 (2023) (majority holding “negligence claims based on childhood sexual abuse accrue once the victim discovers the causal connection between the *intentional act* of sexual abuse and their injuries”) (emphasis in original).

Here, the State inflicted on Timothy Jones socio-emotional distress, betrayal trauma, and other harms by giving his abuser unfettered access to him at multiple foster homes, the locations of which are normally confidential, and in other private settings. The failure to protect<sup>18</sup> at his foster homes and

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<sup>18</sup> Dependent children in foster care have a “substantive due process right to be free from unreasonable risk of harm and to reasonable safety” and the state is liable for violating these rights “when his or her care, treatment, and services substantially depart from accepted professional judgment, standards or practice.” *See Braam ex rel. Braam v. State*, 150 Wn.2d 689, 704, 81 P.3d 851, 859–60 (2003) (internal quotations omitted). *See also* RCW 74.15.010(1) (outlining statutory duty “[t]o safeguard the health, safety, and well-being of children”); RCW 74.15.030(2) (c) (outlining statutory duty to conduct background checks for persons having

during his family time with his mother is extraordinary and contrary to dependency social worker policies, procedures, and practices.<sup>19</sup>

2. The State's failure to protect survivors of childhood sexual abuse suffered in foster care is a unique injustice and exacerbates already profound harms.

Traumatic experiences that involve betrayal by a trusted person or someone you are dependent upon are uniquely harmful. *See* Carly P. Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 119 (2013).

Institutional involvement with interpersonal violence and abuse is often indirect. *See Id.* "Larger institutions...often elicit similar trust and dependency from their members as is found in

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unsupervised access to children in care); RCW 74.13.031(6) (outlining statutory duty to monitor all out of home and in home placements in dependency court actions).

<sup>19</sup>Since the state's duties and obligations flow from constitutional rights of children in foster care, legal expertise and consultation may also be needed. *See Braam*, 150 Wn.2d at 704, 81 P.3d at 859–60.

interpersonal relationships.” *Id.* at 119-20. When powerful institutions that are generally trusted (such as the government or churches) act in ways that cause harm to those dependent on them for safety and wellbeing—that is institutional trauma. *See* Carly P. Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 *AMER. PSYCH.* 575, 575 (2014).

The long-term wellbeing of survivors is undermined, and socio-emotional distress and anguish can be caused (betrayal trauma theory), when institutional actors, like the State, who are tasked with the duty to protect them fail to do so, deny their own culpability, and, by their denial, call survivors’ credibility into question. *See* Smith & Freyd, *Dangerous Safe Havens* at 122 (“Consistent with betrayal trauma theory, sexually assaulted women who also experienced institutional betrayal experienced higher levels of several posttraumatic symptoms.”).

But betrayal trauma is just one of the many harms caused by the State’s negligence. When state workers constantly and continuously deny their complicity or role in putting children in

harm's way, further injury can be inflicted upon children.<sup>20</sup> *See* Rogers, OFF. OF INSPECTOR GEN. OF NEB.'S CHILD WELFARE, at 3 (revealing problematic attitudes from system professionals towards child sexual abuse, including dismissing and not reporting disclosures made by children, led to lack of protection for child survivors and an ineffective systemic response).

Survivors commonly also experience a “second assault” by unhelpful responses from legal systems. *See* Smith & Freyd, *Institutional Betrayal* at 575. Stalwart disbelief can also cause even more injury:

...[D]isbelieving survivors can traumatize them as victims in what has been described as secondary victimization: insensitive, victim-blaming treatment that makes survivors feel as though they are being re-victimized by the systems that are supposed to help them. This treatment can exacerbate girls' culturally imposed tendency to

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<sup>20</sup> Some survivors, like Mr. Jones, experience their abuser being given unsupervised and unfettered access to them while in foster care; others experience the state actively selecting and approving an abuser as their foster care placement or their adoptive parent.

blame themselves for the abuse they experience, which, studies show, can lead to anxiety, depression, PTSD, and suicidal ideation.

Yasmin Vafa & Rebecca Epstein, *Criminalized Survivors:*

*Today's Abuse to Prison Pipeline for Girls* 14 (2023) (internal quotations and footnotes omitted).<sup>21</sup>

Although institutional betrayal trauma and other harms are separate from the sexual assault itself (either events leading up to or following the assault), they exacerbate the effects. *See* Smith & Freyd, *Dangerous Safe Havens* at 123. The State also routinely fails to meet the socio-emotional needs of dependent children and youth at heightened risk of lengthy stays in out of home or institutional foster settings.<sup>22</sup> *See* Pl.'s Motion for

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<sup>21</sup> *See also* NAT'L BLACK WOMEN'S JUSTICE INST., *supra*, note 11 (“Many [Black] survivors do not report their assault for a variety of reasons, including shame, humiliation, fear of retaliation, racism, historical failure to believe and protect Black women, and fear of unjust harm to Black partners. But Black survivors who do report sexual assault or violence are less likely to be believed than their white counterparts.”)

<sup>22</sup> Betrayal trauma is associated with (but not limited to) poorer physical health, anxiety, depression, dissociation, and self-

Preliminary Injunctive Relief<sup>23</sup> ) & Agreement and Settlement Order<sup>24</sup> in *D.S., et al. v. Washington State DCYF*, No. 2:21-cv-00113-BJR, (W.D. Wash. April 21, 2021). Youth “with unstable out of home placements have substantial unmet mental health needs.” Kajung Hong, et al., *Trajectories of Adolescent Psychopathology Among Youth Who Were Maltreated and Placed in Out-of-Home Care*, 128 *Child Abuse & Neglect* 13 (2022).

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harm. Carly P. Smith, et.al., *The Psychology of Judicial Betrayal*, 19 *ROGER WILLIAMS UNIV. LAW REV.*, no. 2, 2014, at 455, [https://docs.rwu.edu/rwu\\_LR/vol19/iss2/6](https://docs.rwu.edu/rwu_LR/vol19/iss2/6) (last visited 5/11/2023).

<sup>23</sup> <https://www.disabilityrightswa.org/wp-content/uploads/2017/10/Plaintiffs-Motion-for-Preliminary-Injunction-24.pdf> (last visited 5/8/2023).

<sup>24</sup> <https://www.disabilityrightswa.org/wp-content/uploads/2017/10/Agreement-Kas-Decl-Exh.-A-1.pdf> <https://www.disabilityrightswa.org/wp-content/uploads/2017/10/Plaintiffs-Motion-for-Preliminary-Injunction-24.pdf> (last visited 5/8/2023).



Disclosure of the underlying interpersonal trauma also often poses a “threat to potentially necessary relationships.”<sup>25</sup> Carly P. Smith, et.al., *The Psychology of Judicial Betrayal*, 19 ROGER WILLIAMS UNIV. LAW REV., no. 2, 2014, at 456. It is also wholly unreasonable to expect survivors of childhood foster care sexual abuse to recognize or fully appreciate as a child or youth the *State’s* injuries against them while they are still in need of support.

3. Survivors may not be able to discern abusive “acts” or “injuries” without expert help and support.
  - a. Psychological help and support may be needed.

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<sup>25</sup> Some survivors burdened by this ruling will have been adopted by their abusers after the state approved the home through chapter 26.33 RCW proceedings; while others will have returned home through the chapter 13.34 RCW proceeding, as Mr. Jones did. Others still may be receiving state funding and case management services through the extended foster care program until their 21<sup>st</sup> birthday. *See* RCW 13.34.267(7).

Survivors may not recognize the “acts” as abuse or the injuries therefrom until later in life. *See C.J.C.*, 138 Wn.2d at 713, 985 P.2d at 268. So, recognizing the *injuries* caused by the State’s negligence is even more difficult for an adult survivor to ascertain, as Timothy Jones experienced here:

For Timothy to have realized such a connection between sexual abuse and betrayal trauma would require a degree of psychological sophistication beyond that of a child or a psychologically naïve and untrained adult.

*Wolf v. State*, 24 Wn. App. 2d at 297, 519 P.3d at 614. It is unsurprising that an injury like institutional betrayal would be harder to “see” for a dependent child or youth. They are unlikely to disbelieve the state worker who is providing their basic care.<sup>26</sup>

There are varied “dimensions” of institutional betrayal, based on the type of action (or inaction) and whether the

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<sup>26</sup>Eligible youth, who are dependent on their 18<sup>th</sup> birthday, may continue receiving state funding and case management services through the extended foster care program up until their 21<sup>st</sup> birthday. *See* RCW 13.34.267.

problem is apparently systemic or isolated. Smith & Freyd, *Institutional Betrayal* at 579. The institution itself (here, the State) may facilitate the interpersonal trauma experienced by the survivor and may complicate the aftermath.<sup>27</sup> Researchers have even developed tools to measure institutional betrayal on multiple dimensions, particularly around unwanted sexual contact. *See* Smith & Freyd, *Institutional Betrayal* at 582 (referencing Institutional Betrayal Questionnaire which measures failure to prevent abuse, normalizing abusive contexts, difficult reporting procedures and inadequate responses, supporting cover-ups and misinformation, and punishing victims and whistleblowers.). Survivors likely would not discern the injuries as such and connect them to the

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<sup>27</sup> Characteristics of institutions where traumatic events are more likely to occur include “policies, practices and cultures that can serve to condone, hide, or normalize trauma,” institutional denial, and prioritizing reputation over the well-being of “members.” Smith & Freyd, *Institutional Betrayal* at 580-82.

childhood sexual abuse without consulting psychological trauma experts.

b. Legal help and support may be needed.

During an open dependency action, it is the State, not the dependency judge, that decides which foster home will receive a dependent child or youth. *See* RCW 13.34.130(1)(b). It is the State that controls who knows where the child lives and who has unfettered and unsupervised access to a dependent child or youth in placement. RCW 74.15.030(2)(c), (2)(e), (2)(h), (3). When the State places a child in an abuser's home or allows an abuser to have access to a dependent child, the child may not even realize the State's role in the abuse. Survivors are unlikely to recognize a connection between the abuse and the State's negligent acts without

consulting specialized legal experts,<sup>28</sup> who could inform them whether there may be a connection between the child sexual abuse they suffered, the State’s failure to protect them, and that a legal tort claim may arise therefrom. *Cf. Wolf v. State*, 24 Wn. App. 2d 290, 294, 519 P.3d 608, 613 (2022) (noting Mr. Jones’ tort lawyer did not inform or advise him of the existence of possible negligence claims against the State). For this connection between the sexual abuse and the third party’s potential liability to be made, a legal expert would need to be consulted and the underlying sexual abuse would need to

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<sup>28</sup>For example, the Washington Legislature was specifically concerned about providing a means for dependent children and youth to assert their rights to safety, among other things, in juvenile dependency court, when it passed a statutory right to counsel at public expense for children at every stage of the chapter 13.34 RCW proceeding. *See* RCW 13.34.090(3); Laws of 2021, ch. 210, §1. The Legislature made explicit findings regarding negative outcomes for children by race and tasking attorneys for Black, Native American, and other children and youth of color to “actively combat disproportionality.” *See* Laws of 2021, ch. 210, §4.

be disclosed. Indeed, many survivors of childhood sexual abuse may not even recognize the “acts” of their abuser as abuse let alone the additional “injuries” caused thereby until much later in life. *See e.g.*, Smith, et.al., *The Psychology of Judicial Betrayal* at 472 (“The capacity of a child or adolescent trauma survivor to understand the legal process, particularly given common post-traumatic difficulties, is often quite limited as compared to other child witnesses or even adult survivors.”). Thus, limiting RCW 4.16.340 in such a way that excludes redress for injuries caused by a negligent third party, the nature or extent of which cannot be ascertained until later in life, works a unique injustice. *See C.J.C.*, 138 Wn.2d at 710, 985 P.2d at 268 (internal quotations omitted) (“As such, the negligence claims are based on intentional conduct within the meaning of the statute because they stem from injuries suffered as a result of intentional childhood sexual abuse”).

**D. There must be an avenue for redressing harm caused by the State and other negligent third parties.**

The civil tort relief available under RCW 4.16.340 is the most robust way for survivors of child sexual abuse to seek redress against negligent third parties, like the State. Neither criminal prosecutions nor juvenile dependency actions provide a forum for survivors to redress harm caused by negligent third parties, like the State, and orders issued therein do not prevent future negligence by those third parties. The civil tort relief available under RCW 4.16.340 is explicitly intended to allow for redress to survivors of criminal sexual misconduct perpetrated by intentional abusers and, when applicable, negligently *caused by third parties*.

Courts hearing criminal prosecutions of child sexual abuse have authority over an intentional abuser in the form of no-contact orders and restitution to the crime victim(s). *See* RCW 9.94A.753 (governing restitution as part of sentence);

RCW 10.99.050 (outlining rules if criminal no-contact order issues at sentencing). The courts' powers are not broad enough to restrain a third-party entity, like the State, with regard to performing its duties towards a dependent child who is a crime victim. Where, as here, the legal custodian is the State, the superior court hearing the criminal prosecution has no jurisdiction to enter orders directing the provision of services while in foster care to a dependent child-crime victim or restraining the State in its treatment of them.

Dependency courts are also ill-equipped to redress systemic harm to large unrelated groups of dependent children and youth as each case is heard individually and in isolation. *Cf. Braam*, 150 Wn.2d at 712, 81 P.3d at 863 (child advocates brought class action lawsuit on behalf of dependent children and youth affirming their constitutional rights to reasonable safety in state custody, among other things); *D.S., et al. v. Washington State DCYF*, No. 2:21-cv-00113-BJR, (W.D. Wash. June 8, 2022) (disability rights advocates brought class



action lawsuit on behalf of dependent children and youth living (without placement) in hotels and DCYF offices). Dependency courts are, in fact, limited to using only those powers granted to them under the dependency statutes in ordering specific relief to or for a dependent child or youth as part of their court case.<sup>29</sup>

Reparations by the State for harm it has negligently caused is a worthy goal. For the State to shift its priority from protecting its reputation to acknowledging its role in the harm caused to Washington's foster youth –

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<sup>29</sup> For example, it has not been squarely decided or affirmed that a dependency judge can order a specific foster care placement. *See e.g., In re Eaton*, 110 Wn.2d 892, 899, 757 P.2d 961, 965 (1988) (reversing order of specific placement at alternative residential placement facility under chapter 13.32A RCW proceeding); *In re Lowe*, 89 Wn.2d 824, 827, 576 P.2d 65, 67 (1978) (reversing order of specific placement in juvenile delinquency proceeding under former statute); *In re Gakin*, 22 Wn.App. 822, 592 P.2d 670, 671 (1979) (reversing order of specific placement in juvenile dependency proceeding under former statute); *In re Placement of R.J.*, 102 Wn.App. 128, 130, 5 P.3d 1284, 1285 (2000) (reversing order for specific placement under voluntary placement agreement).

particularly Black and Indigenous girls – would be one positive step forward.

Washington courts have a role to play in examining the behaviors of institutional actors, like the State, and holding it to the duties and burdens placed upon them as custodians over children and youth made vulnerable by their untethering from their families and natural support systems. “[J]udicial institutions may be particularly at risk for perpetrating institutional betrayal due to their images as a means to justice.” Smith, et.al., *The Psychology of Judicial Betrayal* at 463.

This pathway to redress and justice must be accessible and not illusory. This Court should clarify that all survivors, including those who are at heightened risk of child sexual abuse while in foster care, should not be precluded, as a practical matter, from seeking redress from the State under RCW 4.16.340.

## V. CONCLUSION

For the foregoing reasons, *Amici* urge this Court to reverse the Court of Appeals in this matter.

**VI. CERTIFICATE OF COMPLIANCE**

I, D’Adre Cunningham, do declare under penalty of perjury under the laws of the State of Washington, that to my knowledge and true belief in accordance with R.A.P. 18.17 (b) that the foregoing document excluding the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, and signature blocks is 4,952 words and complies with R.A.P. 18.17 (c)(6).

**DATED: May 12, 2023.**

*Electronically signed by counsel for amici curiae*

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## CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on May 12, 2023, the foregoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, WA, this 12<sup>th</sup> day of May 2023.

/s/ D'Adre Cunningham

Ms. D'Adre Cunningham  
Attorney for Amicus Curiae  
Washington Defender Association

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**Appellate Court Case Title:** Bruce Wolf, et al. v. State of Washington  
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