

# KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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October 27, 2022

The Honorable Tani G. Cantil-Sakauye, Chief Justice,  
and Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102-4797

Re: Amicus Curiae Letter in Support of Petition for Review of  
*Espinoza v. Superior Court*, No. S276444; Court of Appeal  
Case No. B322665

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the Rules of Court, the undersigned amici write to ask the Court to grant review in *Espinoza v. Superior Court*. The case raises crucial issues at the intersection of parents' and children's' fundamental rights to family integrity, due process of law, and the rights of the indigent to access justice. In particular, amici write to inform the Court about a practice in child welfare that has only received significant attention in the past few years: hidden foster care. The incidence of hidden foster care in the instant case and with numerous other low-income families is inconsistent with the notion that probate guardianship proceedings are merely private affairs with no involvement by the state. That mistaken notion, however, has been cited by the courts as one reason for refusing to appoint counsel for parents in probate guardianship proceedings involving the custody of their children.

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### **The Interests of Amici.<sup>1</sup>**

Amici are practitioners, scholars, and advocates for parents, children, and kinship caregivers in the field of child welfare law.

The **Alliance for Children's Rights** ("Alliance"), based in Los Angeles, California, is a nonprofit legal services organization dedicated to protecting the rights of impoverished, abused, and neglected children and youth by providing free legal and social services and promoting systemic solutions. The Alliance's Guardianship Program helps caregivers become the legal guardians of the children in their care by representing them in probate court. In early 2019, the Alliance partnered with Lincoln Advocacy to explore the scope of issues created when child welfare professionals bypass juvenile court for children at risk of entering foster care and to understand the impact of hidden foster care on children, parents, kin caregivers, and child welfare agency staff. That partnership culminated in a report summarizing information gathered through focus group discussions and surveys and proffering recommendations to address the negative impacts of hidden foster care. The Alliance continues to advance the policy solutions enumerated in the report through legislative advocacy and training.

The **Barton Child Law and Policy Center** promotes and protects the legal rights and interests of children who are involved with the juvenile court, child welfare, and juvenile justice systems. The Center's work is directed by Emory Law faculty and performed by law and other graduate students who participate in reform initiatives and holistic client representation by conducting research; advocating for individual clients; writing articles, policy papers, and other informational materials; and analyzing and drafting legislation and policy directives.

The **Children's Legal Services of San Diego** is a non-profit interdisciplinary legal organization that represents abused and neglected children

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<sup>1</sup> Amicus NYU School of Law Family Defense Clinic/Washington Square Legal Services is represented by the undersigned attorneys at Kirkland & Ellis LLP. All other amici have elected to join this letter brief on their own behalf.



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in the County of San Diego's dependency proceedings before the juvenile court. CLSSD protects and defends the rights of children and youth in the child welfare system through high-quality and compassionate legal representation. CLSSD employs a client-centered holistic approach to zealously advocate for our clients' interests. CLSSD works collaboratively with others inside and outside of the San Diego juvenile court system to achieve long term stability either by family reunification or legal permanence with substitute caregivers. When government insists on children being away from their parents, those parents and children should have the right to counsel no matter which courthouse location is addressing those issues.

The **Community Legal Services of Philadelphia (CLSP)** provides free legal assistance to low-income individuals on a broad range of civil matters, including public benefits, landlord/tenant, utilities, mortgage foreclosure, employment and other areas of great need in Philadelphia. For more than 40 years, the Family Advocacy Unit (FAU) at CLSP has provided high quality, multidisciplinary representation to hundreds of parents each year in Philadelphia dependency and termination of parental rights proceedings. As part of its mission, the FAU works to ensure that low-income and other marginalized families involved with the child welfare system receive the due process to which they are entitled and have meaningful access to justice. In addition to individual client representation, the FAU engages in policy advocacy and continuing legal education at both a state and national level to improve outcomes for children and families.

The **Legal Aid Justice Center** partners with communities and clients to achieve justice by dismantling systems that create and perpetuate poverty. We believe that the individual legal problems of our clients are inextricably linked to overarching systems of injustice and oppression. In the Youth Justice Program, we partner with youth, their families, and their communities to achieve racial justice, social justice, and economic justice for all young people by dismantling systems that create and perpetuate poverty such as the education system, foster care system, child welfare system. Our strategies include individual legal representation for youth and their caregivers with unmet needs in the education, foster care, child welfare, and juvenile legal systems, impact litigation, community education and organizing, and statewide policy advocacy. We promote public policies and system

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reforms that keep young people in school, out of the youth justice system, and living successfully in their communities. In furtherance of this mission, we believe that all parents, caregivers, and youth deserve access to zealous legal and community advocates as they navigate every interaction with the child the child welfare and foster care system.

The **Massachusetts Law Reform Institute** (“MLRI”) is a statewide nonprofit poverty law and policy center. Its mission is to advance economic, racial, and social justice through legal and policy advocacy, public education, and initiatives that remove barriers to opportunity and create a path to self-sufficiency for low-income people and historically marginalized communities. Through its Child and Family Law Unit, MLRI advocates for judicial, administrative, and legislative policies in both the private child custody and child welfare arenas that make the lives of low-income parents and their children safer and more physically, emotionally, and financially stable. In particular, MLRI has participated in successful advocacy, including amicus curiae briefs, on the exact issue in the instant matter: the right of indigent parents to be represented in guardianship proceedings and an acknowledgment that due to the influence of child welfare agencies, guardianship proceedings are often not just private matters but an extension of the foster care system.

The **Mother’s Outreach Network’s** interest in this issue relates to the network’s intention to curb these practices and policies in the hidden foster system in Washington, DC. The Mother’s Outreach Network is currently working on a legislative proposal to implement a right to counsel for parents during these informal arrangements when the agency compels parent and relative participation in a diversion/kin placement.

The **National Center for Youth Law** (“NCYL”) is a private, non-profit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. For over 50 years, NCYL has worked to protect the rights of children and ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL uses impact litigation and other strategies to reduce harmful practices in state child welfare

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systems. NCYL works to support family preservation and reunification, and believes that access to counsel is important in guardianship proceedings.

The **NYU Family Defense Clinic** represents low-income and poor parents of children who are in, or at risk of, foster care placement. The Clinic strives to protect and expand the due process rights of these families, and to advocate for the services to which they are entitled, but which they are often denied. Central to the Clinic's mission is to work through both direct representation and systemic advocacy to combat the indignity and inequality routinely experienced by parents involved with the child welfare system. The Clinic also undertakes projects designed to address systemic problems in the foster care and Family Court systems.

The **Parental Rights Foundation** is a national, nonprofit, nonpartisan advocacy organization with supporters in all fifty states. Parental Rights Foundation is concerned about the erosion of the legal protection of parents to raise, nurture, and educate their children without undue state interference, and about the unfortunate, unintended consequences to innocent children caused by the routine overreach of the child-welfare system. Parental Rights Foundation seeks to protect children by preserving the liberty of their parents by educating those in government and the public about the need to roll back some of the intrusive state mechanisms that have worked to harm more children than they help.

The **Public Justice Center**, a public interest legal advocacy and civil rights organization, has advocated for a right to counsel in civil matters involving basic human needs since 2000. It was among the organizations that came together to found the National Coalition for a Civil Right to Counsel in 2003. The PJC's interest in this case centers on family integrity, not just a basic human need, but also a fundamental right under the U.S. Constitution.

The **Sayra & Neil Meyerhoff Center for Families, Children & the Courts** seeks to help build a world that minimizes harmful system involvement and promote well-being for all children and families.

**SC Appleseed Legal Justice Center** fights on behalf of low-income South Carolinians for legal, social and economic justice. We work to ensure families receive services and policies that impact these families, including their rights for

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representation. We understand that families cannot adequately represent their own interests due to the complexity and uncertainty that often comes with these proceedings, often breaking families apart and preventing services from being offered as needed.

**Lois A. Weithorn** is the Raymond L. Sullivan Research Professor of Law, at the University of California, Hastings College of the Law and Consortium Senior Scholar, at the UCSF/UC Hastings Consortium on Law, Science and Health Policy. As a legal scholar, psychologist, and law teacher, Professor Weithorn has devoted her career to analysis of legal policies affecting family relationships and the well-being of children, authoring or co-authoring dozens of publications. She is a co-author of a leading casebook in the area, (Davis, Scott, Weithorn & Wadlington (6th ed. 2020) *Children in the Legal System* [writing all of the book's chapters on the child protection system]), and co-authored a leading family law casebook, (Ellman, Kurtz, Weithorn, Bix, Czapanskiy & Eichner (5th ed. 2010) *Family Law: Cases, Text, Problems*). Other representative publications addressing issues related to child welfare include: *Developmental Neuroscience, Children's Relationships with Primary Caregivers, and Child Protection Policy Reform* (2012) 63 *Hast. L.J.* 1487; and *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes* (2001) 53 *HAST. L. J.* 1-156). Many of her publications examine jurisprudence and legal policy relating to children, (e.g., *A Constitutional Jurisprudence of Children's Vulnerability* (2017) 69 *HAST. L. J.* 179), and legal policies affecting youth who cross system boundaries, (*Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth* (2005) 33 *HOFSTRA L. REV.* 1305-1506.) At UC Hastings, Professor Weithorn teaches or has taught courses in Children and the Law and Family Law, and a seminar on Child Maltreatment and the Law. She currently serves as an adviser on the American Law Institute Project on Restatement of Children and the Law.

### **The Nature, Prevalence, and Due Process Implications of Hidden Foster Care.**

Hidden foster care occurs when a Child Protective Services "agency threatens to remove children and take parents to court, a process that could lead to an indefinite placement of children in foster care, and even termination of parental



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rights, unless the parents agree to change their children's physical custody to" a relative who can take care of the child. (See Josh Gupta-Kagan, *America's Hidden Foster Care System* (2020) 72 Stan. L. Rev. 841, 843.) In California, this change of physical custody over the child is often effectuated through probate guardianships where the relative, at the insistence—and potentially coercion—of a CPS agency, petitions a probate court to be named the child's guardian.

Because states do not typically track this data, the prevalence of this practice has only recently come to light. One study used social worker caseload data to estimate that for every 10 children who entered the foster care/dependency system, an additional 7 to 10 children were diverted by the social workers to the care of kin, varying by jurisdiction. (Karin Malm, Kristin Sepulveda, and Sam Abbott, *Variations in the use of kinship diversion among child welfare agencies* (2019) Child Trends at p. 3, available at <https://perma.cc/LR2N-GSVW>.) Given that "[t]he number of children who enter formal foster care (kinship or otherwise) is reported by each state to the federal government and has ranged from 251,000 to 273,000," that ratio "suggests that 250,000 or more children enter hidden foster care every year" in the United States. (Gupta-Kagan, *supra*, at p. 857 & fn. 79.)

No California agency has collected precise data for the prevalence of hidden foster care in California. That is, no doubt, a feature, not a bug, of hidden foster care. CPS agencies, such as the Los Angeles County Department of Children and Family Services, can push marginal cases into the relatively unregulated probate system precisely *because* it evades the kind of scrutiny that dependency court oversight provides. And in any event, strong circumstantial evidence suggests the practice is prevalent in California. Two leading advocacy groups for the rights of children and families—The Alliance of Children's Rights and Lincoln Advocacy Group—conducted nineteen focus groups and performed additional surveys of non-parental caregivers, service providers, and advocates. (Alliance for Children's Rights & Lincoln Advocacy (2019) *The Human Impact of Bypassing Foster Care for At-Risk Children: Building a Continuum of Support for Families Diverted* (ACR) at pp. 13-14, available at <https://tinyurl.com/bdyedhew>.) Those discussions revealed significant proportions of placements outside of the dependency system. (*Ibid.*)

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CPS agencies and social workers have financial incentives to divert children into the hidden foster care system. “Financial incentives play a big part in hidden foster care. When the foster care system is diverted, the state saves money on things like monthly financial assistance to the caregiver, respite supports, case management, court reports, monthly visits to the home, and the reunification supports and services to the child and parent. Once a child enters hidden foster care, the state often closes the case completely, which can be a help for social workers who often carry burdensome caseloads.” (Angie Schwartz & Cathy Krebs, *Addressing Hidden Foster Care: The Human Impact and Ideas for Solutions* (ABA Mar. 30, 2020) available at <https://tinyurl.com/ra8795mp>.) Federal legislation passed in 2018 provides further financial incentives for state actors to encourage private kinship guardianships. (42 U.S.C. § 671; see also *ACR*, *supra*, at pp. 11-12; Gupta-Kagan, *supra*, at pp. 894–96.)

The relative advantages and disadvantages of diverting a child to the care of a relative or acquaintance versus the traditional dependency system are the subject of debate and often depend on the particular circumstances of the parent or parents, the child, and the prospective kinship caregiver. (See generally Gupta-Kagan, *supra*, at pp. 872-75; see also *ACR*, *supra*, at p. 8; Schwartz & Krebs, *supra*, at p. 3.) There can be no doubt, however, that the decision “has broad implications for the child, the parent, and the caregiver.” (Schwartz & Krebs, *supra*, at p. 3; accord *Troxel v. Granville* (2000) 530 U.S. 57, 65 [“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”].)

One implication of the diversion of cases to hidden foster care is that probate guardianship lacks many of the procedural protections afforded parents and children in the dependency process. “[P]arents are entitled to a full complement of rights in dependency proceedings, including ..., appointment of counsel[.]” (*R.H. v. Superior Court* (2012) 209 Cal.App.4th 364, 371.) On the other hand, probate courts have been reluctant to appoint counsel to parents, even when their fundamental rights are at stake. A key justification for that reluctance is that, unlike in dependency proceedings, “the state is not a party to a probate guardianship, and its resources are not pitted against the parent.” (*Guardianship of H.C.* (2011) 198



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Cal.App.4th 1235, 1248.) “The state initiates no proceedings and carries no burden to prove anything. It performs only a judicial role.” (*Id.* at pp. 1248–49.)

As this Court has explained:

“The differences between probate guardianships and dependency proceedings are significant. Probate guardianships are not initiated by the state, but by private parties, typically family members. They do not entail proof of specific statutory grounds demonstrating substantial risk of harm to the child, as is required in dependency proceedings. Unlike dependency cases, they are not regularly supervised by the court and a social services agency. No governmental entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought under section 1516.5.”

(*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1122, citations omitted.)

But in the case of hidden foster care, any rule based on a presumption that probate guardianships are private legal proceedings where the state wields no coercive power does not hold. “Hidden foster care occurs as a result of the government’s insistence on a child being moved away from a parent.” (Schwartz & Krebs, *supra*, at p. 3.) Indeed, “the coercive beginnings of hidden foster care cases raise profound due process concerns.” (Gupta-Kagan, *supra*, at p. 871.) Basing decisions regarding the appointment of counsel to parents by applying a test that assumes no state involvement is not up to the task that due process and the right of access to justice require. That is why commentators on the issue all agree that parents should be categorically appointed counsel in any case where a CPS agency asks, recommends, or demands that a parent change the physical custody of a child. (Gupta-Kagan, *supra*, at 901-05; Schwartz & Krebs, *supra*, at p. 3; *ACR*, *supra*, at pp. 19–20.)

Even under the test applied in *Guardianship of H.C.*, a presumption of state neutrality in probate guardianship cases vastly underestimates the risk that “the procedures used will lead to erroneous decisions” when hidden foster care is at play.

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(*Guardianship of H.C.*, *supra*, 198 Cal.App.4th at p. 1246, quoting *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27.) Probate guardianships afford no avenue to adjudicate ongoing efforts to avoid removing children from their parents. (Gupta-Kagan, *supra*, at p. 878.) The CPS agency simply “has no further legal obligation to the parent in terms of reunification” under the hidden foster care system. (*Ibid.*) The absence of these guardrails in probate guardianship proceedings makes imperative that courts apply close judicial scrutiny to cases where the state is lurking in the background to separate children from their parents.

It is imperative that courts decide these often-fraught cases based on solid evidence, informed by the advocacy in support of parents with robust procedural protections, including the right to counsel. The need for counsel in a private guardianship proceeding instigated by a CPS agency is especially salient. Guardianship proceedings afford fewer procedural protections for parents than dependency cases, they apply a lower burden of proof separating children, and they erect a higher bar to reunification.

Crucially, unlike in California dependency cases, there is no comparable legal preference for family continuity and reunification in probate guardianship proceedings. (*Guardianship of Christian C.* (2011) 195 Cal.App.4th 581, 600.) Under the statutory scheme governing probate guardianships, a Probate Court can appoint a guardian for a minor whenever “it appears necessary or convenient.” (Prob. Code, § 1514, subd. (a).) The Probate Court can grant custody to a nonparent based only on findings by clear and convincing evidence that: (1) parental custody would be detrimental to the child; and (2) that non-parental custody is required to serve the child’s best interest. (Fam. Code, § 3041, subds. (a), (b); see also Prob. Code, § 1514 subd. (b)(1) [adopting standard from Family Code for probate guardianships of minors].) “[D]etriment to the child’ includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of the child’s parent ... and who has assumed that role for a substantial period of time,” and “does not require a finding of unfitness of the parents.” (Fam. Code, § 3041, subd. (c).)

Determining what is “detrimental to the child” and whether granting custody to a nonparent in his or her “best interest” requires a parent to be able to present



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thorough, accurate information to permit the court to “appropriately balance all the relevant factors arising from the child’s family relationships.” (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1136.) That need for effective advocacy rises exponentially when the proposed guardian is backstopped by the authority of the state. Yet, an indigent parent, with no legal or social-work training, may be unable to meaningfully assist the court in that determination. Depriving parents of legal representation in hidden foster care cases gives rise to enormous risks that the constitutionally protected relationship between children and their parents will be erroneously disrupted.

And the costs of those errors are truly devastating. Forced family separation of any kind has long-lasting psychological effects on children. The ongoing crisis that resulted from separating immigrant children from their families highlights the lifelong trauma of forcible separation. (Shanta Trivedi, *The Harm of Child Removal* (2019) 43 N.Y.U. Rev. L. & Soc. Change 523, 530.) Even after reunification, these immigrant children displayed separation anxiety and attachment disorders with their parents. (*Ibid.*) One child, for example, who was forcibly separated, refused to go to school out of fear of being torn from his mother again. (*Ibid.*) Indeed, recent research on the effect of separation on children has led some hospitals to allow babies to stay with their mothers instead of being placed in the neonatal intensive care unit. (*Ibid.*)

\* \* \*

The legal community’s deep awareness of the prevalence of hidden foster care is a recent development. The role of CPS agencies in probate guardianships upends the key assumptions under which California courts have previously addressed parents’ right to counsel in those proceedings. Whether parents should have a right to counsel in those proceedings is clearly an issue of statewide importance—it potentially affects the fundamental rights of thousands of California parents every year. The Court should grant review to settle this important question of law. Rules of Court, rule 8.500(b)(1).

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Very truly yours,

KIRKLAND & ELLIS LLP

A handwritten signature in black ink, appearing to be 'MS' or similar, written in a cursive style.

Michael Shipley  
*Counsel for NYU Family  
Defense Clinic / Washington  
Square Legal Services*