No. 15-1049

In The
Supreme Court of the United States

M.A., AS MOTHER OF J.D.,

Petitioner,

v.

JOSÉ PADILLA, JUDGE, MARICOPA COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

MOTION FOR LEAVE TO FILE AND BRIEF OF CHILD JUSTICE INC., DV LEAP (DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT), FIRST STAR INSTITUTE, MASSACHUSETTS CITIZENS FOR CHILDREN, VERTIGO CHARITABLE FOUNDATION LLC, LAUREN'S KIDS, THE CHILDREN'S ADVOCACY INSTITUTE (CAI), THE CHILDREN'S JUSTICE FUND, THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS (SNAP) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF CHILD JUSTICE INC., DV LEAP (DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT), FIRST STAR INSTITUTE, MASSACHUSETTS CITIZENS FOR CHILDREN, VERTIGO CHARITABLE FOUNDATION LLC, LAUREN'S KIDS, THE CHILDREN'S ADVOCACY INSTITUTE (CAI), THE CHILDREN'S JUSTICE FUND, THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS (SNAP) FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The above-captioned child protection groups respectfully move this Court to grant them leave to file the attached brief as *Amici Curiae* in the above captioned case. The Petitioner and the State of Arizona have each consented to *Amici Curiae* participation in this matter. Letters attesting to their consent have been submitted to this Court.

American Professional Society on the Abuse of Children is the leading national organization for professionals who serve children and families affected by child maltreatment, which includes both abuse and neglect. A multidisciplinary group of professionals, APSAC achieves its mission through expert training and educational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles. APSAC is a

28-year-old organization that has played a central role in developing professional guidelines that address child maltreatment.

Child Justice Inc. is a national organization that advocates for the safety, dignity and self-hood of abused, neglected and at-risk children. Child Justice works with local, state and national advocates, legal and mental health professionals, and child welfare experts to defend the interests of affected children by providing public policy recommendations, community service referrals, court watching services, research and education.

Children's Advocacy Institute (CAI) is a part of the University of San Diego School of Law. It is involved in the governance of the National Association of Counsel for Children, the Partnership for America's Children and other organizations, although the opinions expressed herein are solely those of CAI. CAI proposes legislation and is involved in rulemaking and litigation on behalf of children and conducts research and issues state and national reports on the status of children subject to court jurisdiction.

Children's Justice Fund is a non-profit organization whose main purpose is providing financial support, technical assistance, and strategic guidance to unrelated organizations, institutions, and individuals that serve victims of child trafficking, child sex abuse, online child sexual exploitation, and child pornography. CJF conducts and promotes legal, empirical, and social science research concerning

child trafficking, child sex abuse, online child sexual exploitation, and child pornography with the goal of encouraging the development and implementation of child-victim-centered best practices, policies, and law reform. A core aspect of CJF's mission is filing *Amicus* briefs, writing law review articles, and issuing papers and reports in support and in furtherance of its overall mission and focus on child victims.

Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is a non-profit organization that provides a stronger voice for justice and is committed to ensuring that courts understand the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants.

Foundation to Abolish Child Sex Abuse, Inc. is a non-profit organization whose mission is to influence state and federal governments, courts, the criminal justice system and the media to: protect children from sexual abuse, hold those who sexually abuse children accountable, hold institutions which condone and enable the sexual abuse of children accountable and help child sex abuse victims find justice.

First Star Institute ("FSI") is a non-profit corporation that focuses on policy issues affecting abused and neglected children in the U.S. The Institute continues and builds on First Star's sixteen years of experience in providing assistance to courts through *Amicus Curiae* briefs, and in researching and

publishing reports and articles that assess the laws that aim to protect children.

Lauren's Kids was founded by Lauren Book, a survivor of childhood sexual abuse for six years. Lauren's Kids is based in South Florida and educates adults and children about sexual abuse prevention, awareness campaigns and speaking engagements around the country and the world. The organization also leads an annual, statewide "Walk in My Shoes" awareness walk across the state of Florida – 1,500 miles from Key West to Tallahassee – and provides more than 7 million education and awareness materials statewide through direct mail every year. The foundation has helped advocate for the passage of nearly two dozen laws to support survivors and protect children from predators.

Massachusetts Citizens for Children – "MassKids" is the nation's oldest statewide child advocacy organization. In the 1960s, it developed policies that kept children and youth out of adult psychiatric facilities. As court-declared "Next Friend of Abused Children," it filed a class action in the 80s that through a 4-year out-of-court Settlement Agreement helped improve child protective services. In 2000, it issued the "*State Call to Action to Prevent Child Abuse and Neglect in Massachusetts*" which was lauded by both state and national policymakers and advocates as a model for prevention action.

National District Attorneys Association is the oldest and largest association of state and local

prosecutors, victims' rights advocates, investigators, and other law-enforcement personnel in the United States. It provides for the training and technical assistance of the Nation's prosecutors on all aspects of criminal justice and public safety, including training and technical assistance on the prosecution of child trafficking, child sex abuse, online child exploitation and child pornography and established the National Center for the Prosecution of Child Abuse in 1985 to ensure prosecutors have access to best practices, policies and procedures in child cases.

Stop the Silence: Stop Child Sexual Abuse, Inc. (Stop the Silence, www.stopthesilence.org) is a non-profit corporation with a mission to expose and stop child sexual abuse (CSA) and help survivors heal worldwide. Stop the Silence provides comprehensive programming locally, nationally, and internationally toward the prevention and mitigation of child sexual abuse through media and other outreach, education, and training through creative and impactful assistance to individuals, families, organizations, and local, state and national governments through the CSA Survivor Force, which provides information to a growing number of CSA survivors to educate and catalyze change. The Arts as Advocacy university/ community programs bring art to open hearts and minds and presentations and guided discussions to small and larger groups,and the on-line and in-person training for service providers supplies needed information.

Survivors Network of those Abused by Priests ("SNAP") is a not-for-profit agency and is the oldest and largest self-help support group run by and for survivors. The mission of the organization is to heal the wounded and protect the vulnerable. We provide peer counseling in person, on the telephone, by mail. SNAP also hosts conferences and gatherings and provides education and advocacy about clergy sexual abuse. SNAP works to reform secular and church laws and structures to better safeguard children. Founded in 1988, the organization now has over 22,000 members.

Vertigo Charitable Foundation, LLC is a non-profit whose goal is to help make justice a reality for adult survivors of childhood sexual abuse who seek to hold accountable the individuals who abused them and, where applicable, the institutions that tolerated such abuse. Its overarching goal is to eliminate the numerous ways in which the legal system discriminates against survivors at every stage of the process, including the trial of criminal cases in our courts. We engage in lobbying and advocacy activities to eliminate unfair legal practices and procedures that obstruct survivors' efforts to obtain legal relief against their perpetrators. Moreover, it advocates for legal reforms that recognize the unique aspects of child sex abuse cases and that protect the interests of children who are compelled to become witnesses and/or litigants to obtain justice for the crimes committed against them. Accordingly, the issues presented by

the Petition for Certiorari in this case go to the very heart of our stated mission.

This case has a direct bearing on the conditions and civil rights of child victims and child witnesses in the United States of America. *Amici Curiae* have advocated for the best interests of children across the United States for decades. Some of the *Amici*, represented by Prof. Marci Hamilton, as in this case, have submitted child protection *Amicus* Briefs for this Court before, including *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. ___, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012). The *Amici Curiae* are particularly well situated to provide insight to the Court on the issues in this case. Therefore, abovementioned *Amici Curiae* respectfully request the opportunity to file this *Amicus* Brief in Support of granting the Petition for Writ of Certiorari.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

American Professional Society on the Abuse of Children is the leading national organization for professionals who serve children and families affected by child maltreatment, which includes both abuse and neglect. A multidisciplinary group of professionals, APSAC achieves its mission through expert training and educational activities, policy leadership and collaboration, and consultation that emphasizes theoretically sound, evidence-based principles. APSAC is a 28-year-old organization that has played a central role in developing professional guidelines that address child maltreatment.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *Amici*'s intention to file this brief. Petitioner and the State Respondent have consented to the filing of this brief. Mr. Simcox has not provided written consent as of the time of this filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amici* or their counsel made a monetary contribution to this brief's preparation or submission.

and education. Child victims should not be forced to endure the additional trauma of revicitimization which will occur when they are cross-examined by their sexual assault perpetrator.

Children's Advocacy Institute is an academic center educating law students in child rights and is an active advocate for the interests of children in California and nationally, representing children in juvenile dependency court. CAI proposes legislation and is involved in rulemaking and litigation on behalf of children. It also conducts research and issues reports on the status of children subject to court jurisdiction.

Children's Justice Fund is a non-profit organization whose main purpose is providing financial support, technical assistance, and strategic guidance to organizations, institutions, and individuals that serve victims of child trafficking, child sex abuse, online child sexual exploitation, and child pornography. CJF conducts and promotes legal, empirical, and social science research concerning these crime epidemics with the goal of encouraging the development and implementation of child-victim-centered best practices, policies, and reform.

Domestic Violence Legal Empowerment and Appeals Project is a non-profit organization that provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers,

psychologists and judges on best practices, and spearheading the realities of domestic violence litigation in the Supreme Court. DV LEAP has co-authored *Amicus* briefs in numerous State courts and the United States Supreme Court, including multiple cases involving Criminal Procedure.

Foundation to Abolish Child Sex Abuse, Inc. is a non-profit organization whose mission is to influence state and federal governments, courts, the criminal justice system and the media to: protect children from sexual abuse, hold those who sexually abuse children accountable, hold institutions which condone and enable the sexual abuse of children accountable and help child sex abuse victims find justice.

First Star Institute is a non-profit corporation focusing on policy issues affecting abused and neglected children in the U.S. by providing assistance to courts through *Amicus* Briefs, and in researching and publishing scholarship that assess the laws that aim to protect children. The Institute is committed to elucidating issues and providing information that yield better outcomes for our nation's youth, and further best practices in state agencies, courts and foster care systems.

Lauren's Kids was founded by Lauren Book, a survivor of childhood sexual abuse. Lauren's Kids is based in Florida and educates adults and children about sexual abuse prevention. The Foundation has helped advocate for the passage of nearly two dozen

laws to support survivors and protect children from predators through in-school curricula.

Massachusetts Citizens for Children is the nation's oldest statewide child advocacy organization. It has a solid 56-year history of effectively tackling the tough and complex issues affecting Massachusetts' most vulnerable children. In 2002, it secured a grant from CDC to develop the Enough Abuse Campaign, a model to prevent child sexual abuse that has been adopted in many Massachusetts communities and to date in the states of Maryland, New Jersey, New York, Nevada, North Dakota, and 25 California counties.

National District Attorneys Association is the oldest and largest association of state and local prosecutors, victims' rights advocates, investigators, and other law-enforcement personnel in the United States. It provides for the training and technical assistance of the Nation's prosecutors on all aspects of criminal justice and public safety, including training and technical assistance on the prosecution of child trafficking, child sex abuse, online child exploitation and child pornography and established the National Center for the Prosecution of Child Abuse in 1985 to ensure prosecutors have access to best practices, policies and procedures in child cases.

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children who are compelled to become witnesses and/or litigants to obtain justice.

SUMMARY OF ARGUMENT

Child sex abusers have the right like any other criminal defendant to choose to represent themselves pro se. When they do, the potential arises that they may desire to question their child victim on the stand, leading to almost certain re-traumatization and a reduction in the reliability of the child's testimony. This case raises the question whether the child (parent, guardian or state) may ask that the defendant not be permitted to examine the child himself, or whether the child abuser defendant has a rigid Confrontation Clause right to question the child directly in all cases.

Given the prevalence of child sex abuse, with 1 in 4 girls and 1 in 6 boys abused,[2] and the fact that many states are increasing access to justice in these cases,[3] this issue will repeat itself. The decision below followed the minority of courts, which have imposed a rigid requirement under the Confrontation Clause

[2] *Adverse Experiences in Childhood Study*, Centers for Disease Control, Injury Prevention & Control: Division of Violence Prevention (2009), *available at*: http://www.cdc.gov/violence prevention/acestudy/prevalence.html.

[3] Marci A. Hamilton, SOL-REFORM.COM, (Mar. 15, 2016, 8:33 PM), *available at*: http://sol-reform.com/.

that a pro se child sex abuser has an automatic right to personally question his child victim.

Amici children's groups request this Court either grant certiorari in this case or, summarily reverse the decision below and instruct, consistent with the majority of courts to address the issue, that there is no rigid right that permits child sex abusers to directly examine their child victims. Summary reversal would deter further delay, thereby avoiding more children being re-victimized by perpetrators who desire to subject their victims to direct examination.

ARGUMENT

I. There Is a Split in the Circuits and State High Courts Whether a Pro Se Child Abuser Has a Rigid Right to Directly Examine His Child Victim

Federal circuit and State high courts are split on whether the Confrontation Clause, U.S. Const. amend. VI, requires that a trial court acquiesce to the desire of an accused child abuser to personally cross-examine his own child victim when representing himself under *Faretta v. California*, 422 U.S. 806 (1975).

A. The Majority Approach

The majority of courts to have directly considered this question has found that the due process liberty

interest of the child victim, as indicated in *Parham v. J.R.*, 442 U.S. 584, 587 (1979), should be considered along with the state's compelling interest in the welfare and protection of children. *Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982); *Ginsberg v. N.Y*, 390 U.S. 629, 640-41 (1968); *Prince v. Mass.*, 321 U.S. 158, 165 (1944); *Matter of Pima Cnty. Juv. App. No. 74802-2*, 164 Ariz. 25, 31, 790 P.2d 723 (Ariz. 1990), *abrogated on other grounds*, *State v. Getz*, 944 P.2d 503 (Ariz. 1997) (citing *Ginsberg*, 390 U.S. at 640). The State interest in child protection is "particularly" compelling in cases involving child sexual abuse. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 263 (2002) (O'Connor, J., concurring); *New York v. Ferber*, 458 U.S. 747, 761, (1982).

When those two factors are combined, the Confrontation Clause right cannot require the rigid and extreme guarantee adopted by the court below. *U. S. v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 331, 172 L. Ed. 2d 238 (2008); *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995), *cert. denied*, *Fields v. Angelone*, 516 U.S. 884 (1995); *Depp v. Commw.*, 278 S.W.3d 615, 619 (Ky. 2009); *Partin v. Commw.*, 168 S.W.3d 23, 29 (Ky. 2005); *State v. Sims*, 158 Vt. 173, 186-87, 608 A.2d 1149 (Vt. 1991); *State v. Taylor*, 562 A.2d 445, 454 (R.I. 1989); *State v. Carrico*, No. 38127-0-I, 1998 Wash. App. LEXIS 1016, *29-31 (Wash. Ct. App. July 6, 1998), *review denied*, 972 P.2d 466 (Wash. 1999); *State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993),

review denied, 121 Wash. 2d 1024 (Wash. 1993); *Lewine v. State*, 619 So.2d 334, 336 (Fla. Dist. Ct. App. 1993), *review denied*, 630 So.2d 1100 (Fla. 1993); *cf*., *Coronado v. State*, 351 S.W.3d 315, 329 (Tex. Crim. App. 2011).

The case relied on by the state of Arizona, which *Amici* respectfully rely on, is *Fields v. Murray*. There the Fourth Circuit found that the trial court had properly denied a child rapist's request that he be allowed to self-represent for the express purposes of cross-examining witnesses. Finding that the denial did not violate the Confrontation Clause, because even if the pro se request had been granted, defendant could not have been permitted to cross-examine his own child victims himself, the Fourth Circuit concluded, "[i]f a defendant's Confrontation Clause right can be limited in the manner provided in *Craig*, we have little doubt that a defendant's self-representation right can be similarly limited." *Id*. at 1035. The degree of harm inflicted on the child in this case is significantly greater than that presented in *Maryland v. Craig*, 497 U.S. 836 (1990). The Fourth Circuit, sitting en banc in *Fields*, correctly found "[i]t is far less difficult to conclude that a child sexual abuse victim will be emotionally harmed by being personally cross-examined by her alleged abuser than by being required merely to testify in his presence." *Id*. at 1036. Requiring the same high standard of evidence called for in *Craig* in factual situations such as those posed here would be devastating to the child witness. "[F]iltering constitutional concerns through

a seine woven of practical necessity is a tricky business, and different situations likely will yield different accommodations," under the Confrontation Clause. *U.S. v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997). While application of the *Craig* factors are not required in pro se cases, the child protection compelling interest rationale of *Craig* does, by extension and analogy, support the state of Arizona's requested narrowly tailored accommodation request. *Fields*, 49 F.3d at 1027.

More recently, the Eighth Circuit reached the same conclusion via a different vehicle in *United States v. Brown*,[4] where, while affirming sufficiency of appellate-standby counsel's performance, the Court also found that defendant's Confrontation Clause rights were not harmed by counsel's failure to appeal a finding that "substantial likelihood of emotional harm if the victim were subject to confrontation by [pro se defendant] in a courtroom."[5] The evidence upon which the trial court had based its "case-specific" finding of "substantial likelihood of emotional harm" was the testimony of a therapist, and the record itself.[6] In upholding the lower courts, the Eighth Circuit was careful to distinguish the *Brown*

[4] 528 F.3d 1030 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 331, 172 L. Ed. 2d 238, (2008).

[5] *Id*. at 1033.

[6] *Id*.

facts from its previous cases expressly following *Craig*:[7]

> [T]he government made a pretrial motion only after Brown asserted his right to self-representation. Self-representation would include cross examining the victim, which meant that face-to-face confrontation . . . while the victim testified would subject the child not only to his presence in the court-room, but also to his questioning her, face-to-face, about the traumatic events in question.

Brown, 528 F.3d at 1033.

The Supreme Court of Kentucky has repeatedly found a rigid application of *Craig* inapplicable to pro se child rape defendants. In *Partin v. Commonweath*, it held a trial court's decision to require standby counsel to pose questions written by the defendant to the child victims to be consistent with the Sixth Amendment right to self-representation. 168 S.W.3d at 29. *See also*, *Fields*, 49 F.3d at 1036.

Once a child victim witness has applied for relief from direct cross-examination by their rapist, and submitted some corroboration, the trial court should automatically grant relief to the child victim.

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[7] *U.S. v. Bordeaux*, 400 F.3d 548, 553 (8th Cir. 2005); *U.S. v. Turning Bear*, 357 F.3d 730, 737 (8th Cir. 2004).

> [T]he right . . . of cross-examining witnesses personally, lacks the fundamental importance of the right denied in *Craig*, that of confronting adverse witnesses face-to-face . . . it was [not] essential in this case that psychological evidence of the probable emotional harm to each of the girls be presented in order for the trial court to find that denying [defendant] personal cross-examination was necessary to protect them.

Partin, 168 S.W.3d at 28-29.

The only absolute right in the United States is the right to believe. *Cantwell v. Conn.*, 310 U.S. 296, 303-04 (1940). Thus, a defendant's Sixth Amendment rights, may, and often must, give way in the face of certain other important societal interests, including the state's interests in protecting child sex abuse victims, and in preventing incest. *Poe v. Ullman*, 367 U.S. 497, 552, (1961) (Harlan, J., dissenting); *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (citing *Lawrence v. Texas*). For example, the right to counsel is enshrined in the same Sixth Amendment as the right to proceed pro se. These distinct and inverse Sixth Amendment rights are mutually exclusive. *U.S. v. Bush*, 404 F.3d 263, 270 (4th Cir. 2005). *See U.S. v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). In order for a defendant to proceed pro se, Courts have held that [s]he must make an intelligent and knowing waiver of the right to counsel. *U.S. v. Ductan*, 800 F.3d 642, 648-49 (4th Cir. 2015). Under *Faretta*, "an effective assertion of the right to self-representation (and thus a waiver of the right to counsel) requires

that a defendant 'knowingly and intelligently' forgo the benefits of counsel after being made aware of the dangers and disadvantages of self-representation." *Ductan*, 800 F.3d at 648-49 (quoting *Faretta*, 422 U.S. at 835).

This knowing and intelligent waiver also dictates that the burden of any disadvantages caused by the defendant's choice of proceeding pro se under *Faretta*, are to be borne by the defendant "even if the consequences of his choice prove to be deleterious to his case" *State v. Chamley*, 568 N.W.2d 607, 619 (S.D. 1997). "It is also important to note that so long as the defendant is competent to waive his right to counsel, the trial court need not concern itself with the defendant's ability to represent himself." *Id*. at 618 (citing *Godinez v. Moran*, 509 U.S. 389 (1993)). This procedural default exists because the "right to proceed pro se exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged." *Partin* 168 S.W.3d at 29.

More, the Kentucky Supreme Court expressly accepted as "case-specific" the same type of corroboration to grant the accommodation of questions read by standby counsel in *Partin* that has been rejected by the Arizona Courts in the case at bar. *Id*. at 28-29. The use of standby counsel to perform certain required functions within the context of a pro se litigation does not disturb the *Faretta* right. On the contrary, functions performed by standby counsel are intended to protect defendant's rights as well. *Shaw*

v. Collins, 5 F.3d 128, 132 (5th Cir. 1993). "The trial judge may be required to make numerous rulings reconciling the participation of standby counsel with a pro se defendant's objection[.]" *Partin*, 168 S.W.3d at 29.

In *Depp v. Commonwealth*, 278 S.W.3d 615, 619 (Ky. 2009) the Kentucky Supreme Court further held that even where stand by counsel has been rejected by a pro se defendant, the Confrontation right "is sufficiently protected when the judge asks questions that [defendant] has provided." This is so because "[c]ross-examination can be used to attack the human components of the prosecution's case-in-chief through intimidation. In certain cases, the intimidation of the witness during cross-examination and the tactical advantage gained by it may exceed what the Constitution and fundamental fairness in the adversarial process require." *Partin* 168 S.W.3d at 29. A minor child being forced to obey and respond directly to the explicit demands of their alleged rapist, in a courtroom, under the color of United States' law exceeds such a threshold. Conversely, "it would be difficult to imagine a scenario where" a judge who "did not allow an alleged perpetrator to question an alleged victim of a sexual assault directly" could be found to have acted unreasonably in so doing. *Depp*, 278 S.W.3d at 619.

A Florida appellate court considering a similar set of issues stated: "[t]his appeal involves the competing interests protected in *Faretta v. California*, establishing the right of an accused to conduct his

own defense, and *Maryland v. Craig*, justifying some relaxation of the Confrontation clause of the United States Constitution based on the state's interest in protecting victims of child abuse from the trauma of testifying." *Lewine v. State*, 619 So.2d 334, 335 (Fla. Dist. Ct. App. 1993), *review denied*, 630 So.2d 1100 (Fla. 1993) (internal citations omitted).

The *Lewine* Court held that such an accommodation "fashioned a reasonable solution to the problem posed by the juxtaposition of *Faretta* and *Craig*." *Lewine*, 619 So.2d at 336.

The Supreme Court of Rhode Island in *State v. Taylor*, also recognized the narrowly tailored solution such an accommodation provides as well. 562 A.2d 445, 455 (R.I. 1989); *see also*, *Coy v. Iowa*, 487 U.S. 1012, 1016-18 (1988). Unlike the facts of *Craig*, neither of these core functions will be disturbed in the case at bar. More, the fluid nature of the cross-examination – as controlled by defendant through written or oral direction to standby counsel – will protect the right of Confrontation from abridgement. Microphones and earpieces could allay any legitimate concerns about the speed and dynamics of cross-examination via written questions. The Supreme Court of Vermont cited *Taylor* approvingly in *State v. Sims*, where it found a pro se "[d]efendant's right to question witnesses was not violated," nor "the right of self-representation" "infringed upon" where trial court required questioning pro se defendant's child

victim through standby counsel, but where defendant refused to cross-examine the witness at all instead.[8]

As Washington courts have recognized, the mere act of standby counsel reading aloud a pro se defendant's questions to a child victim witness will not "destroy the jury's perception that the defendant is representing himself." *Faretta*, 465 U.S. at 178; *see also*, *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984) (articulating 2-part test). For example, when a pro se defendant opts to take the stand in his own defense, standby counsel or the judge will often perform the examination. *State v. Layton*, 432 S.E.2d 740, 742 (W. Va. 1993). Jury instructions may generally accompany such examinations. *Carrico*, No. 38127-0-I, 1998 Wash. App. LEXIS 1016 at *29-31. "The court explained that [defendant] would ask questions 'through' [standby counsel]. The jury would have clearly seen [standby counsel] as a subordinate and known that [defendant] was still in charge of the defense." *Id*. at *30. This child protection accommodation applies in Washington even where the pro se defendant has refused standby counsel. *State v. Estabrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993), *review denied*, 121 Wash. 2d 1024 (Wash. 1993).

The right to cross-examination "is essentially a functional right designed to promote reliability in the truth-finding functions of a criminal trial" *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). "The central

[8] *Sims*, 158 Vt. at 186-87.

concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant" *Lilly v. Va.*, 527 U.S. 116, 123-24 (1999) (quoting *Maryland v. Craig*, 497 U.S. at 845. There is "ample" evidence showing that direct cross-examination of a child victim by their alleged abuser decreases reliability of the evidence obtained during said cross-examination of a child witness.[9] Well-documented phenomena, including, but not limited to, P.T.S.D. triggers, C.S.A.A.S., tonic immobility, and freezing, buffer this rather obvious conclusion.

Numerous studies and court cases have detailed the occurrence of C.S.A.A.S., also known by its full name, Child Sexual Abuse Accommodation Syndrome. *See* Patrick Larson, *The Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome As Indicia of Abuser*, 16 Ohio N.U. L. Rev. 81, 81 (1989). C.S.A.A.S. can lead to children lying on the stand to protect their abuser, a risk that is increased exponentially when their very abuser is the person to whom they must give their testimony, because it is already that person whose directions they must respond to and obey on cross-examination itself. Such a procedure de facto re-traumatizes a child victim, particularly because the harms and traumas inflicted by child sexual abuse are not readily apparent, nor their crippling magnitude appreciated for decades after the abuse. Mic Hunter, *Abused Boys*

[9] *Danner v. Motley*, 448 F.3d 372, 377-80 (6th Cir. 2006).

59 (1991). To attempt to objectively assess the level of re-traumatization created by direct verbal reengagement, and with obeying their abuser's commands is anathema to the concept of delayed onset harms. More, because "secrecy" between the abuser and the child is the first phase of C.S.A.A.S.[10] allowing a pro se defendant to question a child witness increases the likelihood that such a forced bond will act as a trigger, causing the children to once again slip back into the bonds of secrecy with their abuser, and lie to protect them. Given that a "child molester might molest 10, 50, hundreds, or even thousands of children in a lifetime," it is also in the interest of public safety to ensure the reliability of the criminal evidence against them. Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis* 52 (5th ed. 2010).[11]

The sound of a rapists' voice, or the smell of his breath are both factors that can trigger a victim's P.T.S.D. *See* Chelsie King Garza, *Mental Anguish: The Overlooked Element of Damages*, Hous. Law., 14,16 (Sept./Oct. 2013); Christina Rainville, *Preparing Children with Post-Traumatic Stress Disorder for Court*, 31 Child. L. Prac. 129, 134-35 (2012).

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[10] Larson, *The Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome As Indicia of Abuser*, at 81.

[11] *Available at*, http://www.cybertipline.com/en_US/publications/NC70.pdf.

"Triggers are stimuli that remind children of the trauma so profoundly that they feel as though the trauma is happening again at that moment." Rainville, *Preparing Children with Post-Traumatic Stress Disorder for Court* at 134-35. Once triggered, P.T.S.D. can engender identical responses during the act of cross-examination as could have occurred during the rape – including freezing, tonic immobility, and the previously discussed C.S.A.A.S. *See* Beatrice Diehl, *Affirmative Consent in Sexual Assault*, 28 Geo. J. Legal Ethics 503, 509 (2015); Sharon Marcus, *Fighting Bodies, Fighting Words*, *in Feminists Theorize the Political* 394 (Judith Butler & Joan W. Scott eds., 1992); Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 Harv. L. Rev. 103, 109-10 (2015); Andrew E. Taslitz, *Willfully Blinded*, 28 Harv. J. L. & Gender 381, 414 (2005). Jurors are often unable to comprehend the reasons behind a witness's silence or disjointed or distant demeanor, thus creating doubt, or a perception of unreliability, which could have been easily avoided – without disturbing the Confrontation Clause – had the victim not been required to directly obey and address her (or his) abuser's verbal queries in order to speak. *See* Jessica Woodhams, et al., *Behavior Displayed by Female Victims During Rapes Committed by Lone and Multiple Perpetrators*, 18 Psychol. Pub. Pol'y & L. 415, 444 (2012); Marijane Camilleri, *Lessons in Law from Literature*, 39 Cath. U. L. Rev. 572-73 (1990).

The international community seems to comprehend how de facto harmful this practice is, yet sadly, the American judiciary is lagging behind. Most of the United States' fellow common law nations have already addressed this issue:

> [D]omestic legislation prohibits unrepresented accused from cross-examining child witnesses, especially in the case of sexual offences, for example in Canada (Criminal Code, R.S.C. 1985, c. C-46, sect. 486.3, subsect. 1), New Zealand (Evidence Act 1908, sect. 23F(1) and Evidence Act 2006, sect. 95) and the United Kingdom (Criminal Justice Act 1988, sect. 34A). *In those States, judges must deny requests made by unrepresented accused to cross-examine child witnesses.* In some countries, it is provided, *alternatively, that the judge may appoint a representative for the accused for the specific purpose of such cross-examination; the representative relays the questions of the accused to the child, thereby avoiding direct contact and potential intimidation*, as is done in Australia (Western Australia Evidence of Children and Others (Amendment) Act 1992, sect. 8).

United Nations Office on Drugs and Crime, *Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary*, Art. 27, ¶ 2 (N.Y. 2009) (emphasis added). Thusly, the United Nations "Model Law provides that the child victim or witness shall not be cross-examined by the accused." *Id*. at Art. 27, ¶ 4.

II. The Minority Approach

Only a small minority of courts has found that the Confrontation Clause requires a separate, additional *Craig*-style hearing "finding that such trauma would result" from factors such as "hearing the defendant's voice" in order to prevent personal cross-examination of the child victim by a pro se defendant. Only one of those cases is recent. *State v. Folk*, 151 Idaho 327, 338-39, 256 P.3d 735, 746-47 (Idaho 2011); *Commonw. v. Conefrey*, 410 Mass. 1, 13, 570 N.E.2d 1384, 1390-91 (Mass. 1991), *superseded by*, 420 Mass. 508, 650 N.E.2d 1268 (Mass. 1995).

In *Folk*, the Supreme Court of Idaho held that the Confrontation Clause right was violated where a trial court first held by "clear and convincing evidence that Child would suffer serious emotional trauma that would substantially impair Child's ability to communicate if he were to testify in the presence of Defendant"[12] and ordered testimony via closed circuit television pursuant to *Craig*. Then, "on that basis"[13] alone, the trial court additionally ruled – sua sponte – that standby counsel would also verbally conduct cross-examination as well. The Confrontation right violation was grounded in the failure of trial court to make "case-specific" findings regarding the closed-circuit procedure, which has far greater implications on the core of the Confrontation right than it does

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[12] *State v. Folk*, 256 P.3d 735, 746 (Idaho 2011).

[13] *Id.*

in courtroom accommodations. Thus *Folk* is easily distinguishable from the case at bar, where no such removal from the courtroom has been requested simultaneous to standby counsel reading the questions, and more, where corroboration[14] for the request has been provided. Still, the Idaho Court's dicta suggesting that in-court testimonial evidence of re-traumatization, or evidence of defendant's specific intent to intimidate would be required in order to accommodate a child witness facing pro se cross-examination by their rapist is problematic, and should be addressed by this Court. The child witness in *Folk* has been forced to testify at repeated trials over the course of over five years. *State v. Folk*, 341 P.3d 586, 589 (Idaho Ct. App. 2014), *review denied*, *State v. Folk*, 2015 Idaho LEXIS 43 (Idaho Feb. 5, 2015). Testimony given at trial one was used by the defendant to traumatize and impeach the child witness at trial two, even though the child's testimony at trial two would have been the statistically less reliable.

A much older case in Massachusetts, *Commonwealth v. Conefrey*,[15] also found a Confrontation right violation it found where a "mere belief held by the judge that the complainant could be intimidated or harmed beyond the normal limits associated with a trial involving a young complainant, or that she

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[14] *Id*.

[15] 410 Mass. 1, 13, 570 N.E.2d 1384, 1390-91 (Mass. 1991).

might respond untruthfully if she was questioned by the defendant" insufficient to justify the trial court's limitation on pro se defendant's personal cross-examination. It would have required separate hearing-style evidence for such an accommodation to be granted.[16] The Massachusetts Supreme Court, however, did not ground its holding solely in the Sixth Amendment, it was grounded in Massachusetts Constitution, Article XII, which offers a broader face-to-face Confrontation right than the text of the United States Constitution. *See* Decl. of Rights, Mass. Const., art. XII.

Most courts to have faced this issue directly have accepted the submission of evidence by the prosecution corroborating, for the record, the obvious fact that being subjected to direction, and often leading cross-examination by a rapist both re-traumatizes the child victim and decreases the reliability of the evidence obtainable via his or her testimony. *See* e.g., *Partin*, 168 S.W.3d at 28-29; *Jordan v. Hurley*, 397 F.3d 360, 363-64 (6th Cir. 2005); *Danner* 448 F.3d at 377-80 (6th Cir. 2006). These Courts have found such corroboration presented in response to a grant of a defendant's request to proceed pro se to satisfy the "case specific"[17] finding requirement in *Craig*. Pro se cross-examination trial procedure must carefully and consistently balance the child victim's

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[16] *Id*. at 1390.

[17] *Craig*, 497 U.S. at 840.

own fundamental liberty rights and the "[s]tate's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children"[18] with the protection of the core of the Confrontation right.[19]

The State of Arizona did submit just such corroborating statements to support the child victim's request upon the grant of the pro se motion in the case at bar. *See State ex rel. Montgomery v. Padilla*, 237 Ariz. 263, 266, 349 P.3d 1100, 1103 (Ariz. Ct. App. 2015). District attorneys, child victims, pro se defendants and their standby counsel, need an identified right that guides how pro se cross-examination of a child victim witness works within, or by extension of the *Craig* framework.

The Court needs to give guidance on this issue, for the protection of children from re-traumatization at the hands of their perpetrators. *Ashcroft v. Free Speech Coal.*, 535 U.S. at 263 (O'Connor, J., concurring). Also relevant is the state's distinct interest in preventing incest. *Poe v. Ullman*, 367 U.S. at 552 (Harlan, J., dissenting); *Muth*, 412 F.3d at 817. Children are citizens and despite their protected status they do maintain their own fundamental liberty rights,[20] as incorporated against the state of Arizona

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[18] *Ferber*, 458 U.S. at 761.

[19] *Taylor*, 562 A.2d at 455.

[20] *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

by the due process clause of the Fourteenth Amendment. U.S. Const. amend. XIV.

The issue presented by this case falls beyond this Court's opinion in *Maryland v. Craig*,[21] *because in that case, the question of how to deal with a pro se defendant was not at stake.* 497 U.S. at 840 n.1. *See State ex rel. Montgomery*, 349 P.3d at 1103. The Arizona courts below have "unreasonably appl[ied] *Craig* to these facts." *Lomholt v. Iowa*, 327 F.3d 748, 752 (8th Cir. 2003). The Confrontation Clause "guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *U.S. v. Owens*, 484 U.S. 554, 559 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, (1987)); *see also Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). As the Kentucky Supreme Court has explained, "The right denied here, that of cross-examining witnesses personally, lacks the fundamental importance of the right denied in *Craig*, that of confronting adverse witnesses face-to-face." *Partin*, 168 S.W.3d at 28-29 (citing *Fields*, 49 F.3d at 1036-37).

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[21] 497 U.S. 836. *See also*, *U.S. v. Longstreath*, 45 M.J. 366, 372 (C.A.A.F. 1996).

Indeed, the statute at issue in *Craig* itself contained a self-representation exception[22] – defendants proceeding pro se were expressly removed from its ambit – thus the *Craig* reasoning has limited value in weighing the issues presented by a pro se child rapist defendant who insists on cross-examining the child victim. The issue here is distinctive and requires this Court's attention for the protection of children across the United States.

The specific accommodation requested by the state of Arizona not only properly balanced competing rights concerns, but also was narrowly tailored to the requisite state compelling interests. *Danner v. Motley*, 448 F.3d at 377-80 (6th Cir. 2006) "The Confrontation Clause, therefore, requires courts to balance the defendant's rights and society's interests." *Id.* at 377. Least restrictive means are not required for the regulation of most Constitutional rights, absent statutory direction. *Hill v. Colo.*, 530 U.S. 703, 704 (2000); *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) (quoting *U.S. v. Albertini*, 472 U.S. 675, 689 (1989)). Narrow tailoring is sufficient. *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989).

Child Protection *Amici* request that this Court grant Certiorari to resolve the growing split regarding Confrontation Clause rights of a child predator

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[22] Md. Cts. & Jud. Proceed. Code Ann. § 9-102 (c) (1989); *Rural Hicks-Bey v. U.S.*, 649 A.2d 569, 577 n.1 (D.C. 1994).

defendant proceeding pro se and insisting on cross-examining his victim. This issue requires this Court's attention in order to ensure the welfare of child sex abuse victims across the United States and the reliability of evidence obtained on cross-examination. The disparate treatment of child victims by trial courts is a budding judicial epidemic that will only continue to grow as public awareness of these crimes increases and children are better believed and educated on how to report. Alternatively, because, the split is so lopsided, this Court would be doing a public service by issuing a summary reversal of the decision below, and a statement that it is *de facto* traumatic for a child victim to be cross-examined by his or her pro se sex abuser. If the victim asks to avoid the cross-examination, courts should be required to either ask the questions themselves or allow appointed stand by counsel to do so.

CONCLUSION

For the foregoing reasons, *Amici* request this Court grant the Petition for Certiorari or, in the alternative, issue a summary reversal and protect children's liberty interests in due process and the compelling interest in their protection without further delay.

Respectfully submitted,

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