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Brief of Amicus Curiae, Fred T. Korematsu Center for Law and Equality in Support of S.K.-P. and E.H.

Fred T. Korematsu Center for Law and Equality

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SUPREME COURT OF WASHINGTON

No. 94798-8

In re the Dependency of E.H., a minor child, and
In re the Dependency of S.K.-P., a minor child.

BRIEF OF *AMICUS CURIAE* FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF S.K.-P. AND E.H.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The interests of *amicus curiae* Fred T. Korematsu Center for Law is set forth in the accompanying Motion for Leave to File.

INTRODUCTION

Judges are keenly aware of the difference it makes when a client is represented by a lawyer in court. This difference is even more pronounced when the client is a child. As this Court has recognized, dependency proceedings threaten a child's liberty interests, as "the child will be physically removed from the parent's home," and "become[s] a ward of the State," facing "the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." *In re Dependency of M.S.R.*, 174 Wn.2d 1, 16, 271 P.3d 234 (2012). The seriousness of these threats to a child's physical and fundamental liberties compels this Court to recognize that Washington's due process jurisprudence must provide the "'guiding hand of counsel at every step in the proceedings.'"[1] It is only through counsel that children exercise the most fundamental dignity of due process—the right to be heard.

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[1] *In re Gault*, 387 U.S. 1, 36, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (quoting *Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

SUMMARY OF THE ARGUMENT

In determining whether children have a right to counsel in dependency proceedings under article I, section 3 of the Washington Constitution, the Court need not justify its interpretation of article I, section 3 through a formal *Gunwall*[2] analysis. Using *Gunwall* as an interpretive tools rather than a rote test ensures fidelity to *Gunwall*'s central purpose—that state constitutional decisions "be made for well founded legal reasons"[3]—and encourages more robust exploration of the arguments that will guide principled development of state constitutional jurisprudence. *See City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) ("*Gunwall* is better understood to prescribe appropriate arguments").

With this understanding, *amicus* documents how Washington has already made a principled departure from federal due process in the right to counsel context. Article I, section 3 affords the right to counsel if *either* fundamental liberty interests *or* physical liberty interests are at stake. *Compare In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (right to counsel when proceedings concern fundamental or physical liberty interests), *with Lassiter v. Dep't of Social Servs. Of Durham Cty., N.C.*,

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[2] *State v. Gunwall*, 106 Wn.2d 54, 62-63, 720 P.2d 808 (1986).
[3] *Id.* at 62.

452 U.S. 18, 25, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (right to counsel attaches at most only when physical liberty is at stake). Washington's due process jurisprudence must therefore recognize that children have a right to counsel in dependency proceedings, where both their fundamental and physical liberty interests are very much at stake.

Finally, employing *Gunwall* factor 4 (preexisting state law) and factor 6 (matters of state and local concern), as well as policy arguments, *amicus* demonstrates that Washington law in fact already recognizes the critical role that a child's attorney plays in dependency proceedings.

ARGUMENT

I. WASHINGTON COURTS NEED NOT APPLY *GUNWALL* TO JUSTIFY DECISIONS BASED ON THE STATE CONSTITUTION.

As this Court articulated in an opinion authored by the late Justice Robert Utter, Washington courts "will first independently interpret and apply the Washington constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature." *State v. Coe* 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984). The different histories and purposes of the state and federal constitutions "clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state

constitution and courts that is closely associated with our sovereignty." *Id.* at 374. "When a state court neglects its duty to evaluate and apply its state constitution, it deprives the people of their double security." *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wn.2d 230, 238, 635 P.2d 108 (1981) (internal quotations and citations omitted); *see also State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring) (observing that "[s]tate constitutions were originally intended to be the primary devices to protect individual rights."). *Amicus* supports petitioners' request that this Court rely on the state constitution to protect fundamental due process rights, and in so doing, continue to "develop a body of independent jurisprudence" in the right to counsel context. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (citing *Coe*, 101 Wn.2d at 373-74) (in a search case, considering petitioner's arguments under article I, section 7 first, rather than under the Fourth Amendment).

Amicus urges this Court to reiterate that where, as here, litigants invoke the state constitution and provide an argument on which to grant relief, Washington courts are free to develop state constitutional jurisprudence without a formal *Gunwall* analysis to justify using our own constitution. *Compare M.S.R.*, 174 Wn.2d at 20 n.11 (even though the child's recognized liberty interests were potentially greater than those of the parents, declining to consider article I, section 3 because petitioner had

not provided *Gunwall* briefing until her supplemental brief), *with City of Woodinville*, 166 Wn.2d at 641-42 ("A strict rule that courts will not consider state constitutional claims without a complete *Gunwall* analysis could return briefing into an antiquated writ system where parties may lose their constitutional rights by failing to incant correctly. *Gunwall* is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue.").[4] Rather, *amicus* suggests the *Gunwall* factors are best understood as interpretive tools that may guide development of a particular constitutional doctrine. *See State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) ("Our inquiry is no longer whether article I, section 7 provides greater protection but, rather, does the scope of the protection apply to the facts of the case….Once we agree that our prior cases direct

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[4] This Court's recent pronouncement in *City of Woodinville* is an answer to courts' and litigants' reliance on *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988), in which this Court declined to reach the state constitutional issue on account of inadequate *Gunwall* briefing. While *Wethered* was "repeatedly used as the basis for blocking access to state constitutional arguments for lack of adequate *Gunwall* briefing," Justice Utter's intent in *Wethered* was to "steer…[the] court toward using the *Gunwall* criteria as interpretive tools rather than as a magic key to the walled kingdom of the state constitution." Hugh Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead—Long Live Gunwall!"*, 37 Rutgers L.J. 1169, 1180 (2006); *see also Hugh Spitzer, Which Constitution? 11 Years of* Gunwall *in Washington State*, 21 Seattle U. L. Rev. 1187, 1205-06, 1211 (1998) (discussing how, in the nine years following *Wethered*, the decision had the practical effect of almost destroying the use of the state constitution, because the Court "proceeded to massively reject state constitutional arguments that were not accompanied by full *Gunwall* briefings.").

the analysis to be employed in resolving the legal issue, a *Gunwall* analysis is no longer helpful or necessary."); Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead—Long Live Gunwall!"*, 37 Rutgers L.J. 1169, 1183 (2006) (the *Gunwall* factors are useful interpretive tools for defining the nature of the heightened protection afforded by the state constitution).

II. THIS COURT HAS ALREADY MADE A PRINCIPLED DEPARTURE FROM FEDERAL DUE PROCESS IN THE RIGHT TO COUNSEL CONTEXT, AFFORDING COUNSEL WHERE THERE ARE *EITHER* FUNDAMENTAL OR PHYSICAL LIBERTY INTERESTS AT STAKE.

Though the federal and Washington constitutions employ nearly identical language in guaranteeing due process of law, Washington has already construed article I, section 3 as providing more protection than the Fourteenth Amendment in the right to counsel context. The right to counsel under article I, section 3 attaches where "the litigant's physical liberty is threatened *or* where a fundamental liberty interest…is at risk." *In re Grove*, 127 Wn.2d at 237 (emphasis added). This is in sharp contrast with federal due process, which limits the right to counsel, at most, to situations "where the litigant may lose his physical liberty if he loses the litigation." *Lassiter*, 452 U.S. at 25; *see also Turner v. Rogers*, 564 U.S. 431, 443, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011) (statements about

right to counsel from *Lassiter* "are best read as pointing out that the Court previously had found a right to counsel '*only*' in cases involving incarceration, not that a right to counsel exists in *all* such cases" (citing *Lassiter*, 452 U.S. at 25) (emphasis in original)). Therefore, article I, section 3 guarantees counsel for parents in termination and dependency proceedings, due to the fundamental liberty interests at stake. *In re the Welfare of Luscier*, 84 Wn.2d 135, 137-38, 524 P.2d 906 (1974); *In re the Welfare of Myricks*, 85 Wn.2d 252, 254-55, 533 P.2d 841 (1975); *see also King v. King*, 162 Wn.2d 378, 383 n.3, 174 P.3d 659 (2007) (recognizing that the federal due process underpinnings of *Luscier* and *Myricks* "may have been eroded by the United States Supreme Court in *Lassiter*" but noting that *Luscier* and *Myricks* were "favorably cited more recently in our case, *In re Dependency of Grove*"); *In re Welfare of Hall*, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983) (affirming that parents' categorical right to counsel in child deprivation proceedings is now based "solely in state law").[5]

Because Washington courts already recognize that the right to counsel under article I, section 3 is materially different than under federal

[5] *Luscier* and *Myricks* preceded *Gunwall*, which has not affected this Court's suggestion that the cases retain their vitality.

due process, the sole question to be resolved is how to *apply* the state constitution.[6]

III. RECOGNIZING A RIGHT TO COUNSEL FOR CHILDREN IN DEPENDENCY PROCEEDINGS IS CONSISTENT WITH STATE DUE PROCESS JURISPRUDENCE, BECAUSE DEPENDENCY PROCEEDINGS THREATEN A CHILD'S FUNDAMENTAL AND PHYSICAL LIBERTY INTERESTS.

Because the purpose of procedural due process is to protect constitutionally recognized rights, a meaningful state constitutional analysis must examine the nature of the rights said to be protected by due process. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 710-11, 257 P.3d 570 (2011) (stating that "context matters" in a due process analysis, and recognizing the context of that case had to be defined by examining the rights implicated in an initial truancy hearing). In dependency proceedings, children, unlike parents, have *both* fundamental and physical liberty interests at stake, necessitating appointment of counsel to protect those interests.

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[6] This is the question the Court of Appeals should have addressed, rather than inquiring *whether* there was justification for independent state constitutional analysis. *Matter of Dependency of S.K-P.*, 200 Wn. App. 86, 101-07, 401 P.3d 442 (2017).

While this Court did not consider article I, section 3 in *M.S.R.*, 174 Wn.2d at 15-23,[7] this Court recognized and articulated children's liberty interests at stake in dependency proceedings, for purposes of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Dependency proceedings implicate the child's physical liberty interests "because the child will be physically removed from the parent's home," and it is the child who "become[s] a ward of the State" and faces "the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." *M.S.R.*, 174 Wn.2d at 16. "Foster home placement may result in multiple changes of homes, schools, and friends over which the child has no control." *Id.* This Court concluded that "the child's liberty interest in a dependency proceeding is very different from, *but at least as great as*, the parent's." *Id.* at 17–18 (emphasis added).[8]

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[7] This Court considered children's right to counsel in the termination of parental rights context under federal due process in *M.S.R.*, 174 Wn.2d at 15-23, and determined there was no universal right to counsel, *id.* at 22-23. Because the petitioner raised the state due process claims for the first time on appeal, *id.* ¶ 2, this Court declined to consider whether article I, section 3 required appointmentment of counsel, *id.* at 20 n.11. This Court concluded that "this case does not provide us with a vehicle to consider *the entire scope* of the article I, section 3 right in this context." *Id.* (emphasis added). This case *is* the proper vehicle for full consideration of whether article I, section 3 requires a categorical right to counsel for children in dependency proceedings.

[8] In addition to the physical and fundamental liberty interests at stake, other rights are also implicated in the dependency proceeding, as articulated by S.K.-P. Supp. Br. of S.K.-P. at 5-6 (detailing state and federal constitutional and statutory rights to education, privacy, religion, culture, speedy resolution of dependency proceedings, and freedom of speech).

Further, children's liberty interests at stake differ in "degree and in kind" to those of their parents. Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 676 (2006). The risk of harm children face in dependency is irreparable. *Id.* While parents "may disagree with absolutely everything that is happening to them and their family, their cognitive awareness and understanding of the proceedings better enables them to survive the trauma. Their children, by contrast, suffer confusion and anxiety on top of everything else." *Id.* at 677. Further, the children's interests may be nuanced, existing somewhere between the binary interests of the parent and the state. *Id.*

> The child may have an interest in a limited form of state intervention short of removal and placement into foster care—an interest that is at odds with the parent's and that can only be vindicated with a judicial determination of dependency. For example, the child's right to remain with her intact biological family and her right to be safe can both be protected with a judicial order that permits the child to remain at home but that also requires her parent to attend an outpatient substance abuse or other community-based social service program.

Id. at 678 (internal citations omitted).

A child's diverse liberty interests at stake in dependency proceedings—as explicitly recognized by this Court in *M.S.R.*, and as explained by merits counsel and all *amici* in the case—form a principled and reasoned basis to require provision of counsel. Given this Court's

determination that *parents* are entitled to counsel in dependency proceedings, where there are fundamental liberty interests but not physical liberty interests at stake, so too should *children* be guaranteed counsel in dependency proceedings because both physical liberty and fundamental liberties are at stake.[9, 10] Any other conclusion creates internal inconsistency with this Court's decisions in *Luscier*, *Myricks*, and *Grove*.

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[9] This Court has recognized that case by case-by-case determinations of the need for counsel are "unwieldy, time-consuming, and costly. The proceeding might itself require appointment of counsel." *King*, 162 Wn.2d at 390 n.11. Further, without counsel, there is an intolerable risk that dependency determinations may be plagued by erroneous fact finding. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 762–63, 102 S. Ct. 1388, 1399–400, 71 L. Ed. 2d 599 (1982) (noting the risk of erroneous fact finding in the context of deprivation proceedings, due to subjective statutory standards and to proceedings vulnerable to judgments based on cultural or class bias).

[10] In reaching this conclusion, there is no concern that this Court will be "substituting [its] notion of justice for that of…the United States Supreme Court." *Gunwall*, 106 Wn. 2d at 63. As discussed above, this Court has already held article I, section 3 to be more protective than the Fourteenth Amendment in some right to counsel contexts. And, in any event, there is no federal precedent addressing whether children in dependency proceedings have a constitutional right to counsel. Because federal due process is silent on children's right to counsel in the dependency setting, a direct comparison is both unnecessary and impossible. It is undeniable that while the U.S. Supreme Court has considered *parents'* rights in the *termination* context, *Lassiter*, 452 U.S. at 31-32, it has never considered *children's* rights to counsel within the *dependency* context.

IV. APPLICATION OF *GUNWALL* AND OTHER INTERPRETIVE TOOLS DEMONSTRATES THAT PROVISION OF COUNSEL TO CHILDREN IN DEPENDENCY PROCEEDINGS ENSURES THEIR EQUAL VOICE.

The *Gunwall* factors help "both attorneys and judges systematically analyze a challenging question from a variety of angles that courts have always used, consciously or unconsciously, to evaluate cases." Spitzer, *New Life for the "Criteria Tests"*, *supra*, at 1184.[11] Factor 4, preexisting state law, includes consideration of the myriad ways in which preexisting state law protects children's liberty interests. Factor 6, whether a matter is of particular state or local concern, also appropriately includes an examination of how Washington has moved towards greater protections for minors in child welfare cases. Further, pre-*Gunwall* decisions support a state due process doctrine that is more protective than under the Fourteenth Amendment.

a. Preexisting State Law Already Recognizes the Unique Role Counsel Plays in a Dependency Proceeding.

Preexisting state law demonstrates Washington's recognition that it is only counsel who can give children a meaningful opportunity to be

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[11] *Amicus* here provides further discussion of factors 4 and 6 to supplement the parties' state due process and *Gunwall* arguments. *See* Supp. Br. of E.H. at 7-11; Supp. Br. of S.K.-P. at 7-10, 8 n.10; Supp. Br. of DSHS at 22-28; *see also State v. Foster*, 135 Wn.2d 441, 461, 957 P.2d 712 (1998) (citations omitted) recognizing that factors 4 and 6 are unique to the context in which the interpretation arises)).

heard in the context of a dependency proceeding. Provision of counsel to children in dependency proceedings is consistent with Washington's common law that has long championed the welfare of the child in the deprivation context. As early as the turn of the 20th century, our Supreme Court recognized the welfare of the child as the paramount consideration in termination proceedings. *Ex Parte Day*, 189 Wash. 368, 382, 65 P.2d 1049 (1937) ("The two principles, then, the welfare of the child and the right of the parent, must be considered together, *the former being the more weighty*." (emphasis added)); *see also State v. Rasch*, 24 Wash. 332, 335, 64 P. 531 (1901) ("It is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent.").

Further, this Court has recognized the importance of appointed counsel for children, as counsel provides different and greater protection than a guardian ad litem. In *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005), *amicus* argued, like *amicus* does here, that the child should have appointed counsel. Because none of the parties had raised the issue, the court declined to address it. *Id.* Importantly, however, the court "urge[d] trial courts…to consider the interests of children in dependency [and] parentage…proceedings, and whether appointing counsel, *in addition to and separate from the appointment of a GAL, to act*

on their behalf and represent their interests would be … in the interests of justice." *Id.* (citing RCW 13.34.100(6); RCW 26.09.110; King County LFLR 13) (emphasis added). The court noted that when "adjudicating the best interests of the child, we must…remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless." *Id.* (quotations omitted).

If courts are to remain centrally focused on the child's interests, it is necessary that counsel be appointed to articulate the child's *actual* interests.[12] It is only counsel who, with the attendant legal training and ethical responsibilities, has the duty to listen to the child and articulate the child's stated interests to the court.[13] Without counsel, *the court cannot fully understand what is at stake for the child from the child's own perspective*, and therefore is not well positioned to successfully work

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[12] *See also infra* note 13, explaining that a guardian ad litem is responsible only for advancing the child's best interests, which can vary drastically from the child's stated interest, and are necessarily a subjective determination on the part of the guardian ad litem.

[13] RPC 1.2(a) (requiring counsel to abide by the client's decisions concerning the objectives of representation). A guardian ad litem, in contrast, has no ethical obligation to advance the actual interests of the child; the Guardian Ad Litem rules recognize that the statutory best interests of the child may expressly conflict with the stated interests of the child. Guardian Ad Litem Rule 2(a) ("A guardian ad litem shall represent the best interests of the person for whom she or he is appointed. Representation of best interests may be inconsistent with the wishes of the person whose interest the guardian ad litem represents.").

through the often complicated and nuanced solutions that might best protect the child's liberty interests at stake.[14]

Additionally, the history of state statutory law provides important context for this Court's analysis of factors 4 and 6, as it demonstrates the legislature's recognition of the unique role of counsel.[15] In its 2010 amendments to RCW 13.34.100, 13.34.105, and 13.34.215, the legislature added a new section that specifically found that "inconsistent practices in and among counties in Washington…resulted in few children being notified of their right to request legal counsel." Laws of 2010, ch. 180, § 1. The legislature's recognition of the importance of providing counsel to children in dependencies in fact applies to *all* dependencies:

> Attorneys…have different skills and obligations than guardians ad litem and court-appointed special advocates, especially in forming a confidential and privileged relationship with a child….Well-trained attorneys can provide legal counsel to a child on issues such as placement options, visitation rights, educational rights, access to services while in care and services available to a child upon aging out of care. Well-trained attorneys for a child can:

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[14] Consider how Judge Erik Pitchal, who, when an advocate at Legal Aid Society, represented two brothers in dependency proceedings and was able to achieve his clients' objective to "get them out of that 'crazy foster care system' and reunite them with their Aunt." Pitchal, *supra*, at 665. He "served discovery demands and interrogatories on the agency and showed up at the hearing with two banker's boxes of documents and lengthy notes for cross-examination of the caseworker." *Id.* His advocacy materially affected the outcome of the proceedings: "[t]he judge was shocked, the agency attorney was not interested in a fight, and we settled the case….[the brothers] were soon on their way to South Carolina with the aunt." *Id.* The brothers "were together, they were with family, and they had some measure of peace." *Id.*

[15] *Gunwall* itself explains that state statutes assist in determining what the proper scope of a constitutional right may be. *Gunwall*, 106 Wn.2d at 61-62.

> (a) Ensure the child's voice is considered in judicial proceedings;
> (b) Engage the child in his or her legal proceedings;
> (c) Explain to the child his or her legal rights;
> (d) Assist the child, through the attorney's counseling role, to consider the consequences of different decisions; and
> (e) Encourage accountability, when appropriate, among the different systems that provide services to children.

Id. The 2010 amendments also require that both the state and the guardian ad litem notify a child of twelve years old or older of the right to request an attorney, and further requires the state and the guardian ad litem to ask the child whether he or she *wishes* an attorney. Laws of 2010, ch. 180, § 2.

Then, in 2014, the legislature again amended RCW 13.34.100. Laws of 2014, ch. 108, § 2. The amendments established a right to counsel for dependent children where there is no parent remaining with parental rights. *Id.* The amendments also permit judges to appoint counsel to children in *any* dependency action, either *sua sponte* or "upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department." *Id.* This increased protectiveness of the right to counsel militates strongly in favor of independent interpretation.

Finally, Washington's contraction of the right of criminal defendants to confront witnesses provides an illustrative contrast to the expansion of the right to counsel. In *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998), the court observed that over time, Washington statutory and case law had carved out more and more exceptions to the right for a

defendant to confront witnesses, which cut against independent analysis under the state constitution. *Id.* at 463-65 ("In recent years, the exceptions to the right have been enlarged….Preexisting law does not support an independent analysis of our state confrontation clause in the context of the present case."). Conversely, while federal law does not recognize a right to counsel for parents or children, Washington law has expanded to recognize a right to counsel for parents both statutorily (RCW 13.34.090(2)) and constitutionally (*Luscier*, 84 Wn.2d 135; *Myricks*, 85 Wn.2d 252), and as discussed above, the legislature has expanded the reach of RCW 13.34.100 over time.

b. Pre-*Gunwall* Decisions Provide Public Policy Rationales for Interpreting Article I, Section 3 as Providing Greater Protection than Federal Due Process.

The *Gunwall* court made clear that the six factors are "nonexclusive," and the *Gunwall* interpretive tools are certainly no bar to the Court examining its own jurisprudence prior to June, 1986, when *Gunwall* was decided. 106 Wn.2d at 58. This Court can and should consider Washington's due process jurisprudence prior to *Gunwall*. In *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984), and *State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984), our courts held that article I, section 3 mandated greater protection than federal due process.

In *Bartholomew*, this Court held that article I, section 3 was

offended by Washington's death penalty statute, which permitted the jury in the sentencing phase to consider any evidence, even if the evidence was inadmissible under the rules of evidence. 101 Wn.2d at 640. The Court reasoned that article I, section 3 would not tolerate a statute that provided lesser protection to those facing a capital sentence, and that the statute was "contrary to the reliability of evidence standard embodied in the due process clause of our state constitution." *Id.* at 640-41. The Court noted that even if its analysis were incorrect under federal law, its interpretation of article I, section 3 was not constrained by the U.S. Supreme Court's interpretation of the Fourteenth Amendment. *Id.* at 639.

In *Davis*, Division I of the Court of Appeals held that use of a juvenile defendant's post-arrest silence for impeachment, regardless of whether the silence followed *Miranda* warnings, was fundamentally unfair and violated article I, section 3. 38 Wn. App. at 605. Federal law allowed the use of a defendant's post-arrest silence for impeachment purposes if the defendant had not received *Miranda* warnings. *Id.* at 604-05 (citing *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982)). The court declined to follow federal law, reasoning that limiting the exclusion of post-arrest silence to instances where *Miranda* warnings are given would penalize a defendant who had not been advised of his rights. *Id.* As a matter of public policy, the court was concerned that following

Fletcher "might also encourage police to delay reading *Miranda* warnings or to dispense with them altogether to preserve the opportunity to use the defendant's silence against him." *Id.* at 605.

These cases demonstrate courts relying on policy rationales to extend heightened due process protections. This Court's previous right to counsel cases alone justify provision of counsel to children in dependency proceedings, and that result is both consistent with other preexisting state law and supported by compelling policy rationales. *See generally* Br. of Amici Curiae Children's Rights, Inc., et al.

CONCLUSION

Amicus urges the Court to hold that article I, section 3 requires provision of counsel to children in dependency proceedings, due to the physical and liberty interests at stake. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920 (1940) (declaring that "state courts be left free and unfettered by us in interpreting their state constitutions"). This development in right to counsel state due process jurisprudence will ensure the dignity of children as participants in the legal process. Separately, it will provide guidance for lower courts and litigants about how to meaningfully employ *Gunwall* when seeking to develop Washington's constitutional law.

RESPECTFULLY SUBMITTED this 2nd day of February, 2018.

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CERTIFICATE OF SERVICE

No. 94798-8

I declare under penalty of perjury under the laws of the State of Washington, that on February 2, 2018, the forgoing document was electronically filed with Washington State's Appellate Court Portal, which will effect service on all attorneys of record.

Signed in Seattle, Washington, this 2nd day of February, 2018.

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