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NOs. 94798-8, 94970-1

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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Consolidated cases of:

*In re Dependency of E.H.*

and

*In re Welfare of S.K.-P.*

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**STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
RESPONSE TO AMICI**

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## I. INTRODUCTION

Amici's briefs primarily offer public policy arguments to support their claim that every child in every dependency proceeding must be appointed an attorney. Many of their arguments address perceived flaws in the foster care system, or alleged failures of participants in that system who are already charged with safeguarding a child's welfare. But common sense and the experience of other states that require attorneys for children show that appointment of counsel for every dependent child will not solve the problems facing children whose parents have abused, neglected, or abandoned them, nor will it solve system-wide difficulties in arranging stable placements. Instead, requiring appointment of counsel for every child—even when an individualized analysis would not support appointing counsel in a particular case—would limit the Legislature's flexibility in addressing these problems by diverting significant resources to amici's preferred policy.

Several of the amici do not address the constitutional analysis at all, and none even attempt to distinguish this Court's recent ruling upholding appointment of counsel for children in termination proceedings on a case-by-case basis. *See In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). Rather, most of the amici focus their efforts on attempting to show the value of attorneys for children in dependency proceedings. The

Department agrees that the stories of children aided by attorneys and the experiences of attorneys representing children is valuable information for policy makers to consider. But the positive, individual experiences of some children who were actually appointed counsel under the current system do not demonstrate a constitutional right that every child in every dependency case must be appointed an attorney.

Finally, the lone amicus brief that does address an independent state constitutional analysis misconstrues prior case law in arguing that the Court should not apply a *Gunwall* analysis. *See* Amicus Br. of Fred T. Korematsu Center for Law and Equality in Support of S.K.-P. and E.H. at 3-7. This Court has not rejected the *Gunwall* approach, and application of the *Gunwall* factors shows that the state due process clause, like the federal due process clause, does not require universal appointment of counsel for children in dependencies.

## II. ARGUMENT

### A. The Court Should Not Consider the Information Presented by Amici as “Evidence”

Amici cite to a tremendous volume of information, statistics, and surveys regarding children in foster care and their personal experiences representing children. *E.g.*, Amicus Br. of Children’s Rights, Inc., et al. at v – ix (including over four pages of citations for extrinsic materials). The

Department agrees that the Court may consider publicly available information in assessing the background in which the legal issues present themselves. But by no means is this information “evidence” in the legal sense. *Contra* Amicus Br. of Children’s Rights, Inc. at 21 (claiming to have presented dispositive “evidence” in their brief). The information was not presented to the trial court, was not subject to evidentiary standards, and was not subject to challenge by the Department or other parties. Much if not all of the information would not have been admissible. *See* ER 802 (hearsay generally inadmissible); *Braam v. State*, 150 Wn.2d 689, 710, 81 P.3d 851 (2003) (report of Office of the Family and Child Ombudsman should not have been admitted as evidence (citing RCW 43.06A.060)).

The Department respectfully submits that the Court should not consider the information as evidence, but instead as mere advocacy.<sup>1</sup> *See* RAP 9.11 (describing circumstances in which court may accept additional evidence); *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009) (requiring parties to meet all six criteria in RAP 9.11 before accepting additional evidence). In particular, the Department objects to amici’s treatment of advocacy organizations’ observations in court or their

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<sup>1</sup> A party may point out improper evidence that the Court should not consider in a brief; it is not necessary to file a motion to strike. *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n.2, 271 P.3d 959, *review denied*, 175 Wn.2d 1004 (2012).

review of internal case files as reliable data, rather than argument. For example, the brief of the Center for Children and Youth Justice and the Mockingbird Society relies heavily on a report issued by the Children and Youth Advocacy Clinic. *See* Amicus Br. of Mockingbird<sup>2</sup> at 5, 9, 13-15. That report in turn relies on data collected by courtroom observers who did not have access to court records and who attended only a small percentage of hearings. Alicia LeVuza, *Defending Our Children: A Child's Access to Justice in Washington State, 2016 Status Report* (Univ. of Wash., Sch. of Law 2016), <http://cdcasa.org/wp-content/uploads/2017/01/UW-Study-2016-Defending-Our-Children.pdf>. Similarly, the Legal Counsel for Youth and Children relies on analyzing its own internal case files, which are likely skewed heavily to the representation of children age twelve and older due to current practices, to draw conclusions about the impact of appointing attorneys for children. Amicus Br. of LCYC at 12-14 (citing its amicus brief filed at the Court of Appeals, which in turn cites to LCYC, *Impact Report* (2015), <https://static1.squarespace.com/static/533dcf7ce4b0f92a7a64292e/t/565d4b9fe4b022b64cac5bd0/1448954783192/Legal+Counsel+for+Youth+and+Children+Impact+Report.+Dated+December+1%2C+2015.pdf>).

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<sup>2</sup> The Department references the brief as “Amicus Br. of Mockingbird” solely to avoid confusion between amicus Center for Children and Youth Justice (CCYJ) and amicus Legal Counsel for Youth and Children (LCYC).

The Department does not doubt the sincerity of these organizations, but the data they cite as support for their arguments was not collected by independent evaluators, published in peer-reviewed journals, or collected using scientific research methods that result in indicia of reliability. They also leave out much of the story. Even if the observations and review of internal case files had some reliability, the findings do not necessarily translate to a system with universal appointment of counsel. As just one example, the LCYC asserts that providing counsel for children makes it more likely that the children will be placed with relatives. Amicus Br. of LCYC at 13. Yet Washington places a greater percentage of foster children with relatives than do many states that require automatic appointment of counsel advocating for a child's stated interest. *See* Kids Count Data Center, Annie E. Casey Found., *Children in foster care by placement type* (showing Washington places 33-35 percent of children with relatives, compared to 23-29 percent for Iowa, 20-26 percent for Massachusetts, and 18-21 percent for New York), <http://datacenter.kidscount.org/data/tables/6247-children-in-foster-care-by-placement-type?loc=1&loct=2#detailed/2/2-52/false/573,869,36,868,867/2622,2621,2623,2620,2625,2624,2626/12994,12995> (last visited Feb. 28, 2018); Children's Advocacy Inst., *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* 58, 70, 92 (3d ed.) (*National Report Card*) (Iowa,

Massachusetts, and New York require appointment of counsel to advocate for child's stated interest), [http://www.caichildlaw.org/Misc/3rd\\_Ed\\_Childs\\_Right\\_to\\_Counsel.pdf](http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf).

The Court should likewise be cautious about using the individual experiences of children and lawyers to draw conclusions about the impact of mandating universal appointment of counsel. Several amici recount the experiences of children in foster care who were appointed attorneys under the current system. *E.g.*, Amicus Br. of Mockingbird at 5-6. It is impossible for the Department to respond to the individual circumstances of these children. But at least some of the stories highlight alleged failures of those who are already charged by statute with advocating for the children. *E.g.*, Amicus Br. of Mockingbird at 9-10, 14 (discussing child whose foster parents kicked him out of the home, resulting in the loss of his possessions, and child whose guardian ad litem and social worker allegedly did not advocate for proper medical equipment). Providing another person statutorily responsible for advocating for these children will not necessarily change the outcome because attorneys are not infallible. *Cf. State v. Estes*, 188 Wn.2d 450, 395 P.3d 1045 (2017) (reversing criminal conviction because of ineffective assistance of counsel). In recognizing this truism, the Department does not intend to devalue the contributions of children's attorneys, but notes that individuals' alleged failings in some cases do not

justify a constitutional ruling that an attorney must be appointed for a dependent child in every case.

**B. Amici’s Policy Arguments Should Be Addressed to the Legislature, Not This Court**

Much of the amici’s arguments center not on a constitutional analysis, but on perceived flaws in the foster care system, and the benefits that representation by an attorney might bring. Neither establish a constitutional right that every child in every dependency case must be appointed an attorney.

Several amici devote significant attention to the challenges faced by Washington’s foster care system, particularly with respect to placement of children. Although the Department agrees that trial courts should have authority (as current law allows) to appoint counsel on a case-by-case basis, amici do not show that universal appointment of counsel for children is the only—or even the best—policy choice to address the identified challenges.

For example, among the concerns voiced by amici is that children should be placed in family-like settings and not group homes. *E.g.*, Amicus Br. of Children’s Rights, Inc. at 7; Amicus Br. of LCYC at 9-10. This observation does not support universal appointment of counsel here. Washington is a national leader in this category, consistently placing only five percent of children in group homes. *See Children in foster care by*

*placement type, supra* p. 5. This percentage is among the lowest in the nation and far below that of many other states that require universal appointment of counsel to advocate for a child's stated interest. *Id.* (showing, e.g., 15-20 percent for Vermont; 16 percent for Texas; and 17-18 percent for Tennessee); *National Report Card* at 113, 115, 119 (Vermont, Texas, and Tennessee require stated-interest attorneys for children). As discussed above, amici also argue that attorneys for children can make placement with family members more likely. Just like the data with respect to group homes, comparing Washington to states that require attorneys shows that universal appointment of counsel is not necessarily the best policy choice to advance this goal. *See supra* at pp. 5-6.

Similarly, Children's Rights, Inc. notes that child welfare agencies in several states have been subject to court supervision because, despite their best intentions, they have not complied with federal and state laws in providing services to children. Amicus Br. of Children's Rights, Inc. at 14. Among the cases cited are several in jurisdictions that require universal appointment of counsel. *Id.* at 14 n.42 (citing, inter alia, *L.J. v. Massinga*, 778 F. Supp. 253 (D. Md. 1991); *LaShawn A. v. Dixon*, 762 F. Supp. 959 (D.D.C. 1991)); *National Report Card* at 43, 68 (District of Columbia requires a best-interest attorney for children and Maryland requires a stated-interest attorney for children).

Amici's concerns about institutionalization or use of psychotropic medications are similarly misplaced. *See* Amicus Br. of Mockingbird at 9, 18; Amicus Br. of Children's Rights, Inc. at 9. In Washington, generally speaking, dependency statutes do not authorize the juvenile court to order placement in a locked facility, even if the child consents. *In re Dependency of A.N.*, 92 Wn. App. 249, 253-54, 973 P.2d 1 (1998). Juvenile courts in dependency cases do have authority to impose remedial sanctions of up to seven days for failure to comply with a court order, but the child must have the power to purge the contempt at any time. RCW 13.34.165; *In re Dependency of A.K.*, 162 Wn.2d 632, 650, 174 P.3d 11 (2007). Otherwise, a child who is the subject of a dependency case may only be institutionalized or held in a secure facility pursuant to other statutes, which require appointment of counsel for the child.<sup>3</sup> *See, e.g.*, RCW 71.34.740 (involuntary commitment of a minor); RCW 13.40.140 (Juvenile Justice Act).

In arguing that the Court of Appeals was incorrect in stating that children in dependencies are not placed in a juvenile detention center or

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<sup>3</sup> Amicus Mockingbird points out that juvenile courts may also use their inherent contempt power to detain children, which is not limited to seven days confinement. Amicus Br. of Mockingbird at 18 (citing *A.K.*, 162 Wn.2d at 652). Although accurate, the *A.K.* opinion also makes clear that a court may only exercise its inherent contempt power after finding statutory contempt remedies inadequate, and only after all necessary due process protections are provided. *A.K.*, 162 Wn.2d at 648, 652. For criminal contempt sanctions, such due process protections include appointed counsel. *Id.*

mental health facility, Mockingbird relies primarily on a law review article, which in turn cites to a court opinion addressing practices in Georgia, not Washington. Amicus Br. of Mockingbird at 18 (citing Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. Davis J. Juv. L. & Pol’y 233, 247 (Winter 2008) (which cites, in footnote 57, *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005))). Mockingbird also cites to this Court’s *A.K.* decision, discussed above, but that case involved contempt proceedings, not institutionalization, and the Court acknowledged that relevant due process protections must be provided before finding a child in contempt. *A.K.*, 162 Wn.2d at 648, 650, 652.

Moreover, pursuant to Department policy, administration of psychotropic medications is authorized only in specific circumstances and in compliance with RCW 71.34 (addressing mental health services for minors). Washington State Dep’t of Soc. & Health Servs., Children’s Admin., *Practices and Procedures Guide* § 4541, <https://www.dshs.wa.gov/ca/4500-specific-services/4541-psychotropic-medication-management> (last visited Feb. 28, 2018). Generally, a social worker or out-of-home care provider may only authorize administration of psychotropic medications if the child is legally free and in the permanent custody of the Department, the

parent consents, or by court order. *Id.* In addition, children age 13 and older must consent to the administration of their own medication. *Id.* If a child 13 or older is incapable of consent due to cognitive disabilities, parental consent or a court order must be obtained. *Id.* If these procedural protections were not sufficient in any particular case, the juvenile court could certainly consider the issue as a factor in assessing whether to appoint counsel to the child on a case-by-case basis.

Amicus Washington Defender Association and Incarcerated Parents Project ranges even further afield, addressing the overrepresentation of minorities in dependency proceedings and the challenges faced by incarcerated parents. *See generally* Amicus Br. of WDA. The brief provides no legal citation and little argument that providing counsel for children would address these problems, let alone that attorneys for dependent children are constitutionally required. While it may be that systemic barriers prevent some incarcerated parents from participating as fully as they would like in a dependency case, in other ways an attorney for an incarcerated parent may be better able to ascertain and advance a parent's view of the child's legal interest. Unlike attorneys in at least some dependency cases, attorneys for an incarcerated parent will generally know the whereabouts of

their clients, and will be able to ascertain their views. *See In re Welfare of S.I.*, 184 Wn. App. 531, 535-37, 337 P.3d 1114 (2014) (father never appeared in dependency, mother made sporadic appearances in court); *In re Dependency of E.P.*, 136 Wn. App. 401, 403-05, 149 P.3d 440 (2006) (court-appointed attorney moved to withdraw because did not know views of parent due to lack of contact). More to the point, not every dependency case involves an incarcerated parent, and a court could consider the impact of an incarcerated parent's ability to participate as a factor when deciding whether to appoint counsel for a child.

In refuting some of the arguments made by amici, the Department is not weighing in on the policy decision of whether appointing counsel for every dependent child would be beneficial. But the mere existence of continued challenges facing Washington's child welfare system does not support amici's argument that the constitution requires counsel be appointed to every dependent child. The Legislature should be free to determine the best policy to address those challenges. The viewpoint and experience of amici, and of the children in foster care they have represented, are a valuable part of that policy development, but they do not show that the extraordinary constitutional requirement of universal appointment of counsel is warranted. *Cf.* Washington State Supreme Court, 2015 *Washington State Civil Legal Needs Study Update* (Oct. 2015) (highlighting

value of attorneys in civil cases in which appointment of counsel is not constitutionally required), [http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy\\_October2015\\_V21\\_Final10\\_14\\_15.pdf](http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf).

**C. The *Mathews* Factors Show that Universal Appointment of Counsel Is Not Required**

**1. The *M.S.R.* Decision Shows a *Mathews* Analysis Supports a Case-by-Case Appointment of Counsel**

Just two of the amicus briefs address a constitutional due process analysis under *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *See* Amicus Br. of Mockingbird; Amicus Br. of Children’s Rights, Inc. Neither of those briefs, nor any of the other amicus briefs, attempt to explain why this Court should forsake its recent *Mathews* analysis in *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). In *M.S.R.*, the Court balanced the same liberty interests of children discussed by amici with existing procedural safeguards and the state’s interests and upheld a case-by-case determination of whether counsel for children should be appointed. *M.S.R.*, 174 Wn.2d at 15-20.

Although the Court was addressing proceedings to terminate parental rights, it considered as part of its *Mathews* analysis virtually all of the interests of children that would be present in a dependency case. Specifically, the Court considered the risk of losing parents, siblings, and other family members; the “physical liberty interest” of a child who might

be physically removed from the parent's home; the risk of being placed in foster care and being forced to move from one foster home to another; multiple changes of homes, schools, and friends; the risk of harm in foster care or of being returned to an abusive or neglectful home; and even the risk of death. *M.S.R.*, 174 Wn.2d at 15-17. Despite acknowledging these significant interests of children, which the Court characterized as at least as great as a parent's, the Court ultimately concluded that a case-by-case consideration by trial courts satisfied due process. *Id.* at 21. As this Court reasoned, "the trial judge, subject to review, should apply the *Mathews* factors to each child's individual and likely unique circumstances to determine if the statute and due process requires the appointment of counsel." *Id.* at 22.

Amici ignore this Court's *Mathews* balancing and ultimate holding in *M.S.R.* Thus, they offer no reason for this Court to reject its prior reasoning.

**2. Amici's *Mathews* Analysis Relies on Liberty Interests Rarely Implicated and Discounts the Significant Procedural Protections in Current Law**

In addition to ignoring this Court's *Mathews* analysis from *M.S.R.*, amici rely on several alleged liberty interests that do not apply in Washington or that are consistent with a case-by-case approach because they are not present in every case. As discussed above, amici claim that

children are at risk of being institutionalized, but Washington law already provides for appointment of counsel under those circumstances. Amici argue that children are at risk of being placed into group homes, but this only applies to five percent of Washington children in out-of-home placements. *See* discussion *supra* at pp. 7-8. Amici also argue that children are at risk of forced psychotropic medication, but significant protections are already in place per Department policy, including requiring consent or court order in many cases. In the consolidated cases here, there was no proposal to institutionalize the children, no proposal to place them in group homes, and no proposal to administer psychotropic medications. Thus, the record in these cases refutes amici's claim that the risk of such occurrences justifies appointment of counsel for every dependent child. Instead, the trial court should have the opportunity to consider the individual circumstances of each child, and appoint counsel when appropriate.

Amici also discount the significant procedural protections already in place that protect children in dependency proceedings. Amicus Mockingbird acknowledges the statutory requirement that the State is charged with ensuring the safety and best interests of the child, but argues that competing pressures sometimes cause children to be moved for reasons

unrelated to a child's best interests.<sup>4</sup> Amicus Br. of Mockingbird at 12. Mockingbird gives as examples that "beds need to be freed for an incoming sibling group, or because the foster parent is retiring and moving out of state, or because the foster parent was late for court and the judge ordered the agency to move the child." Amicus Br. of Mockingbird at 12 (quoting Pitchal, 12 U.C. Davis J. Juv. L. & Pol'y at 255). These examples show the challenges of arranging for placement of children in foster care but do not support universal appointment of counsel. Counsel for a child could do little or nothing about a foster parent moving, and the parties to the proceeding should protect against unreasonable court rulings.<sup>5</sup> And in the instance of a sibling group needing beds, universal appointment of counsel would simply pit one lawyer against another, or two, or three, depending on the number of children in the sibling group.

Mockingbird is similarly dismissive of the significant procedural safeguard of providing a guardian ad litem (GAL) to advocate for a child's

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<sup>4</sup> Mockingbird also mistakenly suggests that placement decisions are made by agency officials and judges without input from parents or relatives. Amicus Br. of Mockingbird at 11. In fact, the department, absent good cause, must follow the wishes of the parent regarding placement of the child with a relative or other suitable person. RCW 13.34.260. Further, caregivers must be notified of dependency hearings, and may file a caregiver's report to the court. RCW 13.34.096.

<sup>5</sup> A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *West v. State*, 162 Wn. App. 120, 136, 252 P.3d 406 (2011). Thus, the Court should not require appointment of counsel for every dependent child based on the possibility that a trial court might act unreasonably and that the parties would not effectively advocate to correct the trial court action.

best interests.<sup>6</sup> Mockingbird correctly points out that a GAL has a different role than an attorney, cannot give legal advice, and has no attorney-client privilege with a child. Amicus Br. of Mockingbird at 13. But those differences are far less meaningful when the child at issue is pre-verbal or not mature enough to direct her representation or receive legal advice. Nearly half of children in foster care in Washington are age five or younger, and 71 percent are age ten or younger. Kids Count Data Center, Annie E. Casey Found., *Children in foster care by age group*, <http://datacenter.kidscount.org/data/tables/6244-children-in-foster-care-by-age-group?loc=1&loct=2#detailed/2/2-52/false/573,869,36,868,867/1889,2616,2617,2618,2619,122/12988,12989> (last visited Feb. 28, 2018). Thus, Mockingbird's argument, which would apply to far less than half of Washington children in dependencies, only reinforces that trial courts should evaluate each child's circumstances before ordering appointment of counsel. *See M.S.R.*, 174 Wn.2d at 21 (noting that an infant would not benefit as much from counsel's advocacy as a child of 10, 12, or 14).

Mockingbird also ignores statutory requirements of GALs and the record in these cases when it argues that a child has no way to express her

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<sup>6</sup> Unless the context indicates otherwise, the Department uses GAL to refer to a guardian ad litem or a Court Appointed Special Advocate (CASA). *See* RCW 13.34.100(2), (9) (authorizing appointment of CASA to serve role of GAL in certain circumstances).

wishes when the GAL's recommendations differ from the child's wishes.<sup>7</sup> Amicus Br. of Mockingbird at 13. Again, this concern is not likely to be applicable to a great number of young children in dependencies who are not capable of forming or expressing a stated interest. In any event, a GAL is required by statute to convey to the court the stated wishes of the child. RCW 13.34.105(1)(b). That is just what the GAL and CASA in these cases did. *E.g.*, CP 021, 084; JA 205, 212 (GAL and CASA reports to court including sections on child's expressed wishes).

Mockingbird next argues that attorneys are necessary because it alleges GALs are not appointed in every case, and some GALs do not properly advocate for children. Amicus Br. of Mockingbird at 13-14. Not so. Appointing an attorney for every dependent child is not the solution to the lack of GALs being appointed or GALs not properly fulfilling their roles. In the vast majority of cases, that would result in an attorney being appointed in a case in which a GAL *is* appointed and *is* properly fulfilling their role. In those cases without a GAL, or with an ineffective one, the

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<sup>7</sup> To support its argument, Mockingbird cites a report of courtroom observers that GALs presented arguments to support the child's position only 30 percent of the time. Amicus Br. of Mockingbird at 13 (citing Alicia LeVuza, *Defending Our Children: A Child's Access to Justice in Washington State, 2016 Status Report* 22 (Univ. of Wash., Sch. of Law 2016), <http://cdcasa.org/wp-content/uploads/2017/01/UW-Study-2016-Defending-Our-Children.pdf>). The survey did not include access to court records, so there is no way to know whether the GAL presented arguments in writing, and the report contains no context such as the age of the child, whether the stated wishes were even possible, or other circumstances that might impact a GAL's actions.

result would still be unsatisfactory, because even with appointed counsel, there would be no effective GAL to gather information, report to the court, and advocate for the child’s best interest.<sup>8</sup>

Finally, Mockingbird takes issue with the Court of Appeals’ reliance on the statutory procedural protection that authorizes the court to appoint counsel for children *sua sponte* or upon request. Amicus Br. of Mockingbird at 15. As an example of the alleged ineffectiveness of this provision, Mockingbird cites a Court of Appeals opinion that reversed a trial court’s decision not to appoint counsel. *Id.* at 16 (citing *In re Dependency of Lee*, 200 Wn. App. 414, 419, 404 P.3d 575 (2017)). What Mockingbird fails to address is that appellate review is yet another procedural safeguard already in place. *M.S.R.*, 174 Wn.2d at 21 (“The constitutional due process right to counsel is also protected by case by case appellate review.”).

The *Lee* decision also answers Mockingbird’s concern that trial courts are not given guidance under the statute as to when to appoint counsel. Amicus Br. of Mockingbird at 15. To the contrary, this Court has already explained that trial courts should “apply the *Mathews* factors to each

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<sup>8</sup> Children’s Rights, Inc. argues that attorneys are necessary in part to ensure that the trial court is fully informed. Amicus Br. of Children’s Rights, Inc. at 17-18. Although attorney representation might make a court better informed in some cases, in others it might not. Unlike GALs, attorneys are obligated in many circumstances to withhold relevant information from the court. *See* RPC 1.6 (a lawyer shall not reveal information relating to the representation of a client).

child's individual and likely unique circumstances to determine if the statute and due process requires the appointment of counsel." *M.S.R.*, 174 Wn.2d at 22. The trial court in *Lee* failed to apply those factors, and the procedural safeguard of appellate review corrected the error. *Lee*, 200 Wn. App. at 450-53. In S.K.-P. and E.H.'s cases, the trial courts did not err; as directed by this Court, each trial court considered the individual circumstances of the child and determined that application of the *Mathews* factors did not support appointment of counsel. CP 328-29; JA 8-11.

### **3. Amici's *Mathews* Analysis Fails to Account for the Unique Circumstances of Dependent Children**

Amici's balancing of the *Mathews* factors ultimately fails to account for two key factors when evaluating due process protections for children in dependencies. First, Amici incorrectly argue that all children are similarly situated in dependency proceedings. *E.g.*, Amicus Br. of Children's Rights, Inc. at 2. This assertion is refuted by this Court's precedent and amici's own briefing.

In *M.S.R.*, this Court concluded that a child's interest in dependencies and proceedings to terminate parental rights would vary widely, citing as just one example the age of the child. *M.S.R.*, 174 Wn.2d at 21. Even amici's own briefing shows the individuality of a child's circumstances in a dependency, pointing to institutionalization, use of

psychotropic medications, placement in group homes, placement with non-family members, and multiple placements as interests that may arise in a dependency. Those individual interests may or may not be present in any particular child's case. For example, S.K.-P. was placed with family members for the entire dependency and experienced none of the circumstances listed above. *See* DSHS Suppl. Br. at 4-6. Other children may not even be removed from a parent's home during a dependency. Likewise, amici decry situations in which a GAL does not advocate for a child's expressed wish. *E.g.*, Amicus Br. of Mockingbird at 13. Again, a conflict between a GAL and the child may occur in some dependencies, but not others. Far from being monolithic, a child's individual circumstance in a dependency or proceeding to terminate parental rights not only varies widely, but is "likely unique." *M.S.R.*, 174 Wn.2d at 22.

Second, Amici do not account for the special circumstances of children, who are unlike adults for purposes of a *Mathews* analysis in several ways. As the U.S. Supreme Court has recognized, even without state intervention children are always in some form of custody. *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Schall v. Martin*, 467 U.S. 253, 266, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984). The *Reno* and *Schall* courts addressed the physical detention of children, and explicitly qualified a child's liberty interest due to this aspect unique to

children. *Reno*, 507 U.S. at 302; *Schall*, 467 U.S. at 265. The same rationale applies to almost all decisions affecting a child’s life. Even without state intervention, a child has little to no control over major decisions in his or her life. Children are also unlike adults for purposes of a *Mathews* analysis because children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); *see also Thompson v. Oklahoma*, 487 U.S. 815, 823, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (“[T]he experience of mankind, as well as the long history of our law, recognize[es] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults.” (Internal quotation marks omitted.)).

The Department acknowledges that children can have liberty interests at stake when the state intervenes in their lives, but as the U.S. Supreme Court has recognized, those interests cannot be evaluated as if the state intervened in the lives of adults in the same way. This Court should adhere to its rationale expressed in *M.S.R.* and uphold Washington’s statutes that allow trial courts to examine a child’s individual circumstances and appoint counsel when warranted.

**D. A *Gunwall* Analysis Shows that the Washington Constitution Does Not Require Appointment of Counsel to Every Child in Every Dependency**

Amicus Fred T. Korematsu Center for Law and Equality (Korematsu Center) is the sole amicus to address a state constitutional analysis. But the Korematsu Center misconstrues precedent when it suggests that this Court has jettisoned its *Gunwall* analysis. The Korematsu Center also overstates the impact of statements that this Court has made with respect to a due process right to counsel under the state constitution. This Court has never required counsel to be appointed in a civil case using an independent state constitutional analysis. Lastly, the Korematsu Center repeats Petitioners' error by relying on recent amendments to state law to support an independent state constitutional analysis.

**1. This Court Has Not Abandoned a *Gunwall* Analysis to Determine if the State Constitution Should Be Interpreted Independently**

This Court has repeatedly held that when assessing whether to independently interpret our state constitution, the Court will consider the six factors set out in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *E.g.*, *Sprague v. Spokane Valley Fire Dep't*, \_\_ Wn.2d \_\_, 409 P.3d 160, 172 (2018); *In re Marriage of King*, 162 Wn.2d 378, 392, 174 P.3d 659 (2007). The Korematsu Center argues that this Court need not engage in a *Gunwall* analysis to determine if the state constitution provides broader

protection than the federal constitution, relying primarily on this Court's decision in *City of Woodinville v. North Shore United Church of Christ*, 166 Wn.2d 633, 211 P.3d 406 (2009). Amicus Br. of Korematsu Center at 5-6. The Court need not address this claim, since the parties here have extensively briefed the *Gunwall* factors at every stage of the proceedings. Regardless, the Korematsu Center overstates the impact of the *Woodinville* opinion and ignores subsequent precedent applying the *Gunwall* factors.

In *Woodinville*, this Court addressed a state constitutional claim under article I, section 11, even though the parties had apparently not engaged in a full *Gunwall* analysis. *Woodinville*, 166 Wn.2d at 641. The Court did not abandon its *Gunwall* approach more generally, and it relied heavily on the fact that precedent already firmly established that article I, section 11 extends broader protection than the federal constitution. *Id.* at 641-42 (citing *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 229-30, 840 P.2d 174 (1992)). Moreover, that precedent also established a distinct analytical framework for assessing the state constitutional claims based in part on the variations in language between the two constitutions. *E.g.*, *First Covenant Church of Seattle*, 120 Wn.2d at 224-26. Under those circumstances, the Department agrees that a *Gunwall* analysis is not always necessary. *See McNabb v. Dep't of Corrections*, 163 Wn.2d 393, 399, 180 P.3d 1257 (2008) (court will apply independent state

constitutional analysis if already well settled; otherwise will address only if *Gunwall* has been briefed).

Opinions issued after *Woodinville* demonstrate that article I, section 3 of the state constitution does not fall within this exception to the *Gunwall* requirements. *E.g.*, *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 711-14, 257 P.3d 570 (2011) (applying *Gunwall* factors to determine that article I, section 3 should not be interpreted independently in the context of providing counsel to children in truancy proceedings); *M.S.R.*, 174 Wn.2d at 20 n.11 (declining to address claim that counsel should be provided to children in proceedings to terminate parental rights under article I, section 3 because party making claim had not addressed *Gunwall* factors). Accordingly, the Court should assess Petitioners' claim under the state constitution by applying the *Gunwall* factors.

**2. The Court Has Not Already Determined that Article I, Section 3 Provides Broader Protection in This Context**

The Korematsu Center incorrectly relies on statements by this Court to assert that the Court has made a principled departure from federal due process in the context of the right to counsel. Amicus Br. of Korematsu Center at 6 (quoting *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995)). Quoting the *Grove* court, the Korematsu Center claims that under the state due process clause, a right to counsel is presumed not

just when a person’s physical liberty is involved, but also when a “fundamental liberty interest” is implicated. Amicus Br. of Korematsu Center at 6. Although the Korematsu Center accurately quotes the *Grove* opinion, the Court’s statement was not a holding and does not represent a principled analysis that the state constitution should be interpreted more broadly than the federal constitution. In fact, neither in *Grove* nor in any other opinion has this Court ever required appointment of counsel in a civil case based on an independent interpretation of the state constitution. *See Grove*, 127 Wn.2d at 237-38 (denying right to counsel because interest was merely financial); *In re Marriage of King*, 162 Wn.2d at 394 (denying parent right to counsel in custody hearing even assuming article I, section 3 provided independent analysis); *Bellevue Sch. Dist.*, 171 Wn.2d 695 (denying child in truancy proceeding right to counsel and determining state constitution should not be interpreted independently).

The genesis of the statement about “fundamental liberty interests” in *Grove* lies in two decisions by this Court: *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975), and *In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974). These two decisions are the sole authorities cited by *Grove* for its statement. *Grove*, 127 Wn.2d at 237. In those cases, the Court held that the federal and state constitutions required appointment of counsel for parents in dependencies and proceedings to terminate parental

rights. *Myricks*, 85 Wn.2d at 255; *Luscier*, 84 Wn.2d at 138. The Court did not give any indication that the state and federal constitutions should be interpreted differently, and relied on federal and state authorities interchangeably.<sup>9</sup> *E.g.*, *Luscier*, 84 Wn.2d at 136-38. Subsequently, the U.S. Supreme Court held that federal due process did not require automatic appointment of counsel to parents in a proceeding to terminate parental rights; it was sufficient to make that determination on a case-by-case basis. *Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18, 31-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

In numerous opinions, this Court has acknowledged that the *Myricks* and *Luscier* opinions did not analyze whether the state constitution provided broader protection than its federal counterpart, and that it was an open question whether the state constitutional underpinnings remained valid. *E.g.*, *M.S.R.*, 174 Wn.2d at 14 (*Myricks* and *Luscier* did not consider what process was due under U.S. Constitution as opposed to state constitution); *Bellevue Sch. Dist.*, 171 Wn.2d at 712 (stating that “[i]t remains undetermined” whether *Lassiter* eroded the constitutional underpinnings of *Luscier* because the Court did not separately analyze the state and federal

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<sup>9</sup> The *Myricks* opinion, which addressed dependency proceedings, cited neither the federal nor the state constitution and, other than *Luscier*, relied almost exclusively on federal court opinions. *Myricks*, 85 Wn.2d at 253-54.

constitutions in *Luscier*); *In re Marriage of King*, 162 Wn.2d at 383 n.3 (declining to address continuing constitutional validity of *Luscier* and *Myricks* because right to counsel for parents had been codified). *But see In re Marriage of King*, 162 Wn.2d at 392 n.13 (citing *Grove* for statement that “[o]utside of cases involving a risk to a fundamental liberty interest, there is a presumption of a right to counsel only where physical liberty is at stake”).

Even the *Grove* opinion itself expressly declined to address whether parents in a dependency had a constitutional right to counsel on appeal, instead finding the right on statutory grounds. *Grove*, 127 Wn.2d at 229 n.6. As this history shows, this Court has never engaged in an independent analysis of the state constitution of any kind in the context of the right to counsel, let alone a principled departure as argued by the Korematsu Center. Accordingly, a *Gunwall* analysis is necessary.<sup>10</sup>

### **3. Preexisting State Law Does Not Support an Independent State Constitutional Analysis**

Like Petitioners, the Korematsu Center incorrectly relies on recently enacted laws regarding appointment of counsel for children to claim that the

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<sup>10</sup> Even if the Court disagreed and determined that *Myricks* and *Luscier* establish an independent, state constitutional right to counsel, those cases would not apply here because they address the appointment of counsel for parents in dependency and termination proceedings, not appointment of counsel for children.

*Gunwall* factor of preexisting state law supports an independent state constitutional analysis. Amicus Br. of Korematsu Center at 15-16 (citing laws from 2010 and 2014). This approach not only defies logic, but perversely provides a strong disincentive for the Legislature to provide citizens additional procedural protections via statute.

Determining whether the drafters of our state constitution intended its provisions to apply differently than the federal constitution based on laws enacted well over a century later makes no sense. That is why this *Gunwall* factor typically examines laws around the time of the state constitution or shortly thereafter. *E.g.*, *Grant County Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004). In instances where this Court has examined recent enactments, it has often been careful to tie those statutes to historical protections. *E.g.*, *State v. Johnson*, 128 Wn.2d 431, 443-46, 909 P.2d 293 (1996) (citing statutes from 1881 through those currently in effect to show a long history of regulating travel).

The Korematsu Center does attempt to tie recent enactments regarding appointment of counsel for children to historical case law generally protecting the welfare of children. Amicus Br. of Korematsu Center at 13. But general statements that the welfare of the child is paramount in proceedings to terminate parental rights do not support providing counsel to children in all dependency cases. Statutes authorizing

discretionary appointment of counsel for children were not enacted until 1979, and even the more recent enactments relied on by the Korematsu Center do not support appointment of counsel to every child in every dependency. *See* Laws of 1979, ch. 155, § 43 (RCW 13.34.100).

The recent enactments expanding the right to counsel for dependent children do not support extending that protection to automatic appointment of counsel. To do so would not only ignore the state's historical laws regarding appointing counsel for children, it would discourage the Legislature from expanding procedural protections in any context, for fear that any such expansion would result in this Court constitutionalizing the statutory procedure. In fact, the Korematsu Center argues that this Court should not just constitutionalize the statutory procedure enacted by the Legislature, but should take it as evidence that the constitution actually requires more. The *Gunwall* analysis does not, and should not, discourage the Legislature from providing greater procedural protections than the minimums required by the constitution.

**4. Pre-*Gunwall* Decisions Do Not Support an Independent State Constitutional Analysis Here**

The Korematsu Center cites two pre-*Gunwall* decisions that interpreted our state constitutional due process clause more broadly than the federal due process clause to support its argument that the Court should do

the same here. Amicus Br. of Korematsu Center at 17-18 (citing *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984); *State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984)). This argument fails for at least three reasons.

First, these cases do not arise in a context anywhere near the current case, and this Court has stated that “context matters” in a state constitutional due process analysis. *Bellevue Sch. Dist.*, 171 Wn.2d at 711; *see also State v. Ortiz*, 119 Wn.2d 294, 304-05, 831 P.2d 1060 (1992) (holding *Bartholomew* and *Davis* did not control because the case arose in a different context). Second, these pre-*Gunwall* decisions do not offer any rationale for interpreting the state due process clause more broadly than the federal due process clause, other than an apparent disagreement with the outcome of federal cases. *Bartholomew*, 101 Wn.2d at 639; *Davis*, 38 Wn. App. at 605; *id.* at 607 & n.1 (Durham, C.J., dissenting) (arguing that majority offers no sound historical reason for interpreting state constitution more broadly and cautioning against visceral reactions to U.S. Supreme Court rationales). Finally, the Korematsu Center does not cite even a single opinion finding broader protection under article I, section 3 since *Gunwall* required an actual justification for an independent interpretation of the state constitution. The absence of such opinions contradicts the Korematsu

Center's argument that these pre-*Gunwall* opinions support broader protection under the state constitution.

### III. CONCLUSION

This Court should reaffirm its analysis in *M.S.R.* and hold that the substantial procedural protections in statute, including the appointment of counsel for dependent children on a case-by-case basis, satisfies the minimum requirements of both the federal and state due process clauses.

RESPECTFULLY SUBMITTED this 2nd day of March 2018.

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## CERTIFICATE OF SERVICE

I certify that I served a copy of the State Department of Social and Health Services Response to Amici, via electronic mail, upon the following:

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I certify under penalty of under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of March 2018, at Olympia, Washington.

*s/ Wendy R Scharber*

WENDY R. SCHARBER  
*Legal Assistant*

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