

SUPREME COURT OF WASHINGTON

No. 94970-1

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

MEMORANDUM OF *AMICI CURIAE*
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
AND LEGAL COUNSEL FOR YOUTH AND CHILDREN
IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

Jessica Levin
Lorraine K. Bannai
Robert S. Chang
Ronald A. Peterson Law Clinic
Seattle University School of Law
1215 East Columbia St.
Seattle, WA 98122
(206) 398-4167
levinje@seattleu.edu
bannail@seattleu.edu
changro@seattleu.edu

Counsel for *Amici Curiae*
Fred T. Korematsu Center for Law and Equality and
Legal Counsel for Youth and Children

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE* 1

ISSUES TO BE ADDRESSED BY *AMICI*..... 1

ARGUMENT 3

 I. THIS CASE WARRANTS REVIEW BECAUSE IT ALLOWS
 THIS COURT TO FURTHER DEVELOP A CONSISTENT DUE
 PROCESS JURISPRUDENCE IN THE RIGHT TO COUNSEL
 CONTEXT.....3

 II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT
 WHILE THE *GUNWALL* FACTORS ARE USEFUL INTERPRETIVE
 TOOLS FOR DEVELOPING OUR STATE CONSTITUTIONAL
 JURISPRUDENCE, THEY ARE NOT NECESSARY TO THIS
 EFFORT.....5

CONCLUSION..... 10

TABLE OF AUTHORITIES

Washington Constitution

Const. art. I, § 3..... *passim*

Washington Cases

<i>City of Woodinville v. Northshore United Church of Christ</i> , 166 Wn.2d 633, 211 P.3d 406 (2009).....	7, 8, 9
<i>In re Dependency of M.S.R.</i> , 174 Wn.2d 1, 271 P.3d 234 (2012).....	<i>passim</i>
<i>In re Grove</i> , 127 Wn.2d 221, 897 P.2d 1252 (1995).....	4
<i>In re Welfare of Hall</i> , 99 Wn.2d 842, 664 P.2d 1245 (1983)	2
<i>In re the Welfare of Luscier</i> , 84 Wn.2d 135, 524 P.2d 906 (1974).....	4
<i>In re the Welfare of Myricks</i> , 85 Wn.2d 252, 533 P.2d 841 (1975).....	4
<i>King v. King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007).....	4
<i>State v. Coe</i> , 101 Wn.2d 364, 679 P.2d 353 (1984).....	5, 6
<i>State v. Foster</i> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	7
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	<i>passim</i>
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	6
<i>State v. Martin</i> , 151 Wn. App. 98, 210 P.3d 345 (2009).....	7
<i>State v. Rainford</i> , 86 Wn. App. 431, 936 P.2d 1210 (1997).....	7
<i>State v. Smith</i> , 117 Wn.2d 263, 814 P.2d 652 (1991).....	10
<i>State v. Wethered</i> , 110 Wn.2d 466, 755 P.2d 797 (1988).....	9

Other Cases

Lassiter v. Dep't. of Soc. Servs. of Durham Cty., N.C., 452 U.S. 18,
101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)..... 2, 8

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893,
47 L. Ed. 2d 18 (1976)..... 4, 8

Minnesota v. Nat'l Tea Co., 309 U.S. 551, 60 S. Ct. 676,
84 L. Ed. 920 (1940)..... 10

State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982)..... 7

Washington Statutes & Court Rules

RAP 13.4..... 2, 3

Other Authorities

Hugh Spitzer, *New Life for the “Criteria Tests” in State
Constitutional Jurisprudence: “Gunwall Is Dead—Long
Live Gunwall!”*, 37 Rutgers L.J. 1169 (2006) 9, 10

Robert F. Utter & Hugh D. Spitzer, *The Washington
State Constitution* (2d ed. 2013) 6, 9

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The interests of *amici curiae* Fred T. Korematsu Center for Law and Equality and Legal Counsel for Youth and Children are set forth in the accompanying Motion for Leave to File.

ISSUES TO BE ADDRESSED BY *AMICI*

S.K.-P.'s case presents this Court with a significant question of state constitutional law, whether article I, section 3 of the Washington constitution requires that counsel be appointed to protect a child's fundamental liberty interests at stake in dependency proceedings.

S.K.-P.'s case also presents this Court with the opportunity to provide clear guidance to lower courts and litigants about when and how courts may consider state constitutional arguments. The absence of clear guidance from this Court on the purpose of *Gunwall*¹ thwarts robust development of state constitutional jurisprudence.

INTRODUCTION

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

¹ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Fourteenth Amendment in the right to counsel context. Specifically, Washington has interpreted article I, section 3 to provide parents a categorical right to counsel in the deprivation context. *Compare 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”), with *Lassiter v. Dep’t of Social Servs. Of Durham Cty., N.C.*, 452 U.S. 18, 31, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (holding that parents do not have a categorical right to counsel in child deprivation proceedings under the Fourteenth Amendment).

This Court considered children’s right to counsel in the deprivation context under federal due process in *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012). Because the petitioner raised the due process claims for the first time on appeal, *id.* ¶ 2, this Court declined to consider whether article 1, section 3 required appointment of counsel, *id.* at 20 n.11. Unlike *M.S.R.*, S.K.-P.’s case is a good vehicle for full consideration of children’s rights under Washington’s due process clause. S.K.-P. submitted thorough briefing on this question to the Court of Appeals, which the court considered in its opinion, and to this Court in her motion for discretionary review.

Amici urge this Court to accept review under RAP 13.4(b)(3) and (4) so this Court can further develop article I, section 3 as a separate and

independent source of law from the Fourteenth Amendment, and so this Court can ensure that every child’s fundamental liberty interests in dependency proceedings are vigorously protected by counsel. Review of this case is further warranted under RAP 13.4(b)(3) so the Court may clarify that while the *Gunwall* factors are useful interpretive tools for developing our state constitutional jurisprudence, they are not necessary to this effort—especially where, as here, federal doctrine is silent on the existence of a particular right. Washington citizens may seek the protection of our state constitution without having to conduct a formal *Gunwall* analysis, and Washington courts are free to grant that relief.

ARGUMENT

I. THIS CASE WARRANTS REVIEW BECAUSE IT ALLOWS THIS COURT TO FURTHER DEVELOP A CONSISTENT DUE PROCESS JURISPRUDENCE IN THE RIGHT TO COUNSEL CONTEXT.

This Court should grant review so it may look to its own pronouncements as to state constitutional precedent in related right to counsel cases. Further, S.K.-P.’s case gives this Court the opportunity to consider the categorical right to counsel for children in the dependency context with robust discussion by the litigants, the Court of Appeals, and *amici curiae* on the state constitutional issue, which was lacking in *M.S.R.*, 174 Wn.2d 1.

Article I, section 3 guarantees counsel for parents in termination and dependency proceedings. *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).² In *M.S.R.*, 174 Wn.2d 1, the Court considered whether children had a categorical right to counsel in the deprivation context under federal due process, *id.* at 11, but declined to analyze the issue under article I, section 3, *id.* at 20 n.11. The mother had raised the issue for the first time on appeal, *id.* ¶ 2, and it was not until the supplemental brief that she provided a *Gunwall* analysis, *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).

In analyzing the children’s liberty interests at stake for purposes of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), this Court in *M.S.R.* noted that 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

² While these cases preceded *Gunwall*, this Court has suggested several times that the cases retain their vitality. See, e.g., *King v. King*, 162 Wn.2d 378, 383 n.3, 174 P.3d 659 (2007) (noting that “*Luscier* and *Myricks* were favorably cited more recently in our case, *In re Dependency of Grove*,” 127 Wn.2d 221, 897 P.2d 1252 (1995)).

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.” 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.

Even though the child’s recognized liberty interests were potentially greater than those of the parents, this Court felt unable to address whether a categorical right to counsel existed under article I, section 3 because counsel did not timely invoke *Gunwall. M.S.R.*, 174 Wn.2d at 20 n.11. S.K.-P.’s case is this Court’s opportunity to revisit the issue and reach the conclusion supported by our state constitutional jurisprudence.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT WHILE THE *GUNWALL* FACTORS ARE USEFUL INTERPRETIVE TOOLS FOR DEVELOPING OUR STATE CONSTITUTIONAL JURISPRUDENCE, THEY ARE NOT NECESSARY TO THIS EFFORT.

As this Court articulated in *State v. Coe*, 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.” 101 Wn.2d 364, 374, 679 P.2d 353 (1984); *see also State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (citing *Coe*, 101 Wn.2d 373-74) (in a search case, considering petitioner’s arguments under article I, section 7 first, rather than under the Fourth Amendment). 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.” *Coe*, 101 Wn.2d at 374;

S.K.-P.’s case is an opportunity to clarify that where, as here, there is no “instructive” federal precedent, a *Gunwall* analysis is unnecessary, and Washington courts are free to develop state constitutional jurisprudence without a formal *Gunwall* analysis. The *Gunwall* decision was a response to our state courts’ uncertainty “about the propriety of applying their constitutions independently of the U.S. Constitution...[so] judges needed comparative factors to justify independent analysis.” Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 14 (2d ed. 2013). Thus, this Court began requiring litigants to provide a *Gunwall* analysis in the context of deciding whether the Washington constitution afforded *greater* protection than the federal constitution.

In *Gunwall*, the court’s analysis centered on a concern for

respecting on-point precedent from the U.S. Supreme Court. It acknowledged that, while states have the “sovereign right” to provide “more expansive” rights under their state constitutions than under the federal, state constitutional decisions that “establish no principled basis for *repudiating federal precedent*” are problematic. *Gunwall*, 106 Wn.2d at 59-60 (emphasis added). State courts needed to be “sensitive to developments in federal law” by looking to U.S. Supreme Court decisions as “important guides on the subjects which they *squarely* address,” *id.* at 60-61 (citing *State v. Hunt*, 91 N.J. 338, 363, 450 A.2d 952 (1982) (Handler, J., concurring) (emphasis added)), because “[f]ederal precedent in areas addressed by similar provisions in our state constitution can be meaningful and instructive.” *Id.* at 60.³

³ Subsequent decisions demonstrate that at least initially, *Gunwall* served a comparative purpose, reflected in the Court’s analysis considering whether the Washington constitution provides “greater” or “different” protection than under the U.S. Constitution. For instance, in *State v. Foster*, this Court explicitly recognized that a *Gunwall* analysis is necessary only when there is federal law on point. 135 Wn.2d 441, 455, 957 P.2d 712 (1998). In conducting its *Gunwall* analysis of the state’s confrontation clause (which had been previously held to be coextensive in other confrontation contexts), the court first looked to federal court interpretations of the Sixth Amendment because “we must first understand the breadth of that right before we can determine whether our state confrontation clause provides *greater* protection to an accused than does the federal confrontation clause.” *Id.* (citing *State v. Rainford*, 86 Wn. App. 431, 436, 936 P.2d 1210 (1997)); *see also City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) (“[*Gunwall*] articulates standards to determine when and how Washington’s constitution provides *different* protection of rights than the United States Constitution” (emphasis added)); *State v. Martin*, 151 Wn. App. 98, 105, 210 P.3d 345 (2009) (analysis of Sixth Amendment jurisprudence was necessary to conduct first, to “illuminat[e] the issues arising in a *Gunwall* analysis of article I, section 22.”).

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. This Court acknowledged the framework laid in *Lassiter*, in which the Supreme Court held that parents’ right to counsel in child deprivation proceedings is subject to *Mathews*, was only “instructive” and not binding, since *Lassiter* concerned the rights of parents and not children. *M.S.R.*, 174 Wn.2d at 15; *see also Lassiter*, 452 U.S. at 43 n.10 (Blackmun, J., dissenting) (noting that providing counsel for children would require “consideration of interests different from those presented here, and again might yield a different result”).

More fundamentally, S.K.-P.’s case presents this Court with an opportunity to clarify that Washington courts are free to consider relief under the state constitution whether or not the litigants have provided formal *Gunwall* briefing. *Compare M.S.R.*, 174 Wn.2d at 20 n.11 (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

Such clarification would be consistent with this Court’s recent pronouncement in *City of Woodinville*, 166 Wn.2d at 641-42, suggesting that while a *Gunwall* analysis is not a precondition to invoking the state constitution, the factors are nevertheless useful interpretive tools. Even though *Gunwall* initially functioned predominately as a comparative tool “for deciding *whether* to interpret a state provision independently,” Utter & Spitzer, *supra*, at 14, the *Gunwall* factors—particularly factors 4 (preexisting state law) and 6 (matters of particular state interest or local concern)—help “both attorneys and judges systematically analyze a challenging question from a variety of angles that courts have always

⁴ This Court’s recent pronouncement in *City of Woodinville* is perhaps 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).

used, consciously or unconsciously, to evaluate cases.” Spitzer, *supra* n.4, at 1184. Further, clarification from this Court that *Gunwall* is simply one possible pathway to relief would ensure the primacy of Washington’s constitution. *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.”); *see also 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”). Failure to give such guidance on *Gunwall*’s purpose will impede development of our state constitutional jurisprudence.

CONCLUSION

For the reasons set forth in the motion for discretionary review and above, *amici* urge this Court to accept review.

RESPECTFULLY SUBMITTED this 12th day of October, 2017.

s/ Jessica Levin

Jessica Levin, WSBA #40837
Lorraine K. Bannai, WSBA #20449
Robert S. Chang, WSBA #44083
Attorneys for *Amici Curiae*
Fred T. Korematsu Center for
Law and Equality and
Legal Counsel for Youth and Children

CERTIFICATE OF SERVICE

Washington Supreme Court Number: 94970-1

I declare under penalty of perjury under the laws of the State of Washington, that on October 12, 2017, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 12th day of October, 2017.

s/ Jessica Levin

Jessica Levin, WSBA #40837
Ronald A. Peterson Law Clinic
Seattle University School of Law
1215 East Columbia St.
Seattle, WA 98122
(206) 398-4130
levinje@seattleu.edu

Counsel for *Amici Curiae*
Fred T. Korematsu Center for
Law and Equality and
Legal Counsel for Youth and Children

KOREMATSU CENTER FOR LAW AND EQUALITY

October 12, 2017 - 11:23 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94970-1
Appellate Court Case Title: In re the Dependency of S.K-P.
Superior Court Case Number: 14-7-01911-8

The following documents have been uploaded:

- 949701_Briefs_20171012231519SC416775_2016.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Memo of Korematsu Center and LCYC supporting discretionary review FINAL.pdf
- 949701_Motion_20171012231519SC416775_6301.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Motion of Korematsu Center and LCYC for Leave to file Memo in support of review FINAL.pdf

A copy of the uploaded files will be sent to:

- BrianW4@atg.wa.gov
- Fred@FETHornelaw.com
- aburton@co.pierce.wa.us
- bannail@seattleu.edu
- brian.ward@atg.wa.gov
- debip@nwjustice.org
- pcpatvecf@co.pierce.wa.us
- robinlcy@gmail.com
- shstacappeals@atg.wa.gov
- zydekbe@gmail.com

Comments:

Sender Name: Jessica Levin - Email: levinje@seattleu.edu

Address:

901 12TH AVE

KOREMATSU CENTER FOR LAW & EQUALITY

SEATTLE, WA, 98122-4411

Phone: 206-398-4167

Note: The Filing Id is 20171012231519SC416775