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

Fred T. Korematsu Center for Law and Equality

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 48299-1-II

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.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* Fred T. Korematsu Center for Law and Equality[1] is set forth in the accompanying Motion for Leave to File.

INTRODUCTION & SUMMARY OF THE ARGUMENT

This Court should interpret Washington's due process clause to afford children in dependency proceedings the right to counsel. The Court may reach this conclusion in two distinct ways. First, the Court should decide that article I, section 3 affords children such a right, without conducting an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Because *Gunwall*'s sole purpose is to help courts determine whether the state constitution affords *greater* protection than the federal constitution, *Gunwall* is unnecessary where, as here, there is no federal law establishing whether children have a right to counsel in dependency proceedings. Furthermore, it is well established that the Washington constitution guarantees parents a right to counsel in terminations 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). Because a child's liberty interests at stake in

[1] The Korematsu Center thanks Darrah Hinton, class of 2017 at Seattle University School of Law, for her contributions to this brief.

a dependency proceeding are at least as great as those of the parents, this Court should similarly conclude that article I, section 3 entitles children to counsel in this context.

Second, should this Court decide that a *Gunwall* analysis is necessary, the Court should use the *Gunwall* analysis as an interpretive guide to ensure principled development of state constitutional law. When properly contextualized in the myriad other protections afforded to children in dependency proceedings by preexisting statutory and common law, as well as our Supreme Court's pronouncements on the right to counsel under article I, section 3, providing children in dependencies the right to counsel is a meaningful next step in Washington's deep tradition of providing robust protection to children.

ARGUMENT

I. THIS COURT SHOULD HOLD WITHOUT CONDUCTING A *GUNWALL* ANALYSIS THAT ARTICLE I, SECTION 3 GUARANTEES CHILDREN IN DEPENDENCY PROCEEDINGS THE RIGHT TO COUNSEL.

a. For Matters of First Impression, Washington Courts Interpret and Apply the Washington Constitution Before the Federal, an Approach that Fosters Robust Development of State Constitutional Law.

As our Supreme 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). 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.* "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) (quoting The Federalist No. 51, at 339 (Modern Library ed. 1937) (A. Hamilton or J. Madison)); *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.").

This case requires this Court to turn to the state constitution to protect individual rights, and in so doing, continue to "develop a body of independent jurisprudence." *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

b. In Interpreting the Washington Constitution, a *Gunwall* Analysis Is Not Appropriate Where, as Here, There Is No Federal Law on Point.

Amicus agrees with appellants that no *Gunwall* analysis is needed

to determine whether children have a due process right to counsel in dependency proceedings under article I, section 3. A *Gunwall* analysis is a comparative tool, designed to guide Washington courts in a principled analysis of whether a particular constitutional provision is coextensive with its federal counterpart or instead affords heightened protection. Because *Gunwall*'s entire purpose is a comparative tool, as stated repeatedly in *Gunwall* and reinforced by subsequent cases, a *Gunwall* analysis is wholly inappropriate for the matter at hand, where there is no federal jurisprudence on point.

In *Gunwall*, the court's analysis centered on a concern for respecting on-point precedent from the U.S. Supreme Court. It began by acknowledging 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). It spoke of the need for "consistency and uniformity between the state and federal governments" by having state courts be "sensitive to developments in federal law," and 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)). It

concluded that the six nonexclusive factors would help ensure that the Court would not be "merely substituting [its] notion of justice for that of duly elected legislative bodies or the United States Supreme Court." *Id.* at 63. It follows that where there is no federal precedent on point, the concerns that motivated *Gunwall* are absent.

Subsequent decisions reinforced *Gunwall*'s purpose by focusing on whether the Washington constitution provides "greater" or "different" protection than under the U.S. Constitution. For instance, in *State v. Foster*, our Supreme 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 federal Sixth Amendment jurisprudence was necessary to conduct first, in order to "illuminat[e] the issues arising in a *Gunwall* analysis of article I, section 22."). By definition, such a comparative analysis loses its meaning where there is no federal precedent "squarely" on point, *Gunwall*, 106 Wn.2d at 60, because there is nothing against which to compare. In these situations, the *Gunwall* test is inappropriate to use.[2]

The only question remaining, then, is whether the U.S. Supreme Court has addressed children's right to counsel in dependency proceedings, and it clearly has not. It is undeniable that while the U.S. Supreme Court has considered *parents'* rights in the *termination* context, it has never considered *children's* rights to counsel within the *dependency* context. *In re Dependency of M.S.R.*, 174 Wn.2d 1, 15, 271 P.3d 234 (2012), is instructive on this issue. There, our Supreme Court considered whether children had a right to counsel in termination of parental rights

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[2] In *Andersen v. King Cty.*, 158 Wn.2d 1, 43, 138 P.3d 963 (2006), the court commented in a footnote, "Whether a *Gunwall* analysis is required does not depend on whether there is dispositive federal law." *Id*. at 43 n.18. However, the plaintiffs made only a single conclusive statement, without support or reasoning, that *Gunwall* should not apply due to the absence of dispositive federal law. *See* Brief of Petitioner-Appellant at 18, *Andersen v. King Cty.*, 158 Wn.2d 1 (No. 75934-1) (2004 WL 3155214). *City of Woodinville*, 166 Wn.2d 633, is more recent than *Andersen* and is more thoroughly reasoned, and the comparative methodology set out there and in *Foster* contradicts the position summarily expressed in *Andersen* without explanation or citation to authority.

cases, but confined its analysis to the federal constitution only. However, even as to just the federal constitution, the court acknowledged the framework laid out by the U.S. Supreme Court in *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 31-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), 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) ("The possibility of providing counsel for the child at the termination proceeding has not been raised by the parties. That prospect requires consideration of interests different from those presented here, and again might yield a different result with respect to right to counsel.").[3] Here, because no federal law exists regarding children's right to counsel in dependency proceedings, a comparison is not only unnecessary, it is impossible.

While there is no federal constitutional precedent on point, rendering *Gunwall* a nullity, this Court can be guided by the

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[3] The issue counsel for children in termination proceedings was not before the Court in *Lassiter*, as North Carolina statutorily guarantees state-provided counsel for children. 452 U.S. at 28 (citing N.C. Gen.Stat. § 7A–289.29 (Supp.1979)). In the one case where the Supreme Court has analyzed the right to counsel for children, it recognized such a right. *In re Gault*, 387 U.S. 1, 36, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (in juvenile delinquency context, reasoning "[t]he juvenile needs…counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.").

pronouncements of our Supreme Court as to state constitutional precedent on similar matters. Article I, section 3 guarantees counsel for parents in termination and dependency proceedings, due to the possibility of deprivation of physical liberty and of the fundamental right to the parent-child relationship. *Luscier*, 84 Wn.2d at 138; *Myricks*, 85 Wn.2d at 841. While these cases preceded *Gunwall*, the 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) ("We note that *Luscier* and *Myricks* were favorably cited more recently in our case, *In re Dependency of Grove*."). Both doctrinally and logically, it follows that because parents are guaranteed counsel in termination and dependency proceedings, so too should children be guaranteed counsel in dependency proceedings, where both physical liberty and fundamental liberties are at stake.

II. ALTERNATIVELY, IF A *GUNWALL* ANALYSIS IS DEEMED NECESSARY NOTWITHSTANDING THE ABSENCE OF FEDERAL LAW ON POINT, THIS COURT SHOULD USE THE *GUNWALL* FACTORS AS INTERPRETIVE GUIDES TO FURTHER PRINCIPLED DEVELOPMENT OF STATE CONSTITUTIONAL LAW.

a. The *Gunwall* Analysis Evolved from a Comparative Tool to Determine *Whether* to Apply the State Constitution into an Interpretive Guide for *How* to Apply the State Constitution.

State v. Gunwall was responsive to criticism that state courts were relying on state constitutional provisions to reach results-oriented

decisions when they simply disagreed with the result dictated by federal law. The *Gunwall* court itself criticized state courts for "resorting to state constitutions rather than to analogous provisions of the United States Constitution [and] simply announc[ing] that their decision is based on the state constitution but…not further explain[ing] it." 106 Wn.2d at 60.[4] In other words, *Gunwall* was initially a response to our state courts' uncertainty "about the propriety of applying their constitutions independently of the U.S. Constitution…judges needed comparative factors to justify independent analysis." Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 14 (2d ed. 2013).

However, while *Gunwall* initially functioned as a comparative tool "for deciding *whether* to interpret a state provision independently, [*Gunwall*] transformed into factors to guide briefing and to aid the court in determining *how much weight* to accord U.S. Supreme Court decisions." Utter & Spitzer, *supra*, at 14; *see also* Hugh Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall Is*

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[4] In the watershed case of *State v. Ringer*, 100 Wn.2d 686, 690-99, 674 P.2d 1240 (1983), our Supreme Court interpreted article I, section 7 to be more protective than the Fourth Amendment. Perfectly summarizing the critique to which the *Gunwall* court responded, the dissent began by criticizing the majority for "picking and choosing between state and federal constitutions" to support what was, in the dissent's view, an unprincipled decision. *Id.* at 703 (Dimmick, J., dissenting).

Dead—Long Live Gunwall!", 37 Rutgers L.J. 1169, 1178 (2006).[5] In fact, although the court in *Gunwall* was transparently addressing the criticism that state courts were, "without adequate explanation, relying on state constitutions rather than analogous provisions of the U.S. Constitution," Utter & Spitzer, *supra*, at 14, the formal purpose of the factors as stated in *Gunwall* is "helping to insure that if this court does use independent state constitutional grounds in a given situation, it will consider these criteria to the end that our decision will be made for well founded legal reasons." *Id.* (quoting *Gunwall*, 106 Wn.2d at 62).

The key *Gunwall* cases in the decades following the *Gunwall* decision reflect the evolution in overall function from comparative—assuming there is federal law on point to compare, which, as discussed above, is absent here—to interpretive. In *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988), while the court declined to reach the state constitutional issue on account of inadequate *Gunwall* briefing, it nevertheless articulated that the nonexclusive *Gunwall* criteria aided in

[5] The *Gunwall* factors themselves are a mix of comparative factors, which help determine whether to apply a state provision differently, and interpretive factors, which help determine how to apply a particular provision. Spitzer, *supra*, at 1178. Factor 1 (text of the state constitution), factor 3 (state constitutional history), factor 4 (preexisting state law), and factor 6 (matters of particular state and local concern) are interpretive in nature, whereas factor 2 (differences in the texts of parallel provisions) and factor 5 (structural differences between federal and state constitutions) are explicitly comparative.

"developing a sound basis for our state constitutional law," and characterized their "use as interpretive principles of our state constitution."[6] *Id.* In *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995), the debate over *Gunwall*'s function was expressed in stark relief. In determining whether the state's double jeopardy clause provided broader protection than the federal, the majority conducted the *Gunwall* analysis to determine *whether* the state constitution could be invoked, and, finding the Washington and federal double jeopardy projections to be coextensive, applied the federal test. *Id.* at 102. In the concurrence/dissent, Justice Madsen emphasized that Washington had a "preexisting independent analysis of double jeopardy" that should have controlled, and that "*Gunwall* was merely intended to be a tool in the development of a principled analysis in cases where an issue is undecided under the state constitution." *Id.* at 110 (Madsen, J., concurring and dissenting). A few years after *Gocken*, in *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998), *as amended* (July 17, 1998), a search case, the court applied article I, section 7 without a *Gunwall* analysis. Thus, the court accepted the view

[6] 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." Spitzer, *supra*, at 1180.

that *Gunwall* was meant to establish principles of state constitutional jurisprudence: "[o]nce we agree that our prior cases direct the analysis to be employed in resolving the legal issue, a *Gunwall* analysis is no longer helpful or necessary." *Id.*

Gunwall's interpretive function, and its aim of developing principled state constitutional jurisprudence, should therefore influence how this Court approaches the factors. *Gunwall* helps "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, *supra*, at 1184.

b. *Gunwall* Factors 4 and 6 Encompass Any Preexisting State Law that Relates and Gives Context to Washington's Due Process Protections in General, as well as to the Specific Nature of the Rights at Stake.

In light of *Gunwall*'s utility as a means for principled development of state constitutional jurisprudence, Amicus urges this Court to analyze factors 4 and 6 within an appropriately broad contextual frame. Because the purpose of procedural due process is to protect constitutionally cognizable rights, a meaningful *Gunwall* analysis must look not only at the constitutional provision itself, but also at 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). Thus, factor 4, which looks at preexisting state law, and factor 6, which asks whether the matter is of particular state concern, must take into account both due process in general and, more specifically, children's liberty interests implicated in dependency proceedings.[7] In fact, our Supreme Court recognizes that factors 4 and 6 are unique to the context in which the interpretation arises. *Foster*, 135 Wn.2d at 461 (citation omitted).[8]

Factor 4 includes consideration of the myriad ways in which preexisting state law protects children's liberty interests, in addition to preexisting state law analyzing article I, section 3. 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.

Our Supreme Court has stated that the right to counsel under the state constitution attaches where "the litigant's physical liberty is

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[7] The same would be true for other interpretive factors such as factor 3, which looks at state constitutional and common law history. *Gunwall*, 106 Wn.2d at 58.

[8] DSHS broadly asserts that "no Washington appellate court applying the *Gunwall* factors has ever concluded that article I, section 3 provides greater protection than the Federal Due Process Clause." Br. of Resp't at 12. How courts have interpreted article I, section 3 in other contexts may or may not be instructive, as it is, by definition, a procedural protection that differs according to the nature of right at stake. *See, e.g.*, *Bellevue Sch. Dist.*, 171 Wn.2d at 711.

threatened or where a fundamental liberty interest, similar to the parent-child relationship, is at risk." *In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (emphasis added). Consistent with this statement, as discussed in Part I.b., *supra*, our Supreme Court has repeatedly protected the right to counsel for parents under article I, section 3 in termination proceedings, due to the physical liberty and fundamental liberty interests at stake, *Luscier*, 84 Wn.2d at 138-39, and in dependency proceedings, due to fundamental liberty interests at stake, *Myricks*, 85 Wn.2d at 253-55. And our Supreme Court has stated that dependency proceedings implicate the child's physical liberty interests "because the child will be physically removed from the parent's home," it is the child who "become[s] a ward of the State," and it is the child that 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.[9] "Foster home placement may result in multiple changes of homes, schools, and friends over which the child has no control." *Id.* Given that our Supreme Court has determined *parents* are entitled to counsel in dependency proceedings, where there are

[9] While *M.S.R.* decided the issue under *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), and not under article I, section 3, 174 Wn.2d at 15-20, the court's articulation of the children's interests at stake in termination and dependency proceeding is important to consider here.

fundamental liberty interests but not physical liberty interests at stake, it follows that article I, section 3 should afford counsel to *children* in dependency proceedings, where there are *both* physical liberty interests and fundamental interests at stake. *See* Appellant's Br. at 7-13.

Such a determination would be 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, 533 (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, our Supreme 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).

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.[10] 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:

[10] *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.

> 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:
> (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, the treatment in Washington of the right of criminal

defendants to confront witnesses provides an illustrative contrast to the treatment of the right to counsel, demonstrating both why preexisting law supports independent interpretation of the right to counsel under article I, section 3, and why the right to counsel is a matter of state concern. In *State v. Foster*, 135 Wn.2d 441, 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.

In sum, factors 4 and 6 support independent analysis as set forth above by Amicus and by S.K-P., Br. of Appellant at 24-28 (factor 4), 28-29 (factor 6), and factors 2, 3, and 5 support an independent state constitution analysis as well, as set forth by S.K-P., Br. of Appellant at 21 (factor 2), 21-24 (factor 3), 28 (factor 5).

c. 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." 106 Wn.2d at 58. This Court can and therefore 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*, our Supreme 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 this Court 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.

Although these cases predate *Gunwall*, they demonstrate courts relying on policy rationales to extend heightened due process protections. For a discussion of the compelling policy rationales for children's right to counsel in dependency proceedings, see Br. of Appellant at 42-48 (describing importance of uniformity and practical courtroom barriers).

CONCLUSION

For the reasons set forth in S.K-P.'s briefing and above, the Korematsu Center urges this Court to interpret article I, section 3 to guarantee counsel for children in dependencies.

RESPECTFULLY SUBMITTED this 16th day of August, 2016.

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CERTIFICATE OF SERVICE

Court of Appeals Number: 48299-1-II

I hereby certify that on August 16, 2016, I electronically filed the foregoing Brief of *Amicus Curiae* Fred T. Korematsu Center with the Clerk of the Court for Division II of the Washington State Court of Appeals by using the appellate e-filing system.

I certify that service will be accomplished via email through the Court's appellate e-filing system as indicated below:

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