No. _____

# In The
# Supreme Court of the United States

J.L., a child,

*Petitioner,*

v.

KATE HALAMAY, M.D. and ALLEGRO PEDIATRICS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Washington Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Washington Supreme Court and the Washington Court of Appeals violate the *Americans with Disabilities Act* by refusing to allow an attorney to represent a mentally or cognitively disabled person because the person's disability precludes them from providing legal direction or informed consent?

2. Did the Washington Supreme Court and the Washington Court of Appeals violate a mentally or cognitively disabled person's right or privilege to an attorney under the *Due Process Clause* of the Fourteenth Amendment to the U.S. Constitution by refusing to allow an attorney to appear on behalf of that person because that person is unable to provide informed consent or legal direction to an attorney?

## PARTIES TO THE PROCEEDINGS

Petitioner J.L., a child, was a plaintiff in the King County Superior Court proceeding and a petitioner in the Washington Court of Appeals and Washington Supreme Court proceedings. Initials are used for the child's name, but the parties' full names were used in the trial court pleadings and in the Washington Court of Appeals.

Susan Chen and Naixaing Lian are the parents of the child J.L.

Respondents Kate Halamay, M.D., was a defendant and Allegro Pediatrics, a Washington professional corporation, formerly known as Pediatric Associates, was a defendant in the King County Superior Court proceeding and an appellee in the Washington Court of Appeals and Washington Supreme Court proceedings.

## RELATED PROCEEDINGS

- *Susan Chen et al. v. Kate Halamay, M.D., an individual, and Allegro Pediatrics f/k/a Pediatric Associates*, King County Washington Superior Court 16-2-26019-5 SEA. Judgment entered granting motion for summary judgment on May 12, 2017. The parents' motion for reconsideration was entered on May 26, 2017. On August 9, 2018, the parents' motion to vacate the summary judgment was denied.
- *Susan Chen et al. v. Kate Halamay, M.D.*, Washington Court of Appeals, No. 76929-4-I. On February 20, 2020, the Washington Court of Appeals

**RELATED PROCEEDINGS**—Continued

affirmed the summary judgment order. On March 23, 2020, the Washington Court of Appeals denied the parents' motion for reconsideration. On April 14, 2020, the motion of James Daugherty to appear on behalf of J.L. was denied.

- *Susan Chen et al. v. Kate Halamay, M.D.*, Washington Supreme Court, No. 98503-1. On November 4, 2020, the Washington Supreme Court denied the Petition for discretionary relief filed by James Daugherty to review the decision to deny his motion to appear on behalf of J.L. The Washington Supreme Court denied the parents' motions for discretionary relief on November 4, 2020, as well as the parents' motion for permission for an attorney to file briefs on behalf of J.L. Review was terminated November 4, 2020.

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## PETITION FOR A WRIT OF CERTIORARI

J.L., a child, petitions for a writ of certiorari to review the orders of the Washington Supreme Court denying permission for an attorney to file briefs on behalf of J.L. and denying J.L.'s petition for review; denying review of J.L.'s parents' motions for review; and the order of the Washington Court of Appeals (Div. 1) denying an attorney's motion to appear on behalf of J.L., a disabled child.

## OPINIONS AND ORDERS BELOW

The Washington Supreme Court order denying discretionary review (*infra* at Appendix 1) is unreported. The Washington Supreme Court Order denying permission for attorney to file briefs on behalf of J.L. and denying petition for review (*infra* at Appendix 2) is unreported. The order of the Washington Court of Appeals (Div. 1) (*infra* at Appendix 4) denying the motion to permit appearance on behalf of the child J.L. is unreported.

## JURISDICTION

The Washington Supreme Court entered orders denying J.L.'s motion for discretionary relief and petition for review, on November 4, 2020. On March 19, 2020, the U.S. Supreme Court extended the deadline to file a petition for a writ of certiorari to 150 days from

the date of the order denying discretionary review. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment § 1 to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 12132 of the United States Code provides in pertinent part:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

## SUMMARY

The mentally or cognitively disabled are protected by the *Americans with Disabilities Act* and the *Due Process Clause* of the Fourteenth Amendment. They have the right to access the court system.

Accessing the court system can include the appearance of an attorney as an accommodation—even if that disabled person is unable to communicate legal direction.

Attorneys may represent the *legal interests* of a client who is unable to communicate their legal directions.

The Washington State Supreme Court and the Washington Court of Appeals (Div. 1) have decided that if a mentally or cognitively disabled child is unable to give informed consent or legal direction to an attorney that child may be prohibited from having an attorney.

Congress stated in its findings for the *Americans with Disabilities Act* that "historically, society has tended to isolate and segregate individuals with disabilities." *Americans with Disabilities Act of 1990*, 42 U.S.C. § 12101(a)(2).

J.L. is severely autistic. J.L.'s parents, immigrants from China, were accused by a physician of neglecting J.L. They were exonerated, but J.L. was traumatized by approximately 9 months of substandard care, in at least 3 different foster homes.

Prior to be placed in foster homes, J.L. was bathroom trained. He could speak, and he understood instructions. Now, he must wear diapers, he cannot speak, and he is completely dependent upon his parents for his care. He screams through much of the day.

J.L.'s parents instituted a medical malpractice action against the physician that made the child neglect report and her employer, the professional medical corporation Allegro Pediatrics.

The physician and the medical corporation filed a motion for summary judgment, and the trial court granted it. However, J.L.'s parents requested the trial court to dismiss J.L.'s case without prejudice because he did not have an attorney or a *guardian ad litem*. This was denied.

J.L.'s parents also did not have an attorney, and both parents speak English as a second language. His parents notified the Washington Courts that they were not able to represent their children as non-attorneys.

J.L. was completely isolated from the Washington state court process. He could not communicate. His parents were not attorneys, and they could not represent him. He was not allowed to have an attorney. His was a perfect segregation.

The 2nd Cir. in *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) stated:

> It goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they

> have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

J.L.'s parents made multiple and persistent requests for accommodations for J.L. under the *Americans with Disabilities Act* (*ADA*). They specifically requested the appointment of an attorney for J.L.

J.L.'s family retained a private attorney to appear (*pro bono*) on J.L.'s behalf at the Washington Court of Appeals (Div. 1) in March of 2020.

That private attorney filed a motion to be permitted to appear on behalf of J.L., following the directions of an opinion published one month before, *In re the Dependency of E.M.*, 458 P.3d 810 (Wash. App. 2020). But the Washington Court of Appeals denied the attorney's motion to appear on behalf of J.L., without elaboration.

J.L.'s attorney filed a petition for review, and J.L.'s parents filed a *pro se* motion for discretionary relief in the Washington Supreme Court. They requested that the Washington Supreme Court accept review through the *Americans with Disabilities Act* and the *Due Process Clause* of the Fourteenth Amendment and allow J.L. to have an attorney.[1]

J.L.'s parents also filed a motion to permit an attorney to file briefs on behalf of J.L. at the Washington Supreme Court, as an accommodation for J.L. under the *Americans with Disabilities Act*.

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[1] They also requested review on separate state grounds.

The Washington Supreme Court denied the motions for discretionary relief and the petition for review on November 4, 2020, and terminated review.

The Washington Supreme Court also denied J.L.'s parents' motion to allow an attorney to file briefs on behalf of J.L.

The prohibition of a mentally or cognitively disabled person from having an attorney, if they cannot provide direction to an attorney, is an important question about the *Americans with Disabilities Act* that has not been settled by this Court, but should be.

The protections of the *ADA* for the disabled are connected to the protections of the *Due Process Clause* of the Fourteenth Amendment. A prohibition of counsel under the *ADA* is parallel to a prohibition of counsel under the *Due Process Clause.*

The child's petition requests that the United States Supreme Court find that people with a mental or cognitive disability that precludes their ability to communicate legal direction or provide informed consent may not be prohibited from having an attorney because of that disability.

## STATEMENT OF THE CASE

### A. Factual Background

J.L. was born in July of 2010. J.L. was diagnosed with autism when he was 3 years old. J.L.'s parents have worked with a variety of therapists and

specialists, including gastroenterologists, feeding specialists and nutrition specialists to treat J.L.

J.L.'s parents had to access urgent care medical resources when J.L.'s primary physicians were not available, frequently for gastrointestinal issues. Gastrointestinal distress is common with children who are autistic.

J.L. was seen by Dr. Halamay in October of 2013 on three occasions, one that resulted in Dr. Halamay reporting the mother of J.L. for child neglect.

The defendants' position, from their summary judgment motion, was that Dr. Halamay consulted (among other things) with various specialists from Seattle Children's Hospital. A recommendation was made that J.L. should be brought to the emergency room at Seattle Children's Hospital to be admitted to the hospital.

J.L. was brought to Seattle Children's Hospital emergency room, but Seattle Children's Hospital discharged J.L. as non-emergent.

J.L. was again seen by Dr. Halamay a few days later, and Dr. Halamay recommended that J.L. be admitted to Seattle Children's Hospital. Dr. Halamay then made a report to Child Protective Services (CPS) at the Washington Department of Social and Health Services (DSHS).

Child Protective Services took J.L. and his brother L.L. into protective custody, and placed J.L. in foster homes and hotels for approximately 9 months. L.L.

returned to his parents' care within a few days after the shelter care hearing.[2]

J.L., a severely autistic child, was placed in at least 3 different foster homes over approximately 9 months. In addition, he was placed in hotel rooms during this time when foster homes were not available. He was moved at least 6 times.

A criminal complaint was filed against the mother charging her with felony criminal mistreatment of a child in the second degree. A warrant was issued for her arrest in the amount of $60,000.00. Her passport was seized.

During that time, J.L. had very limited contact with his parents. The medical issues that his parents had sought help for continued while he was in foster care. In particular, he continued to have the same weight fluctuations and to suffer from the very same gastrointestinal issues that were alleged to be the basis for the neglect charge against the parents.

The matter was investigated by the mother's criminal defense attorney and her dependency attorney. The criminal complaint was subsequently dismissed by the King County Prosecutor's Office. The prosecutor identified evidence discovered after the filing of the complaint as the basis for the dismissal, stating in his

[2] A hearing held within 72 hours of a child being taken into care to determine if the child should be returned home or placed out of home.

certification that the State was unable to sustain its burden of proof.

The dependency actions regarding J.L. and L.L. were also dismissed by DSHS in September of 2014 on its own motion, without establishing a dependency. In addition, DSHS reversed its finding that the mother had neglected and abused J.L. and changed the conclusion of its investigation to "unfounded." Susan Chen and Naixiang Lian regained custody of J.L.

J.L.'s development and abilities have significantly deteriorated since he was taken into foster care. Prior to being placed in foster care, he had been engaged with therapists and counselors. He was documented to be toilet trained, to be able to follow instructions, and to speak. He was removed at an extremely fragile time for him developmentally. The care he had been receiving was disrupted.

He is now ten years old. He has to wear diapers, he cannot provide for his basic needs, and he has no words anymore, as he had before he was placed in the care of Washington state. He screams through much of the day.

### B. Procedural Background

On October 24, 2016, J.L.'s parents filed a *pro se* medical malpractice lawsuit in King County Superior Court against Dr. Kate Halamay and Allegro Pediatrics (defendants).

On December 8, 2016, the defendants' counsels filed a motion for summary judgment.

The parents filed two responses to the motion for summary judgment, both requesting more time to hire an attorney for a complex medical malpractice case. They also raised the objection that they were hampered by a language barrier.

However, the parents did not file declarations to meet the declarations of the defendants, and they did not respond substantively. On May 12, 2017, the defendants' motion for summary judgment was granted, dismissing the parents' complaint against Dr. Halamay and Allegro Pediatrics with prejudice.

On May 19, 2017, the parents filed a motion for reconsideration. The parents raised the issue that non-attorney parents cannot represent their children in court.

They also requested the court to dismiss J.L.'s and L.L.'s claims **without prejudice** and appoint *guardians ad litem* for the children, as the statute of limitations for the children's cases had not expired.

On May 26, 2017, the parents' motion for reconsideration was denied.

On May 31, 2017, the parents filed a Notice of Appeal.

On June 16, 2017, J.L.'s mother filed a request for appointment of counsel for J.L., pursuant to *Washington State Rule of Appellate Procedure* 15.2.

On December 11, 2017, a Superior Court Judge signed an order of indigency regarding the mother's request for the Court to appoint counsel for her sons, among other things.

On January 8, 2018, J.L.'s mother filed a motion for the expenditure of funds for an attorney for J.L., pursuant to *Washington State Rule of Appellate Procedure* 15.2.

On February 7, 2018, Chief Justice Fairhurst of the Washington Supreme Court denied the parents' request for expenditure of public funds for an attorney to represent her sons on the appeal (*infra* at Appendix 5).

On February 8, 2018, the mother filed a request for accommodation under the *ADA* and the *Washington Law Against Discrimination, RCW* 49.60.010 et seq., for J.L. in King County Superior Court.

On February 8, 2018, the Deputy Chief Administrative Officer emailed the mother the forms to request reasonable accommodations for her son. The mother completed and submitted the forms to King County Superior Court.

On February 28, 2018, Chief Civil Judge Schubert denied the parents' motion for accommodations for J.L., stating that he was bound by Chief Justice Fairhurst's order that the expenditure of funds was not authorized.

However, Judge Schubert ordered that Attorney Kevin Khong be appointed the *guardian ad litem* for

the children in the "Order Denying Request for Accommodation on Appeal and Appointing Guardian Ad Litem for Minor Children" (*infra* at Appendix 6).

On February 28, 2018, the mother filed a motion for reconsideration of her motion for accommodations for J.L.

On March 27, 2018, the *guardian ad litem* prepared an Interim Report. On page 5 of the Interim Report of the *guardian ad litem*, the *guardian ad litem* recommended that attorneys be appointed for the children. The *guardian ad litem* also recommended that certified interpreters be utilized for further proceedings.

On April 2, 2018, the *guardian ad litem* filed a Final Report of the *guardian ad litem*. The *guardian ad litem* repeated his recommendation that attorneys be appointed for the children. The *guardian ad litem* also requested that he be discharged (*infra* at Appendix 13).

On May 17, 2018, the parents filed an order to show cause to vacate the judgment of dismissal.

On June 4, 2018, the trial court granted the parents' motion for reconsideration regarding appointment of an attorney, and appointed Nathan Thomas Anderson and Shawn Larson-Bright (*pro bono*) to represent J.L. and to make a reply on behalf of J.L. to the response of the defendants and to appear for J.L.

This was done as an accommodation for J.L.'s disability, pursuant to *Washington General Rule 33*, which is the Washington State Court Rule for making

accommodations for people with disabilities (*infra* as Appendix 10). This order was also entered prior to the decision of *In re the Dependency of E.M.*, 458 P.3d 810 (Wash. App. 2020).

On June 5, 2018, the trial court ordered the discharge of the *guardian ad litem* after approximately 3 months.

On July 16, 2018, J.L.'s appointed attorneys filed a reply in support of the plaintiff's motion to vacate on behalf of J.L.

On July 23, 2018, the motion to vacate was denied by a King County Superior Court Judge.

On August 6, 2018, the *pro bono* attorneys for J.L. withdrew.

On August 7, 2018, the trial judge denied the plaintiff's motion to set aside the order of July 23, 2018.

On August 20, 2018, a Notice of Appeal was filed by J.L.'s parents.

On February 11, 2019, J.L.'s parents filed an opening brief. J.L.'s parents raised the issue that a *guardian ad litem* should have been appointed for J.L. and L.L. by the trial judges.

On June 12, 2019, J.L.'s parents filed a reply to the Respondents' brief. J.L.'s parents again raised the issue that *guardians ad litem* should have been appointed for the children.

On February 10, 2020, the Washington Court of Appeals Div. 1 affirmed the original decision of the trial court granting summary judgment in an unpublished opinion. They found that because the parents were the children's guardians, the civil case could proceed without a *guardian ad litem*. It did not address the issue of appointment of an attorney for J.L., nor did it address Judge Schubert's orders appointing a *guardian ad litem* and an attorney for J.L. as an accommodation for his disability.

On February 28, 2020, the parents filed a motion for reconsideration, arguing that the Court of Appeals overlooked the issue of the unauthorized practice of law, since neither parent was an attorney.

On March 3, 2020, J.L.'s parents retained James Daugherty to represent their son J.L. *pro bono*.

On March 3, 2020, Attorney James Daugherty filed a motion to appear on behalf of the child J.L., based on the directions in *In re the Dependency of E.M*. That published opinion had been issued approximately one month before James Daugherty filed his motion to appear.

On April 14, 2020, the Court of Appeals denied the motion of James Daugherty to appear on behalf of J.L. (*infra* at Appendix 4) without elaboration.

J.L.'s parents filed a *pro se* motion for discretionary review on June 30, 2020.

James Daugherty and the parents filed a petition for discretionary relief on July 30, 2020.

On October 2, 2020, J.L.'s parents filed a *pro se* "Motion for Permission for licensed lawyer, Mr. James Daugherty to file briefs on behalf of minor, J.L." The motion cited both the *Americans with Disabilities Act* and the *Washington Law Against Discrimination*, as well as *Tennessee v. Lane*, 541 U.S. 509 (2004).

On November 4, 2020, the Washington Supreme Court denied the parents' *pro se* motions for discretionary review (*infra* at Appendix 1). The Washington Supreme Court also denied the parents' "*Motion for permission for licensed lawyer to file briefs on behalf of the minor, J.L.*" and the petition for review.

The Washington Supreme Court also terminated review of the motions for discretionary review and the petition for review.

The Petition has eight principal arguments:

1. A significant number of disabled people are unable to express legal direction or provide informed consent to an attorney, but require one to access the court system.

2. Disabled people who cannot express legal directions should not be excluded from the court system.

3. An attorney may represent a person's legal interests, not only the expressed legal preferences of a person, and the attorney may represent a disabled person unable to communicate.

4. Washington Courts prohibited a mentally or cognitively disabled child from having an attorney.

5. Federal Courts require an attorney for cases with a child as a plaintiff.

6. A *guardian ad litem* and an attorney have different roles.

7. The *Mathews v. Eldridge* factors do not support the prohibition against J.L. having an attorney

8. *Due Process* includes the right to aid of counsel.

## REASONS FOR GRANTING THE PETITION

### The *Americans with Disabilities Act*

#### A. Washington State Courts have violated the *Americans with Disabilities Act* by prohibiting a disabled child from having an attorney because of the child's disability. They have decided an important federal question about the *ADA* that has not been settled.

A disabled individual's right to access the court system is an important part of the *Americans with Disabilities Act*. This Court has made clear that the *ADA* applies to court systems in *Tennessee v. Lane*. The Court stated:

> With respect to the particular services at issue in this case, Congress learned that many

> individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities.

*Tennessee v. Lane*, 541 U.S. 509, 527 (2004).

This Court further stated:

> The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.

*Id.* at 531.

A mentally or cognitively disabled person is protected by the *ADA* if their disability substantially limits one or more major life activities of a person. 42 U.S.C. § 12102(1)(A). J.L. is unable to communicate even on a basic level. On page 5 of the Interim *guardian ad litem* report of Kevin Khong, Mr. Khong stated:

> Ms. Chen gave me advanced warning in our previous phone calls about J.L.'s condition resulting in him being completely non-verbal. I confirmed this observation through my own attempts to try and talk with J.L. throughout the two hours that I met with the family. J.L. often responds with non-verbal grunts or hand gestures (only to his mom), and often had a "thousand yard stare" as if he were looking right through me whenever I tried to talk to him.

Interim Report of *guardian ad litem*, page 5.

**A significant number of disabled people are unable to express legal direction or provide informed consent to an attorney, but they require one to access the court system.**

The right of mentally and cognitively disabled people to an attorney as an accommodation under the *ADA* is significant, and it will become more significant. Many people with different forms of mental and cognitive disabilities will be excluded from accessing the courts because of those mental and cognitive disabilities. Allowing access is dependent on a voice for those that will not be able to have a clear voice or a voice at all.

For example, the Alzheimer's Association estimated 5.8 million Americans over the age of 65 years old have Alzheimer's. The Alzheimer's Association estimates that by 2050, 13.8 million Americans over 65 years of age will have Alzheimer's. *Alzheimer's Ass'n, 2020 Alzheimer's Disease Facts and Figures*.

The United States Senates Special Committee on Aging prepared a special report in 2018 *entitled Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans*. It quoted the National Center for State Courts, which estimated there are 1.3 million adult guardianship cases in the United States. Lack of access to counsel for those in guardianships is discussed below at pages 24-25.

The National Institute for Mental Health estimated in 2019 that 13.1 million adults over the age of 18 have a serious mental illness (relying on data from

Substance Abuse and Mental Health Services Administration (SAMHSA)). *2019 National Survey of Drug Use and Health*.

The estimates of the population of those who are diagnosed with an intellectual disability in the U.S. vary. A recent study from the CDC estimates a national prevalence, for children aged 3 to 17, with developmental disabilities of 1.2%. Centers for Disease Control, *National Center for Health Statistics, National Health Statistics Report*, No. 139, Feb. 19, 2020, "Prevalence of Children Aged 3–17 Years With Developmental Disabilities, by Urbanicity: United States, 2015–2018," Benjamin Zablotsky, Ph.D., and Lindsey I. Black, M.P.H.

The denial of access to the courts of a category of mentally and cognitively disabled people, a category potentially consisting of millions of people, because they cannot provide legal direction does not comply with the *Americans with Disabilities Act*.

**Disabled people who cannot express legal directions should not be excluded from the court system.**

A disabled individual that cannot express legal direction should not be excluded from the court system. There is a reasonable accommodation.

A Federal District Court has found that the appointment of a qualified representative is a *required* accommodation for mentally incompetent immigrants

in removal proceedings.[3] A qualified representative is defined as an attorney, a law student or graduate supervised by a retained attorney, or an accredited representative.[4] *See Franco-Gonzalez v. Holder*, 767 F. Supp. 1034, 1058 (C.D. Cal. 2011). The decision did not limit that representation to those that may direct that representation.

Section 504 of the Rehabilitation Act of 1973 is an antecedent and companion to the *Americans with Disabilities Act*. Title II of the *Americans with Disabilities Act* is modeled upon the Rehabilitation Act of 1973 § 504, and the two laws are read to be consistent with each other. *See, e.g.*, *Franco-Gonzalez v. Holder*, 767 F. Supp. 1034, 1051-1052 (C.D. Cal. 2011).

The decision is not a United States Court of Appeal's decision. However, it is an example of a carefully reasoned decision finding that a severely mentally or cognitively disabled person must have an attorney or a qualified representative in order to have access to a program or benefit—the court system.

It is opposed to the interpretation that an attorney can only represent someone who is able to give legal direction or informed consent.

The litigation prompted the Department of Justice and the Department of Homeland Security to provide protections for immigrants with mental disabilities.

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[3] Pursuant to § 504 of the Rehabilitation Act of 1973.

[4] *See* 8 C.F.R. § 1292.1.

**An attorney can represent someone who cannot express their legal directions or provide informed consent.**

An attorney may represent a person's legal interests, not only the expressed legal preferences of a person, and the attorney may represent a disabled person unable to communicate.

The concept of representing a child's or a mentally or cognitively disabled person's "legal interests" has not been addressed by this Court. But the concept presents a framework for analyzing the role and function of an attorney, consistent with the *ADA*, in representing a mentally or cognitively disabled person unable to communicate legal direction.

Disability and infancy are not the same.[5] But the concepts are related. The inability to direct representation may have different sources, but it is nearly an identical effect for an attorney. The analysis and solutions of the *Fordham Conference* and the *President's Guidelines* apply fully to a non-communicating or low-communicating disabled person.

It is a concept that was developed, in part, from the *Recommendations of the Fordham Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham Law Rev. 1301 (1996). It was also adopted

[5] Infancy is used in the non-legal sense. An infant under Washington law means someone under the age of majority.

by the *President's Initiative on Adoption and Foster Care* (2001).

The *Fordham Conference* stated this regarding the concept of representing a child's legal interests:

> In circumstances where a child lacks capacity to direct the representation, the Fordham Recommendations contain standards that "limit the permissible discretion that lawyers for children may exercise on behalf of their clients"; suggest that lawyers for children employ a process that identifies the child's "legal interest," which "begins and ends with [an analysis of] the child-in-context"; and requires lawyers for children to present evidence in court on all of the options existing for the child. *Id.* at 1308-1311.

*Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301, 1301 (1996).

The Massachusetts Supreme Court in 2003 addressed this complex issue in *The Care and Protection of Georgette*, 439 Mass. 28 (2003). Representing children is not only directed representation. It includes representational forms that include the idea of representing "legal interests." The Massachusetts Supreme Court's analysis reflects the complexity of the issue beyond only looking at rules of professional conduct and the traditional dyad of an attorney and a client.

The Massachusetts Court identified and discussed the *Fordham Conference*'s recommendations. The

Court specifically discussed the idea of representing a child's "legal interests" if a child is unable to direct the representation.

The Massachusetts Court cited and discussed the *President's Initiative on Adoption and Foster Care*. The Court stated:

> Finally, standards have been articulated in Guidelines for Public Policy and State Legislation Governing Permanence for Children from Adoption 2002: The President's Initiative on Adoption and Foster Care (rev. 2001) (President's Initiative Guidelines). Those guidelines provide, as far as relevant here, that (1) "*[i]f a child lacks capacity to articulate a preference, the attorney should determine and advocate the child's legal interests.*" (emphasis added)

*The Care and Protection of Georgette*, 439 Mass. 28, 43 (2003).

Representing a client's "legal interests" provides a way for an attorney to represent a client that is unable to provide instructions, consent, preferences, or direction to that attorney.

*The Care and Protection of Georgette* did not include consideration of the *Americans with Disabilities Act*.[6]

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[6] The Massachusetts Supreme Court ultimately chose to refer the matter to their standing advisory committee.

The writers of the law review article *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 Wash. L. Rev. 581, 583 (2016) discussed the success of a young woman (Jenny Hatch) with Down's syndrome who successfully challenged parts of her guardianship. They stated:

> A key factor in this success was that Jenny had access to legal representation. Unfortunately, many people in Jenny's position do not. A major factor contributing to this lack of access is that attorneys are unsure whether they may legally and ethically represent a person subject to a guardianship.

The writers continue to say:

> Moreover, in some jurisdictions, probate courts have taken the position that they can prevent a lawyer from representing a person subject to guardianship who wishes to challenge the guardianship.

(citing in footnote 11 of the article *In re Guardianship of Zaltman*, 843 N.E. 2d 663 (Mass. App. Ct. 2006)). *Ibid* at 584.

*ABA model rule 1.2* is a primary guide for the attorney-client relationship. It requires that an attorney to follow the directions of a client. *ABA model rule 1.2(a)* states in part "a lawyer shall abide by a client's decisions concerning the objectives of representation and as required by Rule 1.4, shall consult with the client as to the means by which they are pursued." Furthermore, *ABA model rule 1.4* requires an attorney to

inform, consult and reasonably explain what is happening to a client during the course of the representation. In addition, an attorney representing a client who has diminished capacity is required to maintain a normal attorney-client relationship, but the attorney may take protective action if the client is at risk of substantial harm.

It is fundamental to the dichotomy of the attorney-client relationship that the attorney follows the directions of a client. However, there are different ways to interpret this dichotomy.

The writers of *Lawyers for Legal Ghosts* propose a "Framework for Determining the Appropriate Model of Representation." They conclude that an attorney should follow a model of representation based upon a client's expressed interests. *See Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 Wash. L. Rev. 581, 630-636 (2016).

However, they believe that a best interest standard should be applied when *RPC 1.14* requires protective action. They believe that this framework is consistent with *RPC 1.14*, and does not require a change.[7]

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[7] They do believe that changes to the comments to RPC 1.14 is required. *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 Wash. L. Rev. 581, 634-636 (2016).

**Washington Courts prohibited a mentally or cognitively disabled child from having an attorney**

**Basis for the Court's Order**

The Washington Court of Appeals and Washington Supreme Court prohibited J.L. from having an attorney. Their orders did not set out their reasons for the denials.

However, their orders can only be based upon the reason that a court may prohibit a mentally or cognitively disabled child (or person) who is unable to communicate direction or provide informed consent to his or her attorney from having an attorney. There cannot be another basis for the orders.

J.L.'s parents filed a *pro se* motion in the Washington Supreme Court to permit Attorney James Daugherty to file briefs for J.L. The motion specifically referred to Title II of the *Americans with Disabilities Act*, and it cited *Tennessee v. Lane*, 541 U.S. 509 (2004). The motion was filed on October 2, 2020. The Washington Supreme Court denied that motion on November 4, 2020. (*See infra* at Appendix 2).

The motion to appear filed by James Daugherty was based upon the directions of *In re the Dependency of E.M.*, 458 P.3d 810 (Wash App. 2020), which had just been published a month prior. That decision from the Washington Court of Appeals (Div. 1) required that an attorney appearing for a child obtain appointment before filing motions. The Washington Court of Appeals in *In re the Dependency of E.M.* stated that:

> Here, the dependency court expressed concerns about privately retained counsel's ability to comply with RPC 1.2, the duty to consult with the client about the scope of representation, RPC 1.4, the duty to communicate promptly with the client because of E.M.'s infancy, and RPC 1.8. This was entirely appropriate. The error was in not seeking appointment by the superior court in advance of seeking access and bringing motions. The trial court did not abuse its discretion in considering the RPCs in reaching its decision to strike Sutton's notice of appearance.[8]

*Id.* at 816.

The Washington Court of Appeals was following its own opinion from a month before, and they decided that J.L.'s inability to communicate or provide informed consent prohibited him from having an attorney.

The attorney for J.L. was following the requirements of Washington State law by filing the motion to appear. However, the Petition's position is that *In re the Dependency of E.M.* violates the *ADA* and the *Due Process Clause* if it prohibits a child from having an attorney because of a child's disability.

J.L. is not an infant, and if he were not disabled, he would have been able to communicate as

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[8] The infant EM would have been almost 3 years old at the time of the appearance by the attorney.

a 9-year-old. The inability to obtain informed consent derives from his mental disability, not his infancy.

The Washington Court of Appeals' order would also have been based upon the arguments of the respondents' answer. That answer objected to the appearance of an attorney for J.L. because he could not communicate. It repeats the objection throughout much of the answer that without an ability to communicate, a person has no right to an attorney because the attorney cannot comply with RPC 1.2, 1.4 and 1.8.

It was J.L.'s disability and his inability to communicate that is the basis for the orders of the Washington Supreme Court and the Washington Court of Appeals.

**Federal Courts require an attorney for cases with children as plaintiffs.**

Federal Courts prohibit parents from proceeding on behalf of their children unless the parents have an attorney. *See*, *e.g., Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876 (3d Cir. 1991).

The Second Circuit stated this regarding parents representing children in *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990):

> It goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they

> are entitled to trained legal assistance so their rights may be fully protected.

The Fifth Circuit stated in *duPont v. Southern Nat. Bank of Houston, Tex.*, 771 F.2d 874 (5th Cir. 1985):

> The roles of a *guardian ad litem* and *an attorney ad litem* differ, and we must consider each separately. A *guardian ad litem* is, in a sense, an officer of the court. "[He] is not simply counsel to one party in the litigation, but instead plays a hybrid role, advising one or more parties as well as the court." *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854 (D.C.Cir.1981), cert. denied, 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982). Subsequent citations omitted.
>
> As one court explained, "[T]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done him. The *guardian ad litem* is appointed merely to aid and to enable the court to perform that duty of protection." *Richardson v. Tyson*, 110 Wis. 572, 86 N.W. 250, 251 (1901). *An attorney ad litem*, in contrast, serves no special function. He performs the same services as any attorney—giving advice, doing research, and conducting litigation—only for a minor child rather than for an adult.

*Id.* at 882.

It is the typical response of Federal Courts to dismiss without prejudice the claims of minors who are not represented by an attorney. *See Smith ex rel. Smith*

*v. Smith*, 49 F. App'x 618 (7th Cir. 2002); *Johns v. Cty. of San Diego*, 114 F.3d 874 (9th Cir. 1997); *Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876 (3rd Cir. 1991); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990).

Significantly, the Washington Supreme Court found that a statute (*RCW* 4.16.190(2)) that eliminated the tolling of medical malpractice claims for minors was unconstitutional. *See Schroeder v. Weighall*, 316 P.3d 482, 179 Wash. 2d 566 (Wash. Supreme Court *en banc* 2014). Consequently, the statute of limitations for J.L.'s malpractice claim is tolled during his minority.

**Different Roles: *Guardian ad litem* and attorney**

The difference between a *guardian ad litem* and an attorney is not always understood or it is glossed over.[9] It is significant that the *guardian ad litem* for J.L., Mr. Khong, was clear that the children needed attorneys in his Interim Report:

> While Ms. Chen's efforts with the Court seem to have resulted in the appointment of a *Guardian ad Litem*, I am concerned about what can be reasonably □accomplished by my appointment without J.L. and L.L. having the actual □appointment of an attorney. After speaking with Ms. Chen, it appears that J.L. and L.L.'s interests require an attorney appearing on their behalf in a representational

[9] *See duPont v. Southern Nat. Bank of Houston, Tex.*, 771 F.2d 874, 882 (5th Cir. 1985).

> capacity that can assist them in their substantive claims.

Interim Report of *guardian ad litem* at page 5.

Mr. Khong states in his Report of the *guardian ad litem*:

> As a result, while I attempted to have a meaningful conversation with Ms. Chen, J.L. and L.L., the conversation concerning the case and the "options" that the minors have at this point in the proceedings involved mainly a discussion with only Ms. Chen and me, even though both children were present. It is clear from my interview that any substantive progress in the case will require the assistance of legal counsel beyond the capabilities of a Guardian ad litem appointment and likely a Mandarin language interpreter for the children. Ms. Chen's pro se attempts to help shepherd the case along (while admirable in what she has been able to do without legal counsel) are simply not sufficient to address the matter in a proficient manner.
>
> It is unclear from the order that appointed me whether the Court is requesting a recommendation from me beyond providing a report summarizing the meeting. However, if the Court has the authority, it is clear that it would be in the best interest of both J.L. and L.L. if the Court were to appoint independent counsel to investigate and pursue a CR 60 motion and assist in preparation of the record for the pending appeal.

(*infra* at Appendix 17-18).

The parents repeatedly stated that they could not represent J.L. They clearly stated they were not qualified to represent him. The record is abundant with the parents' near desperate attempts to obtain counsel for their disabled son J.L., and their disavowing of their ability to represent J.L.

Judge Schubert then later reversed himself and appointed *pro bono* attorneys for J.L. This was done as a reasonable accommodation for J.L.'s disability, pursuant to Washington General Rule 33. This was also done prior to the Washington Court of Appeals decision in *In re the Dependency of E.M.* (*infra* at Appendix 10).

**There is a nexus between a Title II accommodation and the right to counsel under the Due Process Clause of the Fourteenth Amendment.**

Providing an attorney to a disabled person as an accommodation under *Title II of the ADA* crosses into concomitant rights and privileges to an attorney under the *Due Process Clause* of the *Fourteenth Amendment*.

This Court stated in *Tennessee v. Lane*:

> Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review . . . These rights include some, like the right of access to the courts at issue in this case, that are protected

> by the Due Process Clause of the Fourteenth Amendment. (internal citations omitted)

*Tennessee v. Lane*, 541 U.S. 509, 522-523 (2004).

This connection bridges into J.L.'s complete lack of *due process* under the Fourteenth Amendment.

## Due Process

### B. The decisions of the Washington Supreme Court and the Washington Court of Appeals in denying J.L. an attorney violated J.L.'s right to due process of the law.

The right to access the court system under the *ADA* is closely tied to the right to *due process* through the Fourteenth Amendment. This Court stated in *Boddie v. Connecticut*, 401 U.S. 371 (1971) that "In short, 'within the limits of practicability,' *id.*, at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Ibid.* at 379 (quoting *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306 (1950)). *See also Youngberg v. Romeo*, 457 U.S. 307 (1982), holding that the disabled have due process rights.

J.L. had no meaningful opportunity to be heard. There was no semblance of due process for J.L.

**The *Mathews v. Eldridge* factors do not support the prohibition against J.L. having an attorney**

**1. Private interest of J.L.**

J.L.'s private interest is the potential right to recover from the alleged misdiagnosis of neglect, which resulted in his wrongful removal from his family for approximately 9 months and harm to his development, cognitive functioning and his health. The harm of the removal is compounded by his extremely fragile physical, developmental and psychological condition. This private property interest is not quantifiable or ascertainable on the record that now exists. However, the potentially damages of a 9-year-old child that now needs diapers, can no longer speak any words, screams much of the day, and cannot attend to even his most basic needs could be significant.

**2. The risk of erroneous deprivation**

The risk of the erroneous deprivation of J.L.'s interests was excessive. J.L.'s interests were being protected by literally no one. Even his parents renounced their ability to protect his interests. He was completely incapable of protecting his interests. His parents raised this fact to the Washington Courts, in a timely way, and it was never truly remedied by the Washington Courts, except for the 3-month period in 2018 by Judge Schubert.

A substantially disabled, non-communicating 9-year-old cannot have his legal interests protected or advanced without representation. The chosen procedure

of allowing no representation establishes the complete likelihood of the erroneous deprivation of his legal interests.

The representation of J.L. by an attorney would be the most meaningful and trustworthy means of protecting J.L. from the erroneous deprivation of his legal interests. Furthermore, the *guardian ad litem* specifically identified the appointment of attorneys as a necessity. Competent counsel is required for due process.

The representation of J.L. in the Washington Court of Appeals and Washington Supreme Court would have provided a means to argue to the Washington Supreme Court the procedural flaws and deficiencies that were present at the trial court.

For example, the refusal of the trial court to dismiss without prejudice the case of J.L. could be challenged. This would permit J.L. the potential to pursue the claim with appropriate counsel.

### 3. The Governmental interest

The governmental interest in refusing to allow a *pro bono* attorney to appear on behalf of a disabled child is not clear. *In re the Dependency of E.M.* could have implied some interest in "protecting" children from attorneys representing them when they are not able to obtain informed consent. However, the Washington Court of Appeals did not actually articulate this idea, and they did not particularize any risks of non-communicating disabled children of having an attorney.

Otherwise, the Washington Court of Appeals did not identify any administrative or fiscal or policy burdens that would justify not allowing a *pro bono* attorney to appear on behalf of J.L.

#### 4. Balance of the interests

The weight of protecting an unreasonable deprivation of J.L.'s due process interest, and the strength of a dependable and very valuable safeguard of an attorney, outweighs the negligible if non-existent governmental interest in not permitting an attorney to represent J.L.

### Due Process includes the right to aid of counsel

The well-known case of *Powell v. Alabama*, 287 U.S. 45 (1932), was momentous in the growth of the right to counsel. It was carefully reasoned, and it touched on issues that connect with J.L.'s case.

Nine African-American young men were charged with the rape of two white women. The young men were initially told they could not have an attorney, and they were not permitted to communicate with their families in Tennessee. Just before the trial, an attorney from Tennessee appeared before the court after having been contacted by the young men's families. The trial began immediately after this initial contact. The young men were tried and convicted of rape after short, one day trials. They were sentenced to death. Justice Sutherland stated: "And in this casual fashion the

matter of counsel in a capital case was disposed of." *Powell v. Alabama*, 287 U.S. 45, 56 (1932).

Justice Sunderland's abridged quote is presented because its reasoning is farsighted and linked to the circumstances of J.L.

Justice Sutherland stated:

> What, then, does a hearing include? Historically and in practice, in our own country, at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.
>
> *In Ex parte Riggins*, 134 Fed. 404, 418, a case involving the due process clause of the Fourteenth Amendment, the court said, by way of illustration, that, if the state should deprive a

> person of the benefit of counsel, it would not be due process of law.

*Powell v. Alabama*, 287 U.S. at 68-70 (1932).

The principle articulated in *Powell v. Alabama* is that the aid and assistance of counsel is without equivalent. Due Process requires it. It is remarkable to think that, at one time, a capital case could be permitted without meaningful aid of counsel and assistance of counsel was initially refused. It may be, at some time, not allowing a critically mentally or cognitively disabled person, even a child, to have the aid of an attorney will be similarly regarded.

## CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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