NO. 20-1630

In the Supreme Court of the United States

Susan Chen

Petitioner

v.

Kate Halamay 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

The Courts "have power to say what the law is, *not what it should be.*" *Obsergefell v. Hodges,* 576 U.S. 644 (2015) (Roberts, J., joined by Scalia and Thomas, dissenting).In interpreting a statue, the courts must defer to "the intent of the legislature," "until its violation of the Constitution is proved beyond a reasonable doubt." *Ogden v. Sauders*, 25 U.S. 213 (1827).

Wash. Rev. Code. Ann. § 4.08.050 ("RCW 4.08.050") is the statute at issue. RCW 4.08.050 mandates appointment of guardian ad litem for minor plaintiff, without time constraint or legal consequence for minors if no appointment is requested. Here, through a *judicially added* deadline requirement - which had been deliberately excluded by the Legislature, Washington courts imposed a dismissal with prejudice against a disabled minor, J.L. for the alleged untimely request for appointment of guardian ad litem by his *pro se* parent who speaks English as her second language.

The dismissal with prejudice against minors contravenes Washington courts' own precedents, and the decades-long practice of courts nationwide that the appointment of the guardian ad litem was "mandatory" and the court's failure to make appointment is a "reversible error" and the erroneous judgment against him is "voidable at his option"; and that non-attorney representation is prohibited in both federal and state courts. *See* 28 U. S. C. § 1654; RCW 2.48.180; *State v. Yishmael,* 195 Wn.2d 155, 456 P.3d 1172 (2020). The judicially-tailored and result-driven "*Smith loses*" in the hypothetical pending case of *Smith v. Jones* had

deprived J.L.'s access to the Courts. Adopting Respondents [1] position that allowing legal representation for J.L. violates RCW 4.08.050, the Washington Court of Appeals announced that the *pro se* parent could act on minor's behalf. It further denied the appearance of a licensed counsel, Mr. James Daugherty [2] on behalf of J.L, following the previous refusal to appoint legal counsel.

1. Whether the Washington courts erred concluding - contrary to its own long-standing precedent and established laws nationwide that RCW 4.08.050 authorizes a *pro se* parent to act on her child's behalf. Stated another way, the question is whether RCW 4.08.050 effectively deprives a minor's constitutional right to counsel and effective representation as well as his right to access the courts.

2. Whether judicially added time constraint is a violation of separation of powers and an improper encroachment to the legislative power.

3. Whether the court has authority over unrepresented minor children who was not yet made party of the case through the mandatory guardian ad litem and legal counsel.

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[1] The lead appellate counsel for Respondents was a staff attorney having been working with Washington state Court of Appeals for over 15 years, and is currently the Commissioner of that Court, with the short-period leave from that court acting as Respondents' counsel on this matter.

[2] Attorney, Mr. Daugherty submitted a separate petition before this Court for minor, J.L. who was denied of the constitutional rights to counsel. Petitioner respectfully invites this Court to incorporate arguments in Mr. Daugherty's petition. No. 20-1504.

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PETITION FOR A WRIT OF CERTIORARI

Susan Chen respectfully petitions for a writ of certiorari to review orders from the Washington Supreme Court.

OPINIONS BELOW

On November 4, 2020, the Washington Supreme court entered orders denying: (1) motion for discretionary review of order denying appearance of a licensed attorney, Mr. James Daugherty on behalf of minor, J.L.; (2) motion for permission for licensed lawyer, Mr. James Daugherty to File Briefs on Behalf of Minor, J.L; and (3) petition for review of dismissal with prejudice against disabled minor, J.L.. The orders are attached as APP. A at 1a-2a.

JURISDICTION

On March 19, 2020, this Court extended the deadline to file a petition for certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:
No State shall * * * deprive any person of life, liberty, or property, without due process of law.

FEDERAL STATUE INVOLVED

28 U. S. C. § 1654 provides, "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel."

INTRODUCTION

"The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 870 (1991). "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores,* 521 U.S. 507, 535-36 (1997).

As James Madison put it, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control." The Federalist No. 47, at 303 (citing 1 Montesquieu, The Spirit of the Laws).

The Court's duty is to interpret and apply laws, "not [to] substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963). "Under the Constitution, judges have power to say what the law is, *not what it should be*." *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Roberts, J., joined by Scalia and Thomas, dissenting) (emphasis added). Washington state recognizes that the "courts must limit their incursions into the legislative realm in deference to the separation of powers doctrine." *In Re Juvenile Director,* 87 Wn.2d 232 552 P.2d 163 (1976). When the Court elects to "exercise WILL instead of JUDGMENT, the consequence would be equally be the substitution of their pleasure to that of the legislative body."

Alexander Hamilton, Federalist No. 78, The Federalist Papers (emphasis in original).

The law at issue is Wash. Rev. Code. Ann. § 4.08.050 (1) ("RCW 4.08.050"), a guardian ad litem statute. App. G. at 198a-200a. This Petition concerns whether the Washington courts' decision was an improper intrusion to the legislative powers.

RCW 4.08.050 imposes *mandatory* duty of appointing guardian ad litem for the minor *plaintiff*, in which no deadline was required (while "thirty days" requirements were imposed to minor *defendant*) or any legal consequence imposed even if the guardian failed to make such requests.

The issue of lacking guardian ad litem was repeatedly pled by parent, *i.e.*, in Motion for Reconsideration, Motion to Vacate and on appeal - before two trial judges and appellate panel but was unaddressed. Rather, the appellate court opined that "the court was [not] obliged" to make such appointment. App. B at 23a.

The Courts are not afforded authority to *alter* laws (through adding or reducing words) made by the legislative body. Here, through judicially added requirements for both time constraint and legal consequence of RCW 4.08.050 (1), the Washington Court of appeals affirmed a dismissal with prejudice against a six-year-old disabled minor. In recognition of its mandatory duty (*Opinion,* App B at 23a), the court stated that the request for appointment should be made "***before*** the court entered the order granting [pre-discovery] summary judgment". (emphasis added). *Id.* ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983))"). Here, the Legislature imposes "thirty days" requirement *for an* infant "defendant" in RCW 4.08.050 (2) but *not* for an infant "plaintiff" in RCW 4.08.050 (1).

Even the untimely allegation was true (which was denied), RCW 4.08.050 provides the Court no authority to sanction minor, J.L. with a dismissal with prejudice for the alleged untimely request made by his mother through judicially *added* timeliness to the statute– that were intentionally left out by the legislature for minor plaintiff.

Further, RCW 4.080.050 specially requires appointments when parents are found to be "improper". The Court of Appeals found J.L.'s mother to have *improperly* handled the case that a *pro se* did not timely ask for discovery, *Id,* at 22 a, 26a, it did not appoint guardian ad litem for J.L. but further denied the appearance of a private attorney on J.L.'s behalf after Respondents argued that RCW 4.08.050 prevented J.L. from having legal counsel. No language in RCW 4.08.050 prohibited J.L. having legal counsel, but Respondents claimed that RCW 4.08.050 had effectively prohibited J.L. from having an attorney, which was adopted by the court who denied Mr. Daugherty's appearance.

Any "slight encroachments create new boundaries from which legions of power can seek new territory to capture." *Stern v. Marshall,* 564 U.S. 462 (2011). The Court should grant this Petition to address the exceptionally important separation of powers issues presented and clarify aspects of

boundary between the legislative and judicial powers not raised and addressed by the Court's prior decisions. See SUP. CT. R. 10 (c).

Non-lawyer representation is prohibited in both federal and state courts. 28 U. S. C. § 1654; RCW 2.48.180. Indeed, all circuits to address the questions subscribe to this rule. When confronting with lay parent representation, all circuits entered a dismissal *without prejudice*, permitting the children to later refile their claims with the assistance of a competent counsel. Here, relying upon RCW 4.08.50, Washington courts entered and affirmed a dismissal with prejudice against a minor who was purported to be represented by a *pro se* parent, announcing a new rule of lay parents' representation, contravenes the decades-long practice of courts nationwide. *See* SUP. CT. R 10 (b).

Children's rights are paramount. They are entitled to adequate representation.[3] A dismissal with prejudice against minor children itself is unconstitutional. The Court should grant this Petition to address the exceptionally important and recurring issues and clarify that children's rights to legal representation could not be deprived by a state law, which is of such imperative public importance.[4]

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[3] Lay parent representation has been a recurring issue before this Court. *e.g., Winkelman v. Parma City School District,* 550 U.S. 516 (2007) where this issue was not yet resolved.

[4] This is *not* a single event. *In. Re E.M.* 12 Wn.App. 2d 510, 458 P.3d 810(2020) was seeking review before the Washington supreme court on whether another state law could prohibit a minor child from having a legal counsel.

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case.

J.L. saw Respondent Dr. Kate Halamay ("Halamay") in urgent care for three occasions. Without reviewing his medical history or consulting with the main treating physician, Halamay claimed J.L. having "life-threatening" kidney failure such that he needed to be urgently removed - subsequently after this (mis)diagnosis, J.L. was removed to ER, *but* the only medication given at ER was "bisacodyl" (a medication for constipation). Halamay later admitted to Attorney Ms. Twyla Carter in deposition that J.L's kidney was actually "normal."

Halamay misstated multiple knowingly false facts to other providers including but not limited to Dr. Hal Quinn, the detective and child protective service ("CPS"), resulting in one-year wrongful removal to J.L. and false arrest and prosecution against J.L.'s mother, Susan Chen ("Chen").

Washington King County Juvenile Court found "outrageous" for the medical conclusions absent adequate review a child's medical records and history, and consultation with the child's main treating physicians.

Finding that the CPS referral made by Halamay was "contrary to" the truth, Washington State Office of Attorney General and King County Prosecutors moved to dismiss the wrongful dependency and criminal cases. Criminal charges were dismissed "in the interest of justice" and "due to the evidence

discovered after filing [which had been withheld by Halamay, police officer and others]."

The consequences for Susan Chen and her minor child, J.L. was tragic. Due to the one-year removal, interruption, and denial of his therapy, withheld medications and treatment, J.L. lost all the abilities he previously had and cannot regain the skills. At age 10, he cannot speak, and scream uncontrollably, sometime for hours, at any actual or possible separation from his family. These conditions were not present before he was falsely seized. Chen was falsely arrested, jailed and prosecuted.

Halamay's negligence was true. All the damages done to Chen and J.L. were real. J.L. did nothing wrong but had been harmed and will carry on all the pains and damages to the end of his life. It is unfair for him to be declined his every right to have his claims fully reviewed by the Court.

Whether or not J.L. will eventually prove his case should be left to the jury, Petitioner will not go into details here. [5] Fundamentally, J.L. is entitled to his day in court with the assistance of a competent counsel but had been unfairly deprived of such right.

B. The State Superior Court Proceedings

On October 24, 2013, Chen *pro se* sued Halamay and Allegro Pediatrics in Court for her below-the-standard care and medical malpractice.

On December 8, 2013, Halamay moved for a pre-discovery summary judgment, relying upon a

[5] The Opinion below did not include all facts. This Court is invited to review facts in 48-53a, 64-79a, 108-118a.

selective medical record, mostly written by herself. In response to summary judgment, Chen requested to amend the complaint dismissing J.L. whose name was mistakenly added because she 'cannot represent children' as non-attorney parents. *See,* Clerk's Papers ("CP") 210, 282 & 285. This occurred three (3) months before Order granting summary judgment was entered. Before any discovery was conducted and without addressing the raised issue, the court entered a dismissal with prejudice. Chen moved for reconsideration, arguing that absence of guardian ad litem renders the action null and non-attorney parents cannot represent minors in court. Specifically,

> Due to failure to appoint a Guardian ad Litem ("GAL") to bring the action, the action on behalf of the minors was a nullity, and there was no action on behalf of minors for judicial consideration, and therefore no action to dismiss.
>
> In this case, the Court failed to give consideration to the additional factor unique to the context of the case, *i.e.,* L.L. and J.L.'s minority status and J.L.'s disabilities. American Disability Act (ADA) of 1990 and Rehabilitation Act protect the disabled's rights to fundamental fairness. J.L.'s constitution rights of access to the Court cannot be denied due to his inability to understand the legal proceedings without the assistance of counsel and before reaching majority. Dismissing minor's claims with prejudice violates the due process and equal protection guarantees of the Federal and state Constitutions.

...

> In her initial response to summary judgment, the mother requested to amend the complaint dismissing her children when told that she 'cannot represent children' as non-attorney parents.

See App. C, at 29 a & 34 a.

The court denied reconsideration without addressing the raised issues about lacking GAL and legal representation.

Chen later obtained J.L.'s medical record through a related federal action and learned that Halamay's summary judgment was obtained through significant withholds – the withheld 135-pages critical medical records were authored by other providers. The selective medical records submitted were mostly authored by Halamay herself.

Relying upon ADA and Washington State General Rules ("GR") 33 (reasonable accommodation for disabilities), Chen requested the trial court to appoint counsel for J.L. to assist in vacating the summary judgment. The chief Judge Schubert appointed GAL who submitted two reports, suggesting appointment of counsel as "in the best interests of the children". Judge Schubert discharged GAL and appointed counsel for the limited purpose of drafting the reply to the motion to vacate.

The motion to vacate was based on the newly discovered evidence that had been withheld by Respondents, and the court's failure to comply with

guardian ad litem statute (CP 654-656) and minors 'constitutional rights of being represented by competent counsel (CP 656-658). Judge Parisien heard the motion. After identifying personal conflict of interests with the witness Dr. Quinn, Judge Parisien denied the motion in 10 minutes, did not address the raised issue of the absence of GAL (CP 1547). Chen moved for reconsideration, arguing Local Civil Rule 60 provides that only chief judge had authority to hear motion to vacate, as well as the unaddressed GAL issue, which was denied.

C. The State Appellate Court Proceedings

On appeal, Chen again challenged trial court's repeated failure to comply with guardian ad litem statute. Chen wrote,

> [i]n *Newell v. Ayers*, Division Three held that when lacking guardian ad litem, judgment against minors may be voidable at his option.

See Appellate Brief, App. E at 131a, 155a.

On February 10, 2020, Court of Appeals, Division One [6] entered an opinion, affirming a dismissal, finding Chen to have improperly handled the case, *e.g.*, App B, at 22 a & 26a, but opined that the court was not obliged to appoint GAL for J.L. before Chen did not do so before an order granting summary judgment was entered. *Id*, at 23a.

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[6] Hamamay's counsel, Ms. Jennifer Koh had been a staff attorney for Division One from November 2001 to December 2015. She acted as Halamay's counsel from June 2017 to February 18, 2020, filed Response brief. Ms. Koh is now the Commissioner of Division One.

On February 24, 2020, Court of Appeals held in a different case that "only legal counsel can advocate for the legal rights and interests of a child." *See In re Dependency of E.M,* 12 Wn. App. 2d 510, 458 P.3d 810 (2020). On February 28, relying in part on *E.M.* issued four days earlier, Chen moved for reconsideration on multiple grounds, and specifically challenged that through affirming a dismissal with prejudice, Court of Appeals improperly granted *pro se* parents privilege of "unauthorized practice of law", which was inconsistent with both federal and state laws, in particular, its new holding in *E.M.* Chen articulated, "[s]ince the parents were legally not allowed to represent their minor children, J.L. and L.L. were never before the court, and should not be bound by the judgment." App. D, at 48 a & 60a. Chen thus requested, "at minimum, any dismissal as to the children should be 'without prejudice.'" Chen also contested that '[d]ismissing the minors' claims with prejudice without ensuring that they receive meaningful notice [through appointment of guardian ad litem] violates the children's due process rights." *Id,* at 56a.

On March 3, Washington licensed attorney, Mr. James Daugherty sought the court's permission to appear on J.L.'s behalf on a *pro bono* basis. Respondents objected to Mr. Daugherty's appearance by stating:

> Allowing that appearance would violate RCW 4.08.050, which requires that J.L. appear by guardian. To allow Mr. Daugherty to appear for J.L. would require this Court to effectively rewrite the statute to allow infants to appear "by guardian or by

counsel." But, any such a rewrite is a matter for the legislature, not this Court.

Adopting Respondent's position that RCW 4.08.050 prevents minor, J.L. from having a lawyer, Court of Appeals then denied Chen's motion for reconsideration, and subsequently denied Mr. Daugherty's appearance. Both Chen and Mr. Daugherty sought review for both order denying Mr. Daugherty's appearance (#98503-1) and opinion affirming dismissal with prejudice in the State Supreme Court (#98368-2).

D. The State Supreme Court Proceedings

The 9th Circuit appointed pro bono counsel for both J.L. and L.L. in federal court. Chen provided a copy of order to the court and sought permission for Mr. Daugherty to file brief for J.L.

On November 4, 2020, the Washington State Supreme Court entered three orders: (1) refusing to review the lower courts' dismissal with prejudice; (2) denying licensed counsel, Mr. Daugherty's appearance for J.L, and (3) denying motion to permit Mr. Daugherty to file brief for J.L. Thus far, petitioner had exhausted all the remedies at the state courts level.

REASONS FOR GRANTING THE PETITION

I. The Court Must Guard Against Violations of the Separation of Powers Doctrine.

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been

committed... is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr,* 369 U.S. 186, 211 (1962).

Consistent with this "responsibility to enforce the [separation of powers] principle when necessary," *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 272 (1991), this Court's vital function as guardian of separation of powers safeguards and principles includes reviewing and deciding cases raising serious separation of powers questions – even if the Court ultimately concludes no violation has occurred. *See, e.g., Bank Markazi v. Peterson,* 136 S. Ct. 1310 (2016*); Miller v. French,* 530 U.S. 327 (2000)*; Loving v. United States,* 517 U.S. 748 (1996); *Robertson v. Seattle Audubon Society,* 503 U.S. 429 (1992)*; Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868 (1991); *Mistretta v. United States,* 488 U.S. 361 (1989); *Morrison v. Olson,* 487 U.S. 654 (1988); *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); *Clinton v. City of New York*, 524 U.S. 417 (1998).

The principal function of the Separation of Powers, which is to maintain the tripartite structure of the government - and thereby protect individual liberty-by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v . Valeo* , 424 U.S. 1, 122 (1976) (per curiam); *See* The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers confers on each branch the means "to resist encroachments of the others"); *See also Bowsher v. Synar,* 478 U.S. 714 (1986) (invalidating congressional intrusion on Executive Branch);

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (Congress may not give away Article III "judicial" power to an Article I judge); *Myers v. United States,* 272 U.S. 52 (1926) (Congress cannot limit President's power to remove Executive Branch official).

"Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others." *Bond v. United States,* 564 U.S. 211 (2011). For these years, this Court has expressed its concerns over the potential judicial intrusion over the boundary provided by the separation-of-powers doctrine. *e.g., United States v. Windsor,* 570 U.S. 744 (2013) (Scalia, J., dissenting); *Obergefell v. Hodges,* 576, U.S. 644 (2015) (Roberts, J., joined by Scalia and Thomas, dissenting) (stating that adding judicial preference to a law and interfering with legislative powers is "disheartening").

Due Process affords one's right to an impartial tribunal who will decide the case according to laws that are applied predictably and uniformly. This Court has been mindful that the "court is not a legislature". *Id.* Therefore, the court's job is "*not* to rewrite", but "to interpret words *fairly*, in light of their statutory context." *Bond v. United States,* 572 U.S. __(2014) (Scalia, J., joined by Thomas and Alito, concurring in judgment) (emphasis added).

Here, the Washington courts, in indirectly adding languages to a law tailed to J.L.'s suit, have unfairly pronounced a result-driven rule of "Smith loses" in the hypothetical pending case of *Smith v. Jones.* This Court should grant for review, and clarify the bounds of judicial reading of statute, to

prevent any boundless reading, as here, could constitute a violation of constitutional rights.

II. The Questions Presented Are Of Exceptional Importance.

"The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendtthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Given the "disarray" the Framers of our Constitution took an innovative step of creating an independent judiciary which "protects the liberty of the individual from arbitrary power." *Bond v. United States,* 564 U.S. 211, 223 (2011). "When government acts in excess of its lawful powers, that liberty is at stake." *Id.* As James Madison put it, "[w]here the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control." The Federalist No. 47, at 303 (citing Montesquieu, The Spirit of the Law).

To maintain judicial independence, the need for "judicial self-restraint" is needed. *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992). The judiciary should resist the political influence, prohibiting encroaching on the legislature, and avoid imposing its will or preference upon laws. Otherwise, "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78, P. 466. Montesquieu, The Spirit of the Laws 157 (A Cohler, B Miller, & H. Stones eds. 1989).

For a number of years, the courts have been mindful of the boundary between the legislature and the judiciary. "[C]ourts do not substitute their social

and economici beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963). "[Courts] do not sit as a super-legislature to weigh the wisdom of legislation" *Day-Brite Lighting, Inc., v. Missouri,* 342 U.S. 421, 423 (1952). In a 2015 case, three justices of this Court concerned that the judiciary's interference with legislative definition of marriage is "an act of will, not legal judgment." *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Roberts, J., joined by Scalia and Thomas, dissenting). The lawmaking decision "should rest within the people acting through their elected representatives." *Id.* The Courts should avoid "converting personal preference" to the laws. *Id.*

In interpreting a statue, the courts must defer to "the intent of the legislature." *United States v. Am. Trucking Ass'ns, Inc.,* 310 U.S. 534, 542 (1940). Justice Washington stated, "It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt." *Ogden v. Sauders*, 25 U.S. 213 (1827). Thus, the Court will not hold laws unconstitutional simply because finding them "unwise, improvident, or out of harmony with a particular school of thought," *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 488 (1955).

III. The Case is an Ideal Vehicle to Address Unresolved Issues Concerning the Separation of Powers and Clarify When Judiciary Has Infringed the Legislative Power.

The *selective* and *unpredictive* "Smith loses" Decision here is an unprecedent intrusion on the

legislative power. Petitioner contends the Washington courts' decision itself is unconstitutional for the dramatic legal sanction unfairly upon a disabled minor who was not represented by the law-required guardian ad litem, nor the private lawyer who was willing to advocate for him on a pro bono basis.

The laws should not be selective. For over half a century, Washington courts had decided in a series of cases that appointment of guardian ad litem is "mandatory" (AppE, at 155a), the court's failure to make the appointment "will be a reversible error" (*Id*) and the judgment against the minor "may be voidable at his option" (*Id*, at 154a). In *A.G.*, the Washington Court held,

> "The [guardian ad litem] statute is **mandatory**, and the children's interests are paramount. We cannot condone ignoring the statutory provision specifically designed to protect them."
>
> *See* App E. at 154a (emphasis in original)

The court's duty is to exercise "neither force nor will but merely judgment." The Federalist No. 78 (A. Hamilton). Whether "Smith wins" or "Smith loses" should be strictly based on laws, not due to judicial preference. The fundamental principle is that everyone should be treated equally, and in the same way. But here, the Court of Appeals claimed that the court is not obliged to appoint guardian ad litem for J.L. App. B, at 23a. The selective "J.L. loses" is an indication of placing preference over laws.

The laws must be consistent and predictive. As Judge Diane Wood pointed out, "neither laws nor the procedures used to create or implement them should be secret; and ... the laws must not be arbitrary." Judge Diane Wood, The Rule of Law in Times of Stress, 2003. While Washington case laws requires appointment of guardian ad litem and never imposes sanctions on minors with a dismissal with prejudice. While the laws are clear that *pro se* parents cannot represent minors in both federal and state courts, 28 U. S. C. § 1654; RCW 2.48.180. Even if Washington Court of Appeals made the same determination days prior in another case in *E.M.* that minor's legal interest must be represented by legal counsel, J.L. was denied his rights to legal representation by adding words to RCW 4.08.050.

While the court did not directly change the wording of the statute, which it did not have the power to do, it indirectly added words that were not originally in the law, changing the meaning of the statute, and then based its decision on those changes. That sort of judicial intervention constitutes an exercise of the legislative power because the judicial interpretation *per se* altered the laws. Any improper encroachment, whether "directly" or "indirectly", is prohibited. *Patchak v. Zinke,* 583 U.S. __ (2018) (Roberts, J. joined by Scalia and Thomas, dissenting).

The Court's duty is to ascertain the legislative intent. It cannot rewrite the laws, reduces or adds words. *Bond.* Here, Wahington courts of Appeal added time constraint on seeking appointment of guardian ad litem, and further imposed "dismissal with prejudice" to a minor – the judicially amended statute, the decision and the circumstances giving

rise to it unquestionably test the limits of judicial authority to act without intruding upon the legislative power. This case presents an important opportunity for the Court to clarify the boundaries of that authority. *See* SUP. CT. R. 10 (c).

Washington courts have a history of adding words to statutory interpretation. *e.g., In re Dependency of E.M.,* Here, the issue is whether the courts could add time constraint and dismissal with prejudice to the statue, targeting the dismissal of a minor's claim that had never been addressed well before the statute of limitations was to run.

The Court is not a legislature. Whether "Smith wins" or "Smith loses" should be decided by laws, *not* by judicial preference. By adding the legislature-omitted time constraint and legislature-unauthorized legal consequence through judicial interpretation, a disabled minor's constitutional access rights were fully denied by Washington courts.

That this case concerns multiple decisions in a single case, all targeted at denying a disabled minor's rights to access to the courts, makes it critically important for this court to grant the Petition. – Any "[s]light encroachment create new boundaries from which legion of power can seek new territory to capture". *Stern,* 564 U.S., at 502-503. "We cannot compromise the integrity of the system of separated powers... even with respect to challenges that may seem innocuous at first blush." *Id.* at 503. This was not a "slight encroachment", but the flat-out denial of a disabled minor's right to adequate representation.

"It is not every day that [the Court] encounter[s] a proper case or controversy requiring interpretation of the Constitution's structural provisions. Most of the time, the interpretation of those provisions is left to the political branches – which, in deciding how much respect to afford the constitutional text, often take their cues from this Court. [The Court] should therefore take every opportunity to affirm the primacy of the Constitution's enduring principles over the politics of the moment." *NLRB v. Noel Canning,* 134 S. Ct. 2550, 2617 (2014) (Scalia, J. concurring).

"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *INS v. Chadha,* 462 U.S. 919 (1983). "[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court." *Noel Canning*, 134 S. Ct. at 2593 (Scalia, J., concurring) (citing *Public Citizen v. Department of Justice,* 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment).

Recognizing the importance of maintain the separation of powers, this Court has granted review in numerous cases without the presence of conflicting lower court decisions. *e.g., Bank Markazi*, 136 S. Ct. 1310; *Stern*, 564 U.S. 462; *Loving*, 517 U.S., 748; *Plaut*, 514 U.S. 211; *Robertson*, 503 U.S. 429; *Freytag*, 501 U.S. 868; *Morrison,* 487 U.S. 654; *Bowsher*, 478 U.S. 714; *Chadha*, 462, U. S. 919; *Northern Pipeline*, 458 U.S. 50; *Nixon*, 433 U.S. 425; *United States v. Klein*, 13 Wall, 128 (1871); *Patchak v. Zinke,* 583 U.S. __(2018). Here, however, there is a conflict.

IV. The Washington Courts' Decision Creates A Departure and Contravenes the Decades-Long Practice of Courts Nationwide.

A. RCW 4.08.050 Provides No Basis For the Courts To Deprive A Disabled Minor Of His Constitutional Rights To Counsel.

All circuit courts across the county prohibit a non-attorney from representing on others' behalf, with no exemption for *pro se* parents. Indeed, all circuits to address the question subscribe to this rule. *See O'Diah v. Volkswagen of Am., Inc.*, 91 Fed. Appx. 159, 160 (1st Cir. 2004); *Cheung v. Youth Orchestra Found. Of Buffalo, Inc.*, 906 F.2d 59,61 (2d Cir. 1990); *Osei-Afriyie v. Med. Coll. Of Pennsylvania,* 937 F.2d 876, 882 (3d Cir. 1991); *Myers v. Loudon County Pub. Schs.,* 418 F.3d 395, 401 (4th Cir. 2005); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002); *Smith v. Smith*, 49 Fed. Appx. 618, 620 (7th Cir. 2002); *Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 578, 582 (11th Cir. 1997), *cert. denied*, 522 (U.S. 1110(1998).

Washington courts have decades-long history of rejecting non-attorney representation. *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn., 91 Wn.2d 48, 586 P.2d (1978)* ("The *'pro se'* exceptions are quite limited and apply only if the layperson is acting solely *on his own behalf")* (emphasis in original); *Also Hagan v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981) ("In passing RCW 19.62, allowing lay persons to practice law, the legislature imprecisely usurped the courts'

power. Accordingly, RCW 19.62 is unconstitutionally as a violation of the separation of powers doctrine.").

The common law ban on lay parent representation comports with 28 U.S.C. § 1654, which provides that "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel..." Non-attorney representation is a crime in Washington. RCW 2.48.180. *State v. Yishmael,* 195 Wn.2d 155, 456 P.3d 1172 (2020).

The common law rule furthers several important policy objectives. *Pro se* representation carries with it risks that are not present, compared to parties represented by counsel. *McNeil v. United States,* 508 U.S. 106, 113 (1993) (a litigant without counsel could make "a fatal procedural error"). This case illustrates the point. In its Opinion, the Court of Appeals admonished Chen's incompetency, *e.g.,* "Chen made no discovery requests [7] before the court granted summary judgment dismissal...The defendants were under no obligation to provide full copies of J.L.'s medical records in support of their motion for summary judgment." *Opinion,* at 26a. Even finding Chen's incompetency, the Court did not appoint the mandatory GAL. Instead, it declined Mr. Daugherty's appearance, forcing J.L to *pro se* or represented by a *pro se* parent.

When an adult chose to proceed without counsel, he assumes the risk. *Graham-Humphresys v. Memphis Brooks Museum of Art, Inc.,* 209 F.3d 552, 561 (6th Cir. 2000).

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[7] The Complaint was filed on October 24, 2016. Halamay filed summary judgment on December 8, 2016 - granted on May 11, 2017, four months before the discovery cutoff.

However, minors are not bound to their parents' *pro se* actions in such instances. Jurisdictions across the country had chosen to enter a dismissal without prejudice, "thereby giving [minors] further opportunity to secure an attorney at some later time within the limitations period...[minor] should not be prejudiced by his father's failure to comply with the court order." *Johns v. County of San Diego.* The Second Circuit explained:

> The choice to appear *pro se* is not a true choice for minors who under state law...cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect...goes without saying that it is not the interest of minors or incompetents that they be represented by non-attorneys. Were they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

Chueng, 906 F.2d at 61 (remanding to district court so it could either appoint counsel or dismiss the complaint without prejudice); *See also Johns v. County of San Diego,* 114 F.3d 874(9th Cir. 1997) (directing the district court to change dismissal with prejudice to without prejudice; "because the goal is to protect the rights of infants, the complaints should not have been dismissed with prejudice as to minor"). The Courts agreed that "[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 to him." *Osei-Afriyie v. Medical College of Pennsylvania,* 937 F.2d 876, 883 (3rd Cir. 1991).

Under Sixth Amendment, J.L. has a constitutional right to legal counsel, and of course he could elect to proceed *pro se* "voluntarily and intelligently". *See Faretta v. California,* 422 U.S. 806 (1975). No such findings had ever entered. It is against the law to require a mentally disabled minor to *pro se. See Godinez v. Moran,* 509 U.S. 389, 403 (1993) (The courts should decline self-representation when the state of litigant's competency is called into question).

Washington Courts' Decision creates a significant departure for improperly ordering a minor to proceed *pro se,* or represented by an incompetent guardian who has no legal training and speaks English as her second language. It is against the law for Washington courts – within the same court - to order *pro se* parents to act on their minor children's behalf. This is of particular concern when a *pro se* parent is pleading for assistance by requesting appointment of guardian ad litem, and counsel.

The federal courts chose to dismiss the minors' claims without prejudice and did not permit *pro se* parent representation. This Court should accept for review and reverse under Supremacy Clause. *e.g., Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992). *See* SUP. CT. R. 10 (b).

The Washington Court opined that RCW 4.08.050 provides *pro se* parents to represent their minor children in court. Opinion, at 23a. Whether a state law *could* effectively prevent minor from

having legal counsel is a constitutional [8] question for this Court to decide.

B. Absent Notice About Time Constraint and Legal Consequence, Washington Courts' Dismissal With Prejudice Against A Disabled Minor Is A Due Process Violation Under This Court's Decision In *Rabe v. Washington.*

RCW 4.08.050 was enacted by Washington legislature in 1891, remaining almost unchanged for over one century. The statue reads, in pertinent part:

> when an infant is a party he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows:
>
> (1) When the infant is plaintiff, upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.
>
> (2) When the infant is defendant, upon the application of the infant, if he or she be of the age of fourteen years, and applies within thirty days after the service of the summons; if he or she be under the age of fourteen, or neglects to apply, then upon the application of any other party

[8] If RCW 4.08.050 deprives constitutional minor's rights to counsel as alleged, the Washinton Court was obliged to declare it as unconstitutional. It did not do so.

> to the action, or of a relative or friend of the infant.

See App. G. at 198 a

The Washington court conceded the appointment of guardian ad litem is "mandatory" that "RCW 4.08.050(1) provides that a trial court *must* appoint a guardian ad litem for children under 14 years of age" (emphasis added), *See* 23a. It, however, argued that the court was not under the duty to *sua sponte* appoint the guardian ad litem until the application was made by the "relative or friend of the infant." *Id.* But the plain language in the statue seemingly suggests the *initial* duty was upon the Court – *only after* the court made the initial inquiry does the burden shift to request the appointment. Specifically, "[after] in the opinion of the court the guardian is an improper person, the court shall appoint one to act. " If a statute remains ambiguous after a plain meaning analysis, it is appropriate to refer to case law. *Shelly v. Elfstrom*, 13 Wn. App. 887, 538 P.2d 149 (1975) (it was "the duty of *the court* to determine either that [party] was competent or that a guardian ad litem was required"). The interpretation found support under the cannon interpretation in pari materia. Even if ambiguity of the statute arguably exists, it should be resolved "in favor of lenity". *e.g., Rewis v. United States,* 401 U.S. 808, 812 (1971).

As supported by court records, Chen did request the appointment of guardian ad litem, in Petitioners' Motion for reconsideration on May 19, 2017. The Court of Appeals claimed the request as untimely because it was not made "before the court entered an order granting summary judgment

[which was entered seven days earlier]." App B, at 23a.Timing requirement, however, had been intentionally omitted by the legislature in RCW 4.08.050 (1) when infant is the "plaintiff". When Legislature imposed "thirty days" time limit in RCW 4.08.050 (2) when infant is the "defendant" – they could but have deliberately chosen not to do so for minor plaintiffs under expressio unius est exclusio alterius.

RCW 4.08.050 was enacted to protect the minor children's interests. It is the legislative intent, as interpreted as the court, to place the initial burden upon 14-year-old minors or "friends or relative of infant" under 14 years old. In the 1992 c 111 findings, legislature specially expressed its concerns over the affected party's "limited English proficiency". *See* 199a.

Although no language in RCW 4.08.050 (1) imposes deadline for requesting appointment of guardian ad litem, the Washington Court, however, insisted that Chen should have made the request "before" an order granting summary judgment was entered. *see* App B at 23a. This judicial addition altered existing law and was an improper encroachment on the legislative power and statute as written, which was intended to protect the interests of children. Even if accepted, the Opinion itself was a Due Process violation for failing to provide an adequate notice to the affected parties, here, J.L. and Chen.

The dismissal with prejudice was fundamentally unconstitutional because neither Chen nor J.L. ever had notice that a failure to request appointment of guardian ad litem could result in a dismissal with

prejudice, which was not included in RCW 4.08.050. *See Rabe v. Washington,* 405 U.S. 313 (1972) (per curiam). Noting that neither context nor location were part of the crime Rabe supposedly committed: "[Rabe's] conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating", this Court reversed because Rabe had no notice that showing the same film in an indoor theater was permissible but that showing it in a drive-in was not. As pointed out by Judge Diane Wood from the Court of Appeals,

> "[N]either laws nor the procedures used to create or implement them should be secret; and...the laws must not be arbitrary."

Wood, Diane, The Rule of Law in Times of Stress (2003).

Applying here, Chen and J.L. should have been (but were not) made aware of the potential legal consequence, *e.g.,* dismissal with prejudice and been given opportunity to avoid the consequence. Absent adequate notice, Washington courts' dismissal with prejudice was a violation of J.L.'s Due Process Rights.

C. Minor, J.L. Has Been Deprived of Individual Rights - Which Structural Separation of Powers Principles Are Designed to Safeguard.

"The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States,* 564 U.S. 211, 222 (2011). Justice Scalia announces that it is a "bedrock principle that 'the constitutional structure of our government' is designed first and foremost not to look after the interests of the respective branches,

but to 'protec[t] individual liberty.") *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014) (Scalia, J., joined by Thomas and Alito, concurring in judgment). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York,* 524 U.S. 417, 450 (1998) (Kenndy, J., concurring).

The threat to individual rights is particularly acute when the Court neglects the restraints of the judicial role. The question here is who should make the laws, or more exactly, who should decide how the laws should be. In a case of *Smith v. Jones,* whether or not "Smith wins" should be decided according to the original laws, not the judicially amended rule.

Having experienced and rejected "a system of intermingled legislative and judicial powers," *Plaut,* 514 U.S., at 219, the Framers recognized – as has this Court – that "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Hamilton, quoting, 1 Montesquieu, Spirit of Laws 181); *Stern,* 564 U.S., at 483.

Here, RCW 4.08.050 (1) does not require application for appointment of a guardian ad litem to occur before entry of order on motion for summary judgment. Whether or not a time constraint should be added for a minor plaintiff, and whether the failure to request the appointment should be sanctioned by dismissal with prejudice, "the decision should rest with the people acting through their elected representatives," *Obergefell v. Hodges,* 576 U.S. 644 (2015) (Roberts, J., joined by Scalia and Thomas, dissenting). In deciding cases based on a judicially amended statute, the Washington courts

stripped the minor, J.L. of his individual right to have his case adjudicated by an impartial tribunal, free of personal preference.

The decision deprived J.L. and Chen of their rights to "notice" required by Due Process Clause of the Fourteen Amendment. They were not told by anyone or the court that request for the appointment must occur before a motion for summary judgment (which was brought one month following commencement of litigation), nor were they made aware that a dismissal with prejudice could be imposed if the application was not made before a specific date. Absent notices to the affected parties, the order granting dismissal with prejudice violates Petitioners' fundamental due process rights. *e.g., Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950).

Washington courts' decision deprives J.L. of his rights to "meaningful" access the courts. *Bounds v. Smith,* 430 U.S. 817 (1977). Here, J.L. was denied the *minimal* access by this pre-discovery dismissal without representation.

In sum, the Decisions violates minor, J.L.'s rights to counsel, access the courts, and equal protection under U.S. Constitution.

Americans are proud of having "a government of laws and not of men" - which was originally from the Massachusetts Constitution of 1780, in full as below:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or

> either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Citing Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J., dissenting)

The Washington courts erred in converting personal preference into laws by entering a dismissal with prejudice against minor, J.L. To avoid repeating such errors, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins* v. *Harker Heights*, 503 U. . 115, 125 (1992). It "is the obligation of the Judiciary ...to confine itself to its proper role," *City of Arlington v. FCC,* 133 S.Ct. 1863 (2013) (Roberts, C.J., dissenting). The Washington Courts' decisions should be reversed - it was unconstitutional and has violated a disabled minor's most fundamental constitutional rights of the access to the courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 29, 2021.

Resubmitted per this Court's letter directive dated on April 15, 2021.