No. 21-493

ORIGINAL

In the Supreme Court of the United States

Susan Chen.

Petitioner

v.

Darren Migita, M.D., Ian Kodish, M.D., James Metz, M.D. and Seattle Children's Hospital.

Respondents

On Petition for a Writ of Certiorari to The Washington Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Due process, adequate notice must be given to the affected parties. The current petition and the underlying *four-years'* appellate litigation are results of Washington courts' refusal to clarify an ambiguous order about whether minor, J.L. was bound to the dismissal order or whether the dismissal to the minor was without prejudice.

Petitioner *pro se* filed a lawsuit, mistakenly added J.L.'s name but quickly informed the court that she cannot represent minor in court as non-attorney. A Washington state court judge dismissed the action upon Defendants' pre-discovery motion for summary judgment announcing the lack of personal jurisdiction over defendants due to the plaintiffs' defective service. The order was *silent* as to whether it was with or without prejudice as to the *unrepresented* minor plaintiffs ("2017 Order"). The Chief Judge expressed his *intent* to vacate the ambiguous order, reasoning that a dismissal without prejudice was the limit that a court lacking jurisdiction could act and that parties are *entitled to* a clear judgment ("2019 *Intent*") – the Order has not yet been formally entered.

Defendants appealed the court's *intent*. The Washington Court of Appeals reversed, concluding that the Chief Judge abuses the discretion to resolve the jurisdictional challenge, opined that the Court has no obligation to first determine whether or not it has jurisdiction. The Court of Appeals disagreed with chief judge and ordered the indigent Petitioner (Respondent on appeal) to pay appellate

costs and fees to the appeal initiated by the Respondents (Appellants on appeal).

1. Whether a state court's dismissal order, absent clear languages about the legal effects; and its further refusal to clarify – which has led to four years' appellate litigations - violate notice requirement of procedural due process as set out in the Fourteenth Amendments' Due Process Clause?

2. Whether the Court has authority to *further* rule on the merits of the claims and dismiss the unrepresented children's claims, *after* it has announced lacking personal jurisdiction over defendants.

3. Whether the Court has personal jurisdiction over a disabled minor who was *unrepresented* by legal lawyer and guardian ad litem – while *all* federal circuits dismissed the unrepresented minors' claims without prejudice because *pro se* parents are not permitted to represented minors in both federal and state courts. 28 U. S. C. § 1654; RCW 2.48.180.

4. Whether the Court is under the duty to first resolve the jurisdictional issue before ruling on the merits of the case.

5. Whether it is unconstitutional for the state Court to impose legal financial sanction upon the *passive* indigent Respondents who were forced to respond to the interlocutory appeal – if any appellate costs - completely occurred by the appellants themselves.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

On January 6, 2021, the Washington Supreme court denied discretionary review of Court of Appeals' Opinion reversing Superior court's 2019 Order vacating the 2017 summary judgment of dismissal orders. On April 28, 2021, the Washington Supreme Court denied Petitioner's Motion to modify Commissioner's Ruling of imposing appellate legal financial sanction against indigent Petitioner (Respondent below). The orders are attached as APP. A-B, at 1a-2a.

JURISDICTION

The Washington Supreme Court denied discretionary review on January 6, 2021. On March 19, 2020, this Court extended the deadline to file a petition for certiorari to 150 days from the date of order denying discretionary review. 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."

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case.

Seattle Children's Hospital ("SCH") has a long history of making false allegation towards innocent parents, including but not limited to the misdiagnosis of mother having a non-existent and rarely seen disease called Munchausen by Proxy. A SeattlePI investigative article published in 2002 revealed that one single doctor from Seattle Children's Hospital had (wrongfully) accusing over one hundred mothers having Munchausen, all of which was eventually proven to be false.[1]

Prior to the event occurred in 2013, J.L. had been seeing the GI clinic of SCH at over one year, for different digestive problems such as diarrheas, constipation, gas, failure to gain weight, *etc.*

The three SCH Defendant doctors, Darren Migita, James Metz and Ian Kodish (Collectively "Migita"[2]) ignored J.L.'s medical history available in their own institution, did not consult with J.L.'s main treating physicians whose names were known to them in the medical records and labs. Other than negligent, they provided the knowingly false information to child protective services ("CPS"). For example, Defendant Darren Migita claimed J.L. suffering from kidney failure (while in fact J.L.'s kidney function was normal and the only mediation

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[1] https://www.seattlepi.com/news/article/Persecuted - parents - or – protected – children – 1092970.php

[2] For easy statement purpose, no disrespect.

he was given was "Bisacodyl," a medication for constipation); Defendant Metz wrote in the report (sent to CPS) that Chen did not send J.L. to ER on 20th but the medical records showed the contrary. Kodish claimed J.L. did not have autism but reactive attachment disorder with caregivers though he never observed the interaction between J.L. and his parents. The Juvenile Court was "outrageous" with Darren Migita's below-the-standard care for not consulting with the minor patient's main treating physician, talking with parents, and reviewing his medical records before jumping to a conclusion.

As the presiding judge for the dependency action caused by defendants' misstatements, Judge Hollis Hill reviewed testimonies from J.L.'s multiple medical providers; and made multiple discretionary decisions including but not limited to a (later-proven-to-be-wrong) decision of placing J.L. in foster homes resulting into long-lasting damages.

After one-year's investigation, the State concluded that defendant James Metz's misstatements were simply "contrary to" the medical facts in J.L.'s medical records and moved to strike the dependency petition before trial. King County Prosecutors moved to dismiss the wrongful criminal charges against J.L.'s mother, Susan Chen "in the interest of justice" and "due to the evidence discovered after filing [which had been withheld]."

These rightful dismissals came too later. The consequences for Susan Chen and her minor child, J.L. were 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.

Defendant physicians' negligence was true. All the damages done to Chen and J.L. were real. Chen was falsely arrested, jailed and prosecuted, and had to carry on the pains with her son's permanent losing abilities as a result of Migita's negligence. 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 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. [3] 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 by Washington courts.

B. The State Superior Court Proceedings (I)

In October 2016, Chen *pro se* filed lawsuit against the three defendant physicians. Chen mistakenly added minors' name in the complaint, but quickly brought to the Court's attention that *pro se* parents cannot represent minors. *See* Clerk's

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[3] The Opinion below did not include all facts. This Court is invited to review facts in 120-124a, 195-198a, 83-93a.

paper ("CP") 4 ("I was not able to represent my children"); and asked the court to give them time to retain an attorney (CP 5). The issue was unaddressed.

In December 2016, Defendants moved for a pre-discovery summary judgment, arguing at length that trial court lacked personal jurisdiction over them due to Chen's improper service, and that lack of signature on the complaints. They concluded the defects rendered the complaint void *ab initio*. *See* App. I, *at* 62a, 65a.

In their motion for dismissal, the defendant doctors (joined by SCH) made a lengthy argument that the improper service and lack of signature on two of the complaints rendered the complaints void *ab initio*. Thus, they stated that:

- "this Court lacks personal jurisdiction over Dr. Migita, Dr. Kodish, and Dr. Metz because Plaintiffs failed to effect original service of process" *See* App I, at 37a.

- "Voided complaints have no legal effect and are not subject to later amendment because there is nothing to amend" *See Id*, at 38a

- if the summons and complaint are not completed within 90 days, "the action is treated as if it had not been commenced" *See Id*, at 58a;

- "If the original complaint is void, there is nothing to amend (*Id*, at 61a); "Something that is "void" has no legal effect" (*Id* at 62a);

- "the filing of a void complaint does not commence a civil action" (*Id,* at 64a);

- "the complaint Plaintiff seeks to amend does not exist, it is a nullity because it was void ab initio and "there can be no 'relation back' to a pleading . . . that was a nullity from the start" (*Id,* at 65a); and

- plaintiffs' complaints should be dismissed "because they were void *ab initio,* and therefore, they failed to confer subject matter jurisdiction upon this Court" (*Id,* at 66a).

In support the motion, each defendant submitted several sentence declarations (*Id,* at 75-76a; 77-78a; 79-80a) and twenty pages' medical records (the entire medical records were 600 pages). Judge Hill declined Petitioners' very first request for weeks continuance to allow the appearance of counsel, granted the summary judgment and entered a dismissal order, but silent in language about whether it was with or without prejudice. App F, at 24-26a.

Chen moved for reconsideration, asking the Court to clarify the order was without prejudice as to the minor. Chen wrote,

> The Order is silent as to whether this dismissal was with or without prejudice.
>
> As to the minors' claims only, the dismissal should be without prejudice for re-filing, as they are still in their minority, and the statute of limitations is tolled until they

> reach majority. RCW 4.16.190. *Schroeder v. Weighall et al.* 179 Wn.2d 566; 316 P.3d 482; 2014 Wash., holding RCW 4.16.190 (2), which excluded medical malpractice claims from tolling unconstitutional.
>
> Alternatively, due to failure to appoint a GAL to bring the action, the action on behalf of the minors was a nullity, and there was no action on behalf of the minors for judicial consideration, and therefore no action to dismiss.

Judge Hill denied the motion, again, without any explanation. App. F, 22-23a.

Chen appealed, pleading for a clear judgment as the party bound by the judgment. Chen's appeal was dismissed. [4] Chen sought discretionary review at the state supreme court, pleading an answer for the ambiguous order in 2019, which was not accepted.

C. The State Superior Court Proceedings (II)

Chen later obtained J.L. 600 pages' complete medical records from a separate civil action (where she was represented) and filed motion to vacate the 2017 order before the chief judge, Ken Schubert.

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[4] Chen's request for appointment of counsel for minor, J.L. as a reasonable accommodation under ADA and GR 33 was denied by the Court of Appeals. The Clerk ruled that, "[i]t appears that appointing counsel in this case risks fundamentally changing the nature of appellate court services." *See* App E, at 21a.

Migita's appellate attorney Smith Goodfriend ("Goodfriend") was Chen's consulting counsel. Chen moved to disqualify Goodfriend which was granted by the trial court (*See* App H, at 34-36a).

Relying on the Washington Supreme Court's holding in *State v. Nw. Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947) that a dismissal without prejudice is the limit that a court lacking personal jurisdiction could act, Judge Schubert eventually granted Chen's Motion to Vacate the 2017 Order. *See* App G, at 30-33a. Judge Schubert wrote,

> Whether the Court dismissed plaintiffs' complaint on jurisdictional or substantive grounds is critical. If the Court *did not* have personal jurisdiction over Defendants, then it had *no* power to rule on the merits of the claims asserted against them and the dismiss could *not* have been with prejudice as a matter of law. *See State v. Nw. Magnesite Co.*, 28 Wn. 2d 1, 42, 182 P.2d 643, 664 (1947) ("However, we do not agree with the trial court that the order dismissing those respondents should be with prejudice to the state's cause of action against them. The court having been without jurisdiction over those parties, by reason of lack of proper service upon them or of general appearance by them, it had no power to pass upon the merits of the state's case as against those parties."). But if the Court *did* have personal jurisdiction over Defendants, then it could properly reach the merits of plaintiffs' claims against them and

> the dismissal of those claims would presumably be with prejudice.

Under Washington laws, permission was required for the entry of an order on motion to vacate after the appeal was already filed. Judge Schubert thus wrote,

> Should the appellate court so permit, this Court will enter a formal order vacating the March 3 and April 10, 2017 orders pursuant to CR 60(b) as to Defendants only. This Court must receive that permission because plaintiffs have appealed this Court's March 3 and April 10, 2017 orders and this order will change a decision then being reviewed by the appellate court. *See* RAP 7.2(e).

Before the Order was formally entered, Migita appealed the Order. Judge Schubert entered a clarifying that his order is not subject to appeal before it was formally entered. *See* App G, at 27-29a. Chen contended that the order was unappealable because the order was not even a formal order, but an intent; and even if it was a formal order, it was an interlocutory decision because it did not affect parties' rights. Chen argued, the order vacating order granting summary judgment is similar to an order denying summary judgment which is not an appealable order. The Court denied Chen's request to dismiss a pre-mature appeal.

Two months before the Court of Appeals decided the appeal. Chen submitted RAP 10.8 Statement of Additional Authorities. App L at 171-2a):

Pursuant to RAP 10.8, Appellants cite the following additional authorities, with regard to issues in their opening brief, *i.e.*, (1) whether trial court lacking personal jurisdiction can reach merits (*e.g.*, Brief at P. 20- 24) and (2) whether minors had been properly before the court (*e.g.*, Brief at P. 31; 39).

Melo v. U.S. 505 F 2d 1026 (8th Cir. 1974) ("Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but rather should dismiss the action.")

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

Johns v. County of San Diego, 114 F. 3d 874, 877 (9th Cir. 1987) ("a nonlawyer 'has no authority to appear as an attorney for others than himself')

Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn., 91 Wn.2d 48, 586 P.2d 870 (1978) ("[o]rdinarily, only those persons who are licensed to practice law in this state..."[t]he 'pro se' exception are quite limited and apply only if the layperson is acting solely on his own behalf."

RCW 2.48.170 ("Only active members may practice law").

The Court of Appeals did not address any the above authorities, reversed Judge Schubert's Intent to vacate the 2017 Order granting Summary Judgment, opined that the trial court was not obliged to first determine the jurisdiction, and concluded that Judge Schubert abused his discretion for resolving the jurisdictional issue in Chen's favor. App C, at 14a. ("We need not resolve the issue of whether Judge Hill, in fact, first resolved the jurisdictional issue in Chen's favor.").

Chen sought the second discretionary review at the state supreme court, challenging that "Division One's decision ignores the fundamental jurisdictional issue" (App N.at 209a) and the Court was under "nondiscretionary duty" to vacate the underlying 2017 order which was void ab initio. (*Id*, at 214a). Chen argued that "[a] judgment entered by a court which lacks jurisdiction is void and must be vacated whenever the lack of jurisdiction comes to light. *Allied Fid. Ins. Co. v. Ruth,* 57 Wn.App 783, 790 P.2d 206 (1990)." *(Id*, at 214a)

The Court of Appeals further awarded fees and costs to Migita and Seattle Children's Hospital under RAP 14.2. Chen's contention that RAP 14.2 should not apply to indigent Respondent who was at no fault, but *passively forced* to respond to the appeal initiated by Migita was denied. Chen sought discretionary review in Washington state supreme court, which was denied. *See* App. B, at 2a.

Thus far, Chen has exhausted all the state level remedies.

REASONS FOR GRANTING THE PETITION

Jurisdiction is the elementary prerequisite for a court to exercise its judicial power over the case. Without jurisdiction, the court can do nothing but to dismiss the case without prejudice. *Ex parte McCardle,* 7 Wall. 506, 514 (1869). Jurisdiction is always the first question a court must address; *Mansfield, C. & L. M. R. Co. v. Swan,* 111 U.S. 379, 382 (1884). It is "the responsibility of all courts." *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). When the lower courts lack jurisdiction, this Court is obliged to exercises its supervisory power for "the purpose of correcting the error of the lower court." *United States v. Corrick,* 298 U.S. 435, 440 (1936).

Here, the Washington court suggested, "[the chief judge]'s conclusions that Judge Hill was required to address the personal jurisdiction issue before the merits ... We need not resolve the issue of whether Judge Hill, in fact, first resolved the jurisdictional issue in Chen's favor." *See* App C, at 14a. If this suggestion is accepted, the legal system will be in disordered condition. *e.g.,* a California Court could rule against a Florida resident without having to first establish jurisdiction or a bankruptcy court could take over matters in criminal court even having no subject-matter jurisdiction. This Court should reverse in light of *McCardle* and *Mansfield.*

It has been the unanimous decision through *all circuits* across the country that a lay parent cannot represent her minor child in courts. The Washington court suggested differently. This Court

should accept for review and resolve the conflicts. *See* SUP. CT. R. 10 (b).

I. The Court Must Resolve The Jurisdiction Defects Whenever Comes To Light.

Jurisdiction is the power to exercise authority over persons and things within a territory. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 7 Wall. 506, 514 (1869). "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998); *United States* v. *Richardson,* 418 U.S. 166, 179 (1974); *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 227 (1974).

Given its importance, jurisdiction is probably one of the most reviewed issues before this Court. For example, this Court has dealt with the issue seven times in five years. *e.g., Asahi Metal Indus. Co. v. Superior Court,* 107 S. Ct. 1026 (1987); *Burger King Corp. v. Rudzewicz,* 105 S. Ct. 2174 (1985); *Phillips Petroleum v. Shutts,* 472 U.S. 797 (1985); *Helicopteros Nacionales de Colombia,* S.A. v. Hall, 466 U.S. 408 (1984); *Calder v. Jones,* 465 U.S. 783 (1984); *Keeton v. Hustler Magazine,* 465 U.S. 770 (1984); *Insurance Corp. of*

Ireland v. Compagnie de Bauxites des Guinee, 456 U.S. 694 (1982). From 2011 to 2017, this Court decided six personal jurisdiction cases. *See Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

"On every writ of error or appeal, *the first and fundamental question is that of jurisdiction*, first, of this court, and then of the court from which the record comes. *This question the court is bound to ask and answer for itself, even when not otherwise suggested*, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co., v. Jones*, 177 U.S.. 449, 453 (1900). Jurisdiction "would normally be considered a threshold question that must be resolved...**before** proceeding to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Jurisdiction is always an antecedent question and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

The Court cannot resolve contested questions of law when its jurisdiction is in doubt. The threshold question in this case was whether the Washington Court had personal jurisdiction in 2017 to rule on the merits of the case when it already dismissed the claims for lack of personal jurisdiction upon the defendants. The Washington court's jurisdiction was further blurred about because the minor plaintiffs had not been properly

before the court when they were unrepresented by legal counsel and mandatory guardian ad litem. Without first addressing the contested threshold jurisdiction question that "the court is bound to ask and answer for itself" "on every writ of error or appeal." *Great Southern Fire Proof Hotel Co., v. Jones,* 177 U.S.. 449, 453 (1900). This was exactly what Judge Schubert said at the hearing:

> You deal with jurisdiction first. That's the way it's always been. That's the way it should have been here.
>
> App K, at 136a; also App N, at 202a.

The Washington court disagreed. "We need not resolve the issue of whether Judge Hill, in fact, first resolved the jurisdictional issue in Chen's favor," and "the court must have dismissed the claims against the physicians on the merits." *See* App C at 10a.It further concluded that Judge Schubert abused the discretion for first resolving jurisdiction issue. The decision directly conflicts with this Court's holdings. *e.g., Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998) (Jurisdiction is a threshold question that must be "resolved first.").

Washington Court of Appeals' reasoning that a court could ignore jurisdiction but just proceed to act on the merits is dangerously flawed – if accepted, Oregon Courts could act against Washington residents without having to first obtain jurisdiction; or trial court could take over appellate court's appellate authority as long as it *chooses* to do so. This Court's supervisory power is thus justified. See SUP. CT. R. 10 (a).

Jurisdiction is a matter of constitutional concern. *See e.g., Shaffer v. Heitner,* 433. U.S. 186 (1977); *Hanson v. Denckla,* 357 U.S. 235 (1958); *also* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 Sup. Ct. Rev. 77, 77-79 (assuming traditional bases of jurisdiction are matter of constitutional law); George, *In Search of General Jurisdiction,* 64 TuL. L. Rev. 1097, 1107 (1990) (assuming personal jurisdiction is an issue of constitutional law); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State courts: From Pennoyer to Denckla: A Review,* 25 U. Chi. L. Rev. 569, 573 (1958) (assuming personal jurisdiction is an issue of constitutional law).

The Washington courts did not have jurisdiction to render judgment against minor, J.L. because he had not been properly before the courts because minors are considered legally incompetent and he was prohibited from being represented by *pro se* parent. Both federal and state laws. prevent a non-attorney from representing on others' behalf and there is no exception for *pro se* parents. 28 U. S. C. § 1654; RCW 2.48.180. All circuits across the country ruled that minor is not bound to their parents' *pro se* actions and 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,* 114 F.3d 874, 876-77 (9th Cir. 1997). Here, Washington courts' refusal to clarify the dismissal as to the minor was without

prejudice has effectively deprived Chen and J.L.'s Due Process rights to judicial notice. 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 core issue for this appeal is jurisdiction: whether the court has authority to render judgment against *unrepresented* minors; whether a court lacking personal jurisdiction over defendants can *further* rule on the merits; and whether the order was void *ab initio* given the extraordinary facts: *unsigned* complaints, *improperly served* defendants and *statutorily recused* judge and *essentially unrepresented* minors.

"It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect," *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). When the lower courts lack jurisdiction, this Court is obliged to exercises its supervisory power for "the purpose of correcting the error of the lower court." *United States v. Corrick,* 298 U.S. 435, 440 (1936). *See e.g., McGirt v. Oklahoma,* 591. U.S. __(2020) (reversing conviction judgement entered by Oklahoma state court when the alleged unlawful act was only subject to federal jurisdiction, not state jurisdiction). The *McGirt* decision results in "thousands of convicted criminals may have their convictions undone" *Wikipedia. See also Hanson v. Denckla,* 357 U.S. 235 (1958) ("The Florida court did not have in rem jurisdiction...or personal jurisdiction... without such jurisdiction it had no power under Florida law to pass on the validity of the trust. Therefore, its decree is void.").

II. This Case Is An Appropriate Vehicle For Deciding The Important Constitution Question Related to Due Process Rights.

A. The Ambiguous Order Itself Is A Due Process Violation.

Due process provides parties right to notice, hearing and an impartial judicial officer. The burden of ensuring due process rights was upon parties as well as the court. *Caperton v. A. T. Massey Coal Co.,* 556 U.S. 868 (2009) (when the probability of actual on the part of the judge or decisionmaker is too high to "be constitutionally tolerable").

Petitioner did not receive an adequate judicial notice as to the 2017 Order. The silence in the Order and absence of language as to the legal effects as well as the Court's refusal for clarification resulted in four years' appellate inquiries. The question presented is simple and straightforward: Whether a litigant has a Due Process right to a clear judgment from the court.

J.L. had not been properly before the Court, although J.L.'s name was mistakenly added in the complaint (Chen quickly clarified to the Court, *see* CP 4). As argued by the Respondents, the dismissal to J.L. was proper because the mandatory guardian ad litem was not appointed. CP 524-5. *See also* RCW 4.08.050. *Mezere v. Flory,* 26 Wn. 2d 274, 173 P.2d 776 (1946) ("the appointment of a guardian ad litem is mandatory."). *Dependency of A. G.,* 93

Wn.App. 268, 968 P.2d 424 (1998) ("The [guardian ad litem] statute is mandatory, and the children's interests are paramount."). *Newell v. Ayers,* 23 Wn. App. 767, 598 P.2d 3 (1979) ("the rule is that a minor must be represented by a guardian ad litem, or the judgment against him may be voidable at his option."). Washington supreme court held that absent a guardian ad litem who could receive notice on minor's behalf, the minor plaintiff's action was not time barred. *Anderson v. Dussault,* 181 Wn.2d 360, 333 P.3d 395 (2014). Also *State v. Douty,* 92 Wn. 2d 930, 603 P.2d 373 (1979) ("it should be noted that the child, though named in the action, was never served. Consequently, he is not before the court.").

Most importantly, of course, J.L. was not represented, and he cannot be represented by *pro se* parent. 28 U. S. C. § 1654; RCW 2.48.180. Under Washington law, J.L. had not been properly before the court. *e.g., Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 586 P.2d 870 (1978) ("[o]rdinarily, only those persons who are licensed to practice law in this state... [t]he '*pro se*' exceptions are quite limited and apply only if the layperson is acting solely on his own behalf."). Minors are legally incompetent, without representation, the action on behalf of J.L was a nullity, and there was no action on behalf of the minors for judicial consideration.

Respondents mistakenly suggested the statute of limitation has expired (App I, at 59-60a), but this does not apply to minors. In fact, Washington supreme court struck down RCW 4.16.190 (2), holding it unconstitutionally deprived minors'

rights under equal protection. *Schroeder v. Weighall* et al. 179 Wn.2d 566; 316 P.3d 482 (2014). The Washington Supreme Court held that, minor's medical malpractice claim is subject to tolling until reaching the majority of age.

Absent legal representation and the guardian ad litem, minor J.L. has not been properly before the court and the Court has not obtained jurisdiction over him. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 7 Wall. 506, 514 (1869).

In Motion for Reconsideration, Chen asked the court to clarify that the dismissal should be without prejudice as to the minors:

> As to the minors' claims only, the dismissal should be without prejudice for re-filing, as they are still in their minority, and the statute of limitations is tolled until they reach majority. RCW 4.16.190. *Schroeder v. Weighall et al.* 179 Wn.2d 566; 316 P.3d 482; 2014 Wash., holding RCW 4.16.190 (2), which excluded medical malpractice claims from tolling unconstitutional.
>
> Alternatively, due to failure to appoint a GAL to bring the action, the action on behalf of the minors was a nullity, and there was no action on behalf of the minors

> for judicial consideration, and therefore no action to dismiss.

See App J. at 82a

The Court (Judge Hill) refused to clarify, except for an order denying reconsideration. Chen was forced to go through four (4) years' time-consuming appeal, for the sole purpose of seeking a clarification as to the ambiguous order. Her appeal was dismissed. Judge Schubert observed the jurisdictional defects and vacated the ambiguous order on Chen's motion to vacate, it was reversed on Migita's interlocutory appeal.

As a threshold requirement of Due Process, J.L. was still entitled to a clear judgment. However, he did not even know whether or not he was bound to the judgment – Judge Hill refused to clarify, except for another order denying reconsideration/clarification. The Chief Judge agreed that " [t]he parties (and the appellate court) are entitled to know the legal effect of this Court's orders." There, he specially raised the jurisdictional inquiry (*See* App G, 31a):

> Was dismissal due to a lack of personal jurisdiction, and thus without prejudice? Or was dismissal with prejudice due to a finding of both personal jurisdiction over Defendants and a lack of meritorious claims against them?

The Chief judge noted that the limit of a court lacking jurisdiction is the entry of dismissal without prejudice. Thus, the Court ruled,

> The silence of this Court's orders in that regard creates a question of regularity of the proceedings that justifies relief from the operation of those orders.

Id, at 31a.

"A judgement entered by a court which lacks jurisdiction is void and must be vacated whenever the lack of jurisdiction comes to light." *Allied Fid, Ins. Co. v. Ruth,* 57 Wn. App. 783 790 P.2d 206 (1990). Following the law, the chief judge vacated the order with jurisdictional defects, which was pitifully found by the Court of Appeals to "abuse the discretion." The Court of Appeals further ruled that "[the court] need not resolve the issue of whether Judge Hill, in fact, first resolved the jurisdictional issue in Chen's favor." App C, at 14a. The Court of Appeals claimed Judge Schubert's resolution of jurisdictional defect was to correct a legal error made by Judge Hill. Opinion at xx. Legal errors are, however, associated with a court that has complete jurisdiction. *Dike v. Dike,* 75 Wn.2d 1, 448 P.2d 490 (1968). The Court of Appeals was silent how a court could disregard the threshold jurisdiction requirement. [5]

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[5] The Court of Appeals suggested Judge Hill must have dismissed the case on the merits. This is not, however, the only explanation of 2017 order because SCH repeatedly stated that it cannot be sued for "vicarious liability" because "the three co-defendant physicians are not employees of Seattle Children's Hospital." *See* CP 412, also CP 527.

As the affected party, Chen sought judicial clarification that they are entitled to, *i.e.*, a clear judgment about the legal effect. Judge Hill refused to clarify whether it was with or without prejudice for the minors, except for a denial order. The silence of language as to with/without prejudice in the orders "that fail to remark [on] a jurisdiction issue are not assumed to have resolved it by their silence." *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986) (internal citations omitted).

The issue here is not just whether or not the order was wrong, but that J.L. was entitled to a clear due process notice about whether and/or how he was bound to that order. The ambiguous order (and Judge Hill's refusal) itself is a due process violation.

B. The Trial Judge's Failure To Recuse Is A Due Process Violation.

"[T]he principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts." *State ex rel. McFerran v. Justice Courts of Evangeline Starr*, 32 Wn.2d 544, 548, 202 P.2d 927 (1949) (quoting *State ex. Rel. Barnard v. Bd. Of Educ.*, 19 Wash. 8, 17, 52 P.317 (1898)); *also Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966) ("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties."). "[O]ur system of law has always endeavored to prevent even the probability of unfairness," *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The judge must

recuse himself where "he has an interest in the outcome." *Id.*

Both American and Washington Code of Judicial Conduct Rule 2.11(A)(6)(d) requires disqualification:

> (A) A judge *shall* disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:
>
> ...
>
> (6) The judge:
>
> (d) previously presided as a judge over the matter in another court.
>
> (emphasis added).

Judge Hill previously presided over the matter in another court (Juvenile Court), thus was mandatorily recused from this case. Further, this case was as result of the underlying dependency action where Judge Hill was the presiding judge who had made multiple discretionary decisions, including but not limited to order an out-of-home placement for J.L., which *turned out to be wrong.* The state moved to unilaterally strike the dependency action before trial and the handling assistant attorney general apologized to Chen. Judge Hill reviewed evidence and testimonies from witnesses who would re-appear and testify at the current case that was based on damages occurred from the wrongful removal and the wrongful out-of-home placement, highly related to Judge Hill,

Judge Hill's impartiality was thus reasonably questioned.

Here, the Court of Appeals mistakenly claimed that Judge Hill's deep involvement in the underlying dependency case does not require a recusal because "We presume, however, that judges perform 'regularly and properly and without bias or prejudice." *See* App. C at 17a. However, the law does require to decide whether in fact the judge was influenced. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986). *Also see Tumey v. Ohio,* 273 U.S. 510 (1927).The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case. This rule reflects the maxim that [n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison).

Judge Hill does have a direct interest in the outcome of the case because her erroneous decision to place J.L. in out-of-home placement in the underlying dependency case. Judge Hill should have recused from hearing the case but did not. Judge Hill's failure to recuse had deprived Petitioner's Due Process right to an impartial tribunal. *See* Frank, *Disqualification of Judges,* 56 Yale L.J. 605, 611612 (1947) (same). It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison,* 349 U.S. 133, 136 (1955).

III. The question presented involves a recurring issue of exceptional importance that threatens the fundamental right of access to the courts.

A. Absent Legal Representation, J.L.'s access to the Courts had been denied.

J.L. has a right to adequate representation. As a minor, J.L. has rights to be heard, at a meaningful time and in a meaningful manner through a competent counsel. Absent this prerequisite, his *minimal* access was denied.

Whether *pro se* parents could represent the minor children in courts is a recurring issue.[6] **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*

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[6] In 2007, this Court accepted for review but did not resolve this issue. *See Winkelman v. Parma City School District,* 550 U.S. 516 (2007).

River County Sch. Bd., 121 F.3d 576, 578, 582 (11th Cir. 1997), *cert. denied*, 522 (U.S. 1110(1998). These decisions further support that dismissal without prejudice is the limit that a court lacks personal jurisdiction could act.

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 request to SCH for medical records through discovery or otherwise" before the defendants moved for summary judgment.[7] App C, at 17a. Even finding Chen's incompetency, the Court did not appoint the mandatory GAL., but concluding that J.L could be represented by a *pro se* parent. *Id*, at 18a.

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). 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

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[7] The order granted motion for summary judgment was entered six months before the discovery cutoff.

> 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).

B. This is an Ideal Vehicle to Address the "Seldom" Reviewed but Important Rights of Access to The Courts.

Writing for the Supreme Court in *Bounds v. Smith,* 430 U.S. 817 (1977), Justice Thurgood Marshall spoke confidently of "the fundamental constitutional right of access to the courts." Justice Marshall also stressed that the access needs to be "meaningful". *Id.*

This case presents an extremely unusual situation involving a disabled minor whose access was denied. He did not have any minimal access, let alone "meaningful". He was not represented, he was not given an opportunity to conducted discovery,

the order was entered by the judge who previously decided to place him in out-of-home placement – leading to permanent and unreversible disabilities.

Access to the Courts must be *meaningful*. But here, the *minimal* access for this disabled minor had not even been satisfied. The issue here is not whether or not J.L. will eventually be able to prove his case or prevail at trial; but that his access should not have been deprived for denying appearance of his legal counsel. Whether or not the case has merits, it should be left to the open courts, instead of kicking an *unrepresented* disabled child permanently out of the courtroom, without conducting any discovery. The facts that J.L. had been denied counsel by the superior court, the appellate court, the supreme court of Washington will bring "chilling effects" to the public confidence to our judicial system.

This Court should take this case as an excellent vehicle to reiterate the importance of the access to the courts, the cornerstone of our justice system. "This Court has *seldom* been asked to view access to the courts as an element of due process." *Boddie v. Connecticut*. 401 U.S. 371 (1971). Decades could pass before this Court has another opportunity to review this important issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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