Superior Court of Washington, County of Kitsap

In re the parenting & support of: Adeline Marylynn Feulner, (child) Petitioner/s *(person/s who started this case)*: Heather Lynn Wood (mother) And Respondent/s *(other party/parties)*: Lenard Ray Feulner (father)	No. 07-3-01713-1 **AMENDED** Motion To Apply Strict Scrutiny Moving Party: Heather Wood RE: Void/Vacate/Recuse Commissioner Clucas

Motion to Recuse & Objections

TO: The Kitsap County Superior Court Clerk, 614 Division St #202, Port Orchard, WA 98366, (360) 337-716; AND

Lenard Feulner, Respondent, 4101 Anderson Hill Rd. SW, Port Orchard, WA 98367, lilmissarries@yahoo.com

I Identity of the Parties & Jurisdiction

COMES now, Heather Wood, pro se of necessity, without counsel, indigent, in Forma Pauperis to make the Objections noted here and seek the following relief:

JURISDICTION & VENUE

While the instant case would be properly within Kitsap County's Family Court subject matter and in personum jurisdiction due to the minor child's birth and both litigant's residency in Washington State, the Kangaroo unlawfully held impromptu hearing on 8-15-23 before Commissioner Clucas, without a scintilla of due process after the regularly scheduled MTSC hearing was disposed of and Lenard Feulner's motion dismissed, it had no jurisdiction nor authority when it subsequently lured the parties back into the courtroom with no notice in collusion with two non-participating attorneys who observed a commotion/altercation between Heather Wood, mother, and Adeline, her child, OUTSIDE the courtroom in the hallway/lobby where it ensued. Thus, Heather Wood takes exception to jurisdiction, and reserves the same throughout these *fruit of the poisoned tree* proceedings in protest despite her appearance.

(1) **OBJECTION 1: Commissioner Clucas was subsequently privately contracted by these two women, local attorneys, Amanda Williams and Laura Yelish, who manipulated the court into unlawfully recalling the case w/o due process, notice, an opportunity to confront the litigants' accusers, and taking statements from the two attorneys on the record w/o swearing them in: i.e. with NO testimony as a basis, and an illegally held hearing at that. Heather Wood takes exception on the record to this outrage and lawless Kangaroo hearing.**

Heather Wood, the complaining mother in this instance takes exception non a continuing ongoing basis, reserving her protest/objection to the same to this violation of her civil rights and the kidnapping of her child under the pretext of the Court's authority without even the color of State law, thus lack of proper jurisdiction.

II RELIEF SOUGHT

1. ☒ **An Order Strict Scrutiny for all parties, AND (especially) he State be applied to all relevant rules of court, Washington State law, format, and courtroom proceedings in this cause.**

2. ☒ **Findings of fact be entered no genuine emergency justified the granting of Lenard Feulner's Emergency Ex Parte Motion heard on 8-4-23 in this court, judge Houser presiding**

3. ☒ **Conclusions of law be entered: Consideration of the misleading/false pleading submitted by Lenard Feulner, Respondent, improperly substituting his name for Heather Wood's, the true Petitioiner, are void and stricken from he record, that any ensuing hearings resulting from the false/misleading pleading s by Mr. Feulner also are void and stricken from the record as fruit from a poisoned tree.**

4. ☒ **Conclusions of law be entered: The impromptu Kangaroo surprise hearing held by Commissioner Clucas after his dispositive oral ruling from the bench denying Feulner's motion was without a scintilla of due process and unconstitutional.**

III Material & Relevant Facts

1. Contrary to recent Court check boxes marked on the mandatory pattern forms/orders, Heather Wood and Lenard never lived together.

2. **Heather Wood and Lenard Feulner had a child in common born in Washington State on 6-2-07 where both resided and continue to today.**

3. **A Parentage action was filed in WA. State v. Lenard Feulner and Heather Wood, 07-5-00352-8, in which a judgment entered required Mr. Feulner to pay child support for his daughter, Adeline – a fact and order Feulner has resented ever since.**

4. **Lenard Feulner has threatened Heather Wood on several occasions when she contemplated filing for adjustments in the amount ordered, despite having the ability to pay, and working under the table.**

5. **On 7-20-23, alarmed by newly discovered evidence of her underage daughter's delinquency and drug use, Heather Wood transported her daughter to the Providence hospital in Chehalis for drug testing**

6. **Adeline, Heather's daughter, bridled out of resentment and embarrassment, refusing to return home w/her mother upon discharge.**

7. **Adeline, Heather's daughter, bridled out of resentment and embarrassment, refusing to return home w/her mother upon discharge.**

8. **Adeline's father agreed to pick up Adeline and drove her to his 93 year old mother's residence in Port Orchard where Adeline remained for over 15 days. No emergency existed during this entire time, or ever, justifying the stripping of the mother's parental rights and bond w/her daughter.**

9. **During the above described fortnight, Adeline and Lenard Feulner colluded to file an emergency ex parte show cause hearing in the instant case to strip Heather of her parental rights and property, including insurance proceeds.**

10. **Judge Houser entered an emergency ex parte order stripping the mother of her parental rights w/o sufficient evidence/proof of an imminent irreversible threat to Adeline or her father's safety/welfare.**

11. **Judge Houser entered an emergency ex parte order stripping the mother of her parental rights w/o sufficient evidence/proof of an imminent irreversible threat to Adeline or her father's safety/welfare.**

12. **Judge Houser allowed Lenard Feulner to have his minor daughter, Adeline (the subject of a heated custody battle between the parents, and alienation by the father) to appear in court as a witness testifying against her mother for the most self serving purposes. It is not certain Adeline was sworn in, given Commissioner Clucas' failure to do so for two non-participant local attorneys well known to him and in collusion with the commissioner to pervert court**

rules, due process, and the laws of Washington State and its code of judicial conduct.

13. **On 8-15-23 conducted AFTER this cause had been disposed of earlier the same morning, the MTSC was denied, the following court audio record revealing no sworn testimony , consent, confrontation, or participation by the parent litigants, was made and purchased soon thereafter:**

Clerk: Do you want me to tell them to come in?

Clucas: Please.

Clucas: Great were back in the record of the Feulner/Wood case number:

07-3-01713-1.

After the parties stepped out into the hallway I heard a lot of yelling and screaming coming down the hallway and I've been told that there's been a lot of activity including someone calling the police. Miss Yeish is an of - an attorney who is not a part of the ___ in this matter, and so is Miss Williamson, and apparently they were out there and saw what happened. Miss Yelish, can you give the court a brief description of what you saw?

Yelish: Um, Yes your honor. I will provide the first half of the incident, and I believe Miss Williamson has some additional information.

Clucas: 'kay

Yelish: But I was in courtroom 210 and I heard elevated voices/raised voices, the mother had a raised voice, yelling at the child and kind of encroached upon the child while she was sitting on the bench. She

[mother] indicated the child was coming with her 'cause she had full custody. Child indicated that she did not want to leave. Um, then got up, stood up and the mother was blocking her way at the top of the stairs. They then walked downstairs, security was called. At that point, the mother was still blocking the child from her being able to move out the exit. The child appeared to be telegraphing that she was going to be running, or at least try and get away from the mother. At that point the father was threatened by the male individual with the mother, stating that there was custodial interference of the 1sr degree, that he was going to have, you apparently have some kind of charge for that.

Father stepped back and did not participate in the conflict, merely watched.

The child kept edging toward the door.

Mom became very verbally aggressive, was standing in the child's space.

Child then made a run, ran out the door, then immediately out the front door then turned to the right. Father did indicate that she had his car keys on her. So he was concerned that she had keys to the car but security did asked the father to stay back, so he did stay back in there. By the time, time that I walked toward where the child was, it appeared that the child had gotten into the driver's side and pulled the car up onto the sidewalk.

Clucas: Pulled the car up into the sidewalk?

Yelish: Yes, Your Honor. The mother and the male individual who was with her were still there. There still appeared to be some

heated conversation going on, however I was not close enough to overhear anything that was happening. At that point I, um, walked back, spoke to the father and then, just kind of um made sure that he was staying back, and at that point, law enforcement had already arrived. There were police on the scene, they were speaking to everybody. At that point I came in to ask Miss Loki if perhaps it would be possible for the parties to supplement the record that something had happened with this child who was, uh, indicating by all intents and purposes that she did not want to be with the mother.

Clucas: Miss Williamson, is there anything else too that you would like to add?

Williamson: I um, oh I was within the same vicinity of Miss Yelish, so I witnessed all of the same things, um, Miss Yelish and I had a discussion. She came by here to ask if you could recall the case, I stayed, um, at the scene and I asked the officers if I could speak to the child and I let the officers know that I was a guardian ad litem for children, so I thought that maybe I could be helpful in speaking to the child, and I did have the opportunity to do that and talked with her while we determined if you could recall the case, and while they were talking to the mother, I will..at one point I asked, um, the mother if she could not speak so loudly because the child was

Heather L Wood, hrwoodo12@gmail.com
9129 James Rd, SW, Rochester, WA 98579

hearing everything the mother was reporting to the police, and it was upsetting her. I'll tell the court the child seems genuinely afraid to go home, well, I won't give my opinion, but she did seem genuinely afraid to go home. She did walk back to the courthouse with Miss Yelish and when she was outside she indicated that she could have spoken to you herself, but we told her, well, I told her that that's not normally what happens. She seemed very upset, so...

Clucas: Court's signing an order today that states the following: Pending further order of the court, the child shall remain with the father on a temporary basis.
The child shall have visits with the mother at the child's discretion. The court shall review this on September 1, 2023 at 1:30. So pending for the order of the court, sir, the child shall reside with you.
Ma'am you are not to call or reach out to your child unless she reaches out to you. I will see you both back here. Ma'am if ,you had followed that At Risk Youth petition as I told you to do, versus trying to cause a scene in the courthouse requiring law enforcement to come, you could do so, and I will review the status on September 1st.
Will you please make copies for these folks, get them copies here, and Officer, if you will please help them find their way out of the court house safely.

Thank you all. We're at recess.

14. Contrary to the above claim at the bottom of page 5, I did NOT yell at my child, Adeline, nor was I ever given an opportunity to confront/cross-examine the mistaken statements of the unsworn attorney manipulating the court in violation of her Professional Code of ethics and the most fundamental of my civil rights.

15. Commissioner Clucas broke every code of ethics and due process in the books when he elected to convene his Kangaroo hearing after disposing of the case earlier and denying Feulner's motion. The above transcript of the audio from tha Kangaroo hearing session is replete with admissions of collusion between the 2 local non-participant lawyers named and Commissioner Clucas. Regardless of his decision to recuse himself (discretionary) It is anticipated Clucas will be subpoenaed as a witness in their lawsuit for damages against the two attorneys, personally. Having not been sworn in publicly on the record, they are not immune to such a lawsuit for damages, nor is the Commissioner immune from responding to process-the very element he egregiously ignored in the impromptu Kangaroo hearing referenced above on the record.

I declare under penalty of perjury of the laws of the State of Washington and pursuant to GENERAL Court RULE 13 and RCW 9A.72.085 that the foregoing is true and correct.

DATED this 29th day of August , 2023, in the County of Thurston, WA.

Heather Wood

IV Argument, Points & Authorities

Grounds for Motion to Recuse Judge

1. **While the grounds folr a finding of abuse of judicial discretion are high, they have been more than met in the instant case as described and recorded above. No competent reasonable judge would have conducted the impromptu ad hoc sua sponte hearing Commissioner Clucas did on 8-15-23 subsequent to this cause being disposed of earlier on the same morning. The denial of Heather Wood's civil and parental rights wasn't a close call, but complete.**

2. **All parties are entitled to a fair trial, which requires that the judge overseeing the trial be completely impartial. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599 (1993). If either the state or the defendant believe that circumstances exist that would prevent the**

trial judge from carrying out his or her duties in an impartial manner, the party may move the court for recusal on the following grounds:

3 Statutory

Per G.S. 15A-1223(b) and (e), a party may move that the trial judge disqualify himself or herself from a hearing or trial on the grounds that the judge is:

a. Prejudiced against either party;
b. Closely related by blood or marriage to the defendant;
c. A witness for or against one of the parties in the case; or
d. Unable to perform the duties required of him or her for any other reason.

Washington's Code of Judicial Conduct provides that upon the motion of any party, a judge should disqualify himself or herself in a proceeding in which his or her impartiality may reasonably be questioned, including but not limited to instances where he or she has a personal bias or prejudice concerning a party.

4 Due Process

Although it will apply "only in the most extreme of cases," such as here, a party may also move for a judge's recusal on due process grounds if one or more of the following circumstances exist:

a. **The judge has a direct, personal, and substantial pecuniary interest in the outcome of the case;**
b. **The court is structured such that the judge may be tempted to impose a fine because the judge's governmental entity would benefit (e.g., where judge was also the mayor, and imposing fines would benefit the town's budget);**
c. **The judge trying the criminal case was responsible for initially bringing the criminal charges, or in contempt cases where judge has a strong personal interest in the outcome; and/or**
d. **One party has made a campaign contribution to the judge that was large enough to have likely affected the outcome, and knowing that the party's case would come before that judge.**
e. **See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (key**

inquiry for due process analysis is whether there exists a "constitutionally intolerable probability of actual bias"); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (allegations of judge's bias based on "general frustration with insurance companies" were "insufficient to establish any constitutional violation"); *Ward v. Monroeville*, 409 U.S. 57 (1972) (finding due process violation where mayor also sat as judge hearing traffic violations, and thus stood to benefit financially from fines, costs, and fees collected in court).

5. **While not a criminal case as outlined in 'c' (ibid), here, Commissioner Clucas in collusion with the 2 local non-participant attorneys cited above in III(11), well known to Clucas by his own admission, was completely responsible for reconvening what amounted to a Kangaroo hearing completely devoid of any due process, notice, consent, swearing of putative witnesses, confrontation of the mother's accusers, or recourse before being stripped of her parental rights w/o representation. Commissioner's glib instructions to the mother about pursuing an ARY remedy were stonewalled by the agency due to the Commissioner's unlawful removal of the at risk child from the mother's custody—Catch 22! Having cruelly set up the mother for failure, the Commissioner added insult to injury by prohibiting any contact by he mother with her delinquent child except pursuant to the child's largess. JFK said in his inaugural address to Congress, "The rights of man do not flow from the largess of government, but are endowed upon us by our Creator."**

6. **Standing alone, "a mere allegation of bias or prejudice is inadequate to compel recusal." *State v. Moffitt*, 185 N.C. App. 308 (2007). See *State v. Kennedy*, 110 N.C. App. 302, 305 (1993) (allegation that the judge's wife had been seriously injured by an impaired driver, without more, did not show the requisite bias or prejudice and did not disqualify superior court judge from presiding over trial); *State v. Honaker*, 111 N.C. App. 216 (1993) (defendant who alleged that judge made biased comment, necessitating recusal, has burden of producing record or other evidence proving that judge made the remark and context of remark).**

7. **Instead, the party moving to disqualify a judge must "demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that the judge would be unable to rule impartially." *State v. Fie*, 320 N.C. 626, 627 (1987); accord *State v. Honaker*, 111 N.C. App. 216 (1993); *In re***

Nakell, 104 N.C. App. 638 (1991) **(stating that where judge is embroiled in personal dispute with defendant, maintaining appearance of absolute impartiality and fairness may require judge to recuse himself).**

8. **Here, there can be no doubt as to the evidence for it issues from Commissioner Clucas' own mouth as reflected in the transcript of the audio from the impromptu Kangaroo hearing he orchestrated.**

9. **As noted above, the standard for ordering recusal is whether there are reasonable grounds to question the judge's objectivity. The judge is only required to order recusal (or refer the matter over to another judge to decide whether recusal is necessary) if a reasonable person, knowing all the facts, would have doubts about the judge's ability to be impartial in the case.**

10. **The general rule is that, to warrant recusal, a judge's expression of an opinion about the merits of a case, or his familiarity with the facts or the parties, must have originated in a source outside the case itself. This is referred to in the United States as the "extra-judicial source rule" and was recognized as a general presumption, although not an invariable one, in the 1994 U.S. Supreme Court decision in *Liteky v. United States*.**

11. **At times justices or judges will recuse themselves *sua sponte* (on their own motion), recognizing that facts leading to their disqualification are present. However, where such facts exist, a party to the case may suggest recusal. Generally, each judge is the arbiter of a motion for the judge's recusal, which is addressed to the judge's conscience and discretion. However, where lower courts are concerned, an erroneous refusal to recuse in a clear case can be reviewed on appeal or, under extreme circumstances, by a petition for a writ of prohibition.**

12. **A judge who has grounds to recuse themself is expected to do so. If a judge does not know that grounds exist to recuse themselves the error is harmless. If a judge does not recuse themselves when they should have known to do so, they may be subject to sanctions, which vary by jurisdiction. Depending on the jurisdiction, if an appellate court finds a judgment to have been made when the judge in question should have been recused, it may set aside the judgment and return the case for retrial.**

13. In re the Honorable Mary Ann Ottinger

CJC No. 4475-F-119

May 5, 2006

The Commission conducted a public hearing on allegations that Judge Mary Ann Ottinger of the King County District Court violated Canons 1, 2(A), and 3(A)(1) by routinely failing to adequately advise unrepresented criminal

defendants of their constitutional due process rights. The Commission found that the misconduct occurred and was compounded by the fact that Respondent was previously censured by the Commission for similar behavior (CJC 3811-F-110). The Commission censured Judge Ottinger and recommended to the Washington State Supreme Court that she be suspended from office for thirty days without pay. The State Supreme Court affirmed the Commission's decision and suspended Judge Ottinger for thirty days.
Supreme Court Order In re Ottinger, No. 200,389-3 filed 7/20/2006.
Commission Decision filed 5/5/2006.
Answer to Statement of Charges filed 6/30/2005.
Statement of Charges filed 6/14/2005.

14. In re the Honorable Rudolph J. Tollefson
CJC No. 2699-F-81
August 21, 2000

On December 16, 1999, the Commission filed a Statement of Charges alleging that Judge Rudolph J. Tollefson of the Pierce County Superior Court violated the Code of Judicial Conduct by using intemperate and abusive language and behavior towards court staff and another judge; engaging in improper conduct by entering ex parte orders when he was a district court judge; engaging in ex parte contacts and failing to maintain his impartiality in a child custody matter pending before him; including undertaking an ex parte investigation outside the courtroom; and failing to maintain, enforce, and observe high standards of judicial conduct so that the integrity and independence of the judiciary would be preserved.

15. Judge Tollefson agreed that there was sufficient evidence to establish his described conduct and that such conduct violated Canons 1, 2 (A), 2 (B), 3 (A)(1, 2, 3, 4, 5 and 7), 3 (B)(1), 3 (B)(3), and 3 (D)(1) of the Code of Judicial Conduct. The judge agreed to a censure, to take a course in judicial ethics, and to participate in anger management therapy. The judge further agreed to a five-month suspension without pay. The State Supreme Court approved the stipulation and suspended Judge Tollefson for five months without pay.

Certification and Order of Completion filed 2/2/2001.
Supreme Court Order In re Honorable Rudolph J. Tollefson In re Tollefson, 70051-6 filed 8/30/2000.
Stipulation, Agreement and Order of Censure, and Recommendation for Suspension filed 8/21/2000.
Stipulated Amendment to the Statement of Charges filed 1/31/2000.
Answer to Statement of Charges filed 1/6/2000.
Statement of Charges filed 12/16/1999.

TABLE OF AUTHORITIES FOR STRICT SCRUTINY

Cases

Other Authorities

ARGUMENT, Points & Authorities

A. THIS COURT SHOULD GRANT THE MOTION TO CLARIFY THE APPROPRIATE TEST (Strict Scrutiny) COURTS MUST USE IN ADJUDICATING PARENTS' FUNDAMENTAL RIGHTS OF CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN

Pursuant to Supreme Court Rule 37, The Justice Foundation has submited briefslike what Heather Wood (Mother). Petitioner, faces in the issues before this Court. "The Justice Foundation is a 501(c)(3) charitable foundation that provides free legal representation in cases to protect individual and parental rights and to promote appropriate limited government. The following summarizes its position in this regard: *"We*

believe in protecting children from those who would destroy their innocence and exploit them for their own purposes. On the whole, parents are the best protectors of children and have the natural right and duty for the care, custody, and control for their children. Children, in the main, are naturally incapable of exercising self-government until reaching the age of majority."

Heather Wood's case (Petitioner) is important to every parent who seeks to assert their right to determine the upbringing and education of their child as a state, federal, natural, and God-given right.

SUMMARY OF THE ARGUMENT

This case centers upon the very cornerstone of our society: the family. Deeper still, this case involves the intersection of the family and the law: parents' fundamental rights in directing the care, custody, and control of their children as a family and the State's power to affect, limit, or even terminate those rights.

The U.S. Supeme Court has determined that parents have a fundamental right to direct the care, custody, and control of their children. That Court also has determined that the government shall not interfere with this right unless and until a parent is proven unfit. In contradiction to this determination, the North Carolina Supreme Court in the case below declared protection of that fundamental right irrelevant in a custody dispute between two natural parents. Routten v. Routten, 843 S.E.2d 154, 159 (2020). Instead, the North Carolina Supreme Court upheld the trial judge's denial of custody and reasonable visitation to the Petitioner based on the judge's findings related to the best interest of the child, even though the trial judge did not find the mother unfit. Id. at 159. The holding below directly contradicts the U.S. Supreme Court's recognition of parents' primary and fundamental rights in the care, custody, and control of their children.

No doubt contributing to this contradiction, the U.S. SupremeCourt has not clearly articulated the appropriate test for adjudicating the protection of parents' right when involving both natural parents. The U.S. Supreme Court also has not clearly articulated the level of scrutiny in judicial review of parents' fundamental right in such cases. To safeguard against such government infringement and avoid such contradictions in this State's courts, this Kitsap Family Court should explicitly adopt a standard articulating both the appropriate test and the appropriate level of scrutiny consistent with the Constitution and the U.S. Supreme Court's precedent.

This case presents the opportunity for the Kitsap Family Court to unequivocally articulate the fitness of the parent as that test and **strict scrutiny** as that level of scrutiny for judicial review. Indeed, this case presents the appropriate vehicle to do so because it involves the rights of two natural parents. Therefore, this Court should grant the Petitioner's Motion for Strict Scrutiny in this cause.

ARGUMENT

I. THE KITSAP FAMILY COURT SHOULD GRANT THE PETITIONER'S MOTION TO CLARIFY THE APPROPRIATE TEST COURTS MUST USE IN ADJUDICATING PARENTS' FUNDAMENTAL RIGHTS OF CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN.

Nearly one hundred years ago, the U.S. Supreme Court acknowledged that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510 (1925). Thereafter, in Stanley v. Illinois, 405 U.S. 645 (1972), the U.S. Supreme Court affirmed the fundamental rights of parents "in the companionship, care, custody, and management" of their children. Id. at 651. That same year, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the U.S. Supreme Court declared that "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Id. at 232.

More recently, the High Court declared in Washington v. Glucksberg, 521 U.S. 702 (1997), that the Constitution, and specifically the Due Process Clause of the Fourteenth Amendment, protects the fundamental right of parents to direct the care, upbringing, and education of their children. Id. at 720. And in Troxel v. Granville, 530 U.S. 57 (2000), the High Court again unequivocally affirmed the fundamental right of parents to direct the care, custody, and control of their children.

In Troxel, the U.S. Supreme Court stated that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent's child." 530 U.S. at 68-69 (emphasis added). Therefore, a failure to consider the fitness of the parent represents "an unconstitutional infringement on [that parent's] fundamental right to make decisions concerning the care, custody, and control" of her children. 530 U.S. at 72. In fact, so inviolable and sacred is this right that the nation's Supreme Court declared a presumption that "a fit parent will act in the best interest of his or her child." Id. at 69. Yet, in the case below, the North Carolina Supreme Court expressly rejected allowing this presumption in favor of the natural mother of the children. Routten, 843 S.E.2d at 159

In 2005, quoting Yoder and Troxel in response to a public school district's subjection of children to inappropriate and sexually explicit content, the United States House of Representatives affirmed that "the fundamental right of parents to direct the education of their children is firmly grounded in the Nation's Constitution and traditions." House Resolution 547 (November 16, 2005). Yet today, State courts of last resort throughout the United States are split, adjudicating children as "creatures of the State" by limiting or terminating parents' rights through using a subjective "best interest of the child" test or by evaluating some level of "harm" to the child. In fact, in the case below, the North

Carolina Supreme Court determined that, in a dispute between two natural parents, "the trial court must apply the 'best interest of the child' standard to determine custody and visitation questions." Routten, 843 S.E.2d at 159. Such a test blatantly violates the fundamental rights of natural parents, not only in custody and termination cases, but also in separation agreements where extra protection may be necessary due to inequality among spouses.

In that regard, scholars recognize that the "best interest of the child" standard provides "no standard at all because of its vagueness" and uncertainty. See, e.g., Janet Weinstein, And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System, 52 U. Miami L. Rev. 79, 108 (1997). As Notre Dame Law School Professor Eugene Volokh recognized, courts applying "the best interest of the child" test in parent custody cases violate sacred, fundamental, constitutional rights of those parents. See Volokh, "Parent-Child Speech and Child Custody Speech Restrictions," 81 N.Y.U. L. Rev. 631 (2006). Professor Volokh also recognized that "harm" analyses have significant limits, foremost being their highly subjective nature and risk of the fact-finder's personal hostilities entering into the determination. Volokh, supra at 700. Essentially, both tests violate the due process rights of parents guaranteed by the Fourteenth Amendment to the Constitution if the fitness of the parents is disregarded. Yet today, some State courts still apply these inappropriate tests without first making the required constitutional finding of a parent's unfitness. As a result, these courts continue to violate the fundamental right of parents to direct the care, custody, and control of their children.

While the U.S. SupremeCourt has alluded to the fitness of the parent test in the past, that Court has not articulated the exact standard in these cases. See Troxel, 530 U.S. at 73 ("We do not, and need not, define today the precise scope of the parental due process right in the visitation context"). Given the complexities of the modern family dynamic and the high-stakes interest of the parties involved in these cases, Heather Wood submits that the time has come for the Kitsap Family Court to adopt the fitness of the parent test as the appropriate standard moving forward for cases involving both natural parents.

This case presents the ideal vehicle for the Kitsap Superior Family Court to clearly articulate the fitness of the parents test as the appropriate test for all custody disputes before it because this case involves a likely review of the rights of both natural parents. Troxel, while providing cogent precedent, involved the rights of a natural parent and the rights of grandparents after the children's father died. Stanley, likewise, is analytically different because it involved the natural but unwed father of the children who had been declared wards of the state after their mother died. As demonstrated in Petitioner's Motion, this case involves two natural biological parents, both of whom have fundamental rights protected from unwarranted government interference by the Fourteenth Amendment and both of whom seek care, custody, and control of their child. Only the fitness test protects the constitutional rights of both natural parents in a custody case such as that presented in this Motion.

II. THIS COURT SHOULD GRANT THE MOTION TO CLARIFY THE LEVEL OF SCRUTINY A COURT MUST USE IN ADJUDICATING PARENTS' FUNDAMENTAL RIGHTS OF CARE, CUSTODY, AND CONTROL OF THEIR CHILDREN.

In addition to articulating the appropriate test, the Kitsap Superior Family Court also has the opportunity to clearly articulate the appropriate level of scrutiny a court should use in adjudicating parents' constitutional rights of care, custody, and control of their children. As one State court judge explained regarding the failure of State courts and judges to follow what this U.S. Supreme Court has suggested as the appropriate standard:

Despite the United States Supreme Court's determination to subject infringement upon such fundamental rights to strict scrutiny and of our own legislature's mandate to preserve and foster parent-child relationships . . . courts have developed a jurisprudence under which trial court decisions severely curtailing that relationship stand absent an abuse of discretion. Considering the importance of and the risk to the rights at issue and the legislature's clear mandates that courts take measures to protect this most sacred of relationships, The mother (Heather Wood, Petitioner) believes the Family Court needs to carefully re-examine the standards by which decisions that limit a parent's access to or possession of a child are made and reviewed.

In Re: J.R.D. and R.C.D., 169 S.W.3d 740, 752 (Tex. App. 2005) (Puryear, J., concurring) (internal citations omitted).

Because this case involves such deeply grounded fundamental rights guaranteed under the Constitution to the parents, this court must consistently apply the appropriate level of judicial scrutiny. In this regard, just as the fitness of the parent test alone satisfies the constitutional requirements, only strict scrutiny will suffice for judicial review in these situations.

In his concurring opinion in Troxel, Justice Thomas summarized an important aspect of this Court's precedential opinion in Pierce v. Society of Sisters, 268 U.S. 510 (1925), writing that "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them." Troxel at 80 (Thomas, J., concurring). This fundamental right is just as critical and sacred today as when Justice Thomas wrote those words twenty years ago and when the High Court cemented that truth in 1925. Justice Thomas proceeded to the next step in the analysis by concluding: "I would apply strict scrutiny to infringements of fundamental rights." Id.

The Petitioner (Heather Wood) agrees that strict scrutiny is the appropriate level of review and submits that this issue alone, as presented in this case, supports this Court granting her Motion. Petitioner Heather Wood now provides this Court with the ideal opportunity to declare the appropriate level of scrutiny for the Kitsap Superior Family Court it needs to apply if justice is to prevail in Kitsap County.

CONCLUSION

This Motion presents the ideal opportunity for this Court to resolve the conflict among the Paries and articulate one test – the fitness of the parent test – for adjudicating natural parents' rights in the care, custody, and control of their children. The North Carolina Supreme Court, in the opinion below, declared this test irrelevant.

This Motion also presents the ideal opportunity for this Court to resolve the conflicts between parents and articulate one standard of review – strict scrutiny – when reviewing the fundamental rights of natural parents in the care, custody, and control of their children. The North Carolina Supreme Court, in the opinion below, required no such level of review.

In today's world, family dynamics are always changing, especially in an era of ever-increase divorce rates. Even in the face of such change, however, constitutional rights remain steadfast. Therefore, Heather Wood respectfully submits that this Court should grant her Motion.

Respectfully submitted,

Heather Wood

I declare under penalty of perjury of the laws of the State of Washington and pursuant to GENERAL Court RULE 13 and RCW 9A.72.085 that the foregoing is true and correct.

DATED this 29th day of August, 2023, in the County of **Thurston**, WA.