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SUPREME COURT  
OF THE STATE OF WASHINGTON

LYNETTE KATARE,

*Respondent,*

v.

BRAJESH KATARE,

*Petitioner.*

**FILED**  
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STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF PETITIONER

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## I. INTRODUCTION.<sup>2</sup>

In 2003 when fashioning the parenting plan, the trial court expressly found that “[b]ased on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children.” CP 168, App. C-4. But the trial court then banned all international travel of the children with their father, Petitioner Brajesh Katare (“father” or “Brajesh”) until they become 18, and required he surrender his passport before each visitation to avoid the “serious consequences” that might occur “if I’m wrong.” VI RP, p. 10. It rejected Brajesh’s request in 2003 for a sunset clause, stating there was no reason to think it would be less “concerned” about abduction in the future. VII RP, p. 31:18-23.

After the first reversal and remand, the trial court kept as a basis for its “concern” about abduction its 2003 findings that Brajesh was from India (even though a U.S. citizen), had ties to his birth family in India, and India had not signed the Hague Convention on International Child Abduction. *See* CP 168 ¶¶ 2.20.1, 2.20.2, App. C-4. A second reversal resulted in the remand hearing in 2009 where the trial judge relied on so-called “expert” testimony of the “profile” of a typical child abductor. After that profile evidence, the trial court found Brajesh “meets the criteria for several profiles and ‘red flags’ which indicate a risk of abduction by the father, which is against the best interests of the children,” CP 156, deleted the

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<sup>2</sup> The case history, statement of the case, and record protocols are in the Petition for Review (“PRV”) at pp. 1-11. The merits briefs from *Katare I* and *Katare II* are in PDF format on a CD as part of App. H to the Opening Brief, per the protocol below.

finding that had been reaffirmed on the first remand that Brajesh was not a serious threat to abduct, and again kept the restrictions in place.<sup>3</sup>

Brajesh appealed again. This time the Court of Appeals upheld the international travel ban and passport controls even though the appellate court also held the trial court “abused its discretion in admitting the testimony about risk factors and profiles,” recognizing such evidence “was essentially akin to profile evidence, inadmissible in criminal proceedings, and was more prejudicial than probative.” *Slip Op.*, pp. 23-24. The Court of Appeals correctly faulted the trial court for considering the profile evidence, observing at *Slip Op.*, p. 24:

[T]he evidence about ‘profiles’ of abductors was not probative because it did not assist the trier of fact to determine whether, and to what extent, Brajesh presented a risk of abduction. We hold that the testimony was inadmissible and the trial court abused its discretion in admitting and considering the testimony.

But although the Court of Appeals concluded that admitting the profile evidence was erroneous, it failed to indicate whether it viewed that error as one of constitutional magnitude, or to identify any applicable harmless error standard. Instead, it simply upheld the trial court’s order prohibiting

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<sup>3</sup> The profile evidence included *Ex. 28*, a U.S. Dep’t of Justice study of “risk factors for parental abduction” which identified these “characteristics of known offenders” as risk indicators: (1) the parent has “strong ties to their extended family in their country of origin” and (2) the parent is “end[ing] a mixed-culture marriage” and “may need to return to their ethnic or religious roots to find emotional support.” *Ex. 28*, p. 3.

In this profile, parents at risk of becoming child abductors are those who idealize their own family, homeland, and culture *and deprecate American culture.* *Ex. 33*, p. 5 (emphasis added). These same risk factors are mentioned in *Ex. 26*, p. 12, and in *Ex. 33*, p. 5, as the trial judge herself noted. CP 156, bullet 3. The Justice Department profile also states there “[i]s a high risk [of child abduction] if [the parent is] from a non-Hague country.” *Ex. 28*, p. 7.

the father from taking his children with him on a trip to India because of other evidence the court deemed sufficient to support the restrictions.

The trial court's erroneous consideration of the profiling evidence was constitutional error for two reasons. *First*, distinctions based upon national origin are constitutionally suspect; they violate the Equal Protection Clause unless they meet the exacting requirements of strict scrutiny. *Second*, the parental right to choose how to raise and educate one's child is a fundamental constitutional right. *See* Section A.2., *infra*; *Opening Brief*, pp. 22-26. Since the trial court's travel ban prohibits Brajesh from taking his children to India, prevents him from introducing his children to their grandparents who live there, and makes it impossible for them to experience Indian culture first-hand, the ban unconstitutionally burdens the exercise of a substantive due process right.

Many courts have recognized that discrimination on the basis of national origin is often a proxy for race discrimination. Given the persistence of race discrimination in our society, some courts have concluded that, whenever race discrimination infects a judicial proceeding, it should be treated as a *structural error* that can never be deemed harmless, and which always requires reversal. Brajesh urges this Court to hold the erroneous consideration of a parent's ties to his country of national origin in a family law proceeding to be a form of unconstitutional race discrimination that should be treated as a structural error that always requires reversal and, here, striking the travel and passport restrictions. Alternatively, the father urges this Court to hold that national origin

discrimination is constitutional error that requires reversal and striking the restrictions unless the error can be shown to have been harmless beyond a reasonable doubt. Because such discrimination in a family law case like this one affects the father's fundamental substantive due process rights as a parent to raise and educate his own children, and to introduce his children to his family relatives in another country and half the children's cultural heritage, the error must be deemed to trigger at a minimum the constitutional harmless error test. And even assuming *arguendo* that the error in this case was mere non-constitutional error, the father respectfully submits that the balance of admissible, competent evidence cannot sustain the restrictions.

## II. ARGUMENT.

### A. **The Erroneous Admission of Racial Profiling Evidence is Constitutional Error. It Should Be Considered Structural Error, Which Is Never Harmless. In the Alternative, It Should Be Presumed Prejudicial and Require Reversal Unless It Is Shown to Be Harmless Beyond a Reasonable Doubt.**

#### 1. **Discrimination on the Basis of Ancestry or National Origin Triggers Strict Scrutiny and Normally Violates Equal Protection. Moreover, National Origin Discrimination Is Often A Proxy for Race Discrimination.**

The admitted child abductor profile evidence classified Brajesh as a risk to abduct his children because he was born in India and had relatives there. Restricting a parent's ability to travel with their children to the parent's country of origin on such a basis is blatant national origin discrimination. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320

U.S. 81, 100 (1943). “[T]he rights of a citizen may not be subordinated merely because of his father’s country of origin.” *Oyama v. California*, 332 U.S. 633 (1948).<sup>4</sup> Discrimination on the basis of “[s]uspect classifications, such as race, alienage and national origin, are subject to strict scrutiny.” *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010).

Differential treatment based upon a person’s country of national origin is often a proxy for discrimination on the basis of race. In *Oyama* the California law found to be unconstitutional denied “aliens ineligible to citizenship” the privilege of buying land for agricultural purposes. Fred Oyama, a minor and a citizen of the United States, could not hold land himself as a minor, so it was held by his father as his guardian. Because his father was a resident alien born in Japan, he was ineligible for U.S. citizenship under U.S. immigration laws and could not hold the land for his son. The Supreme Court held this was unconstitutional discrimination on the basis of ancestry because “*the discrimination is based solely on his parents’ country of origin.*” *Oyama*, 332 U.S. at 640 (emphasis added). Justice Murphy noted that the taproot of the law was racism and the Constitution condemns racism “whatever cloak or disguise it may assume”: “The California statute is nothing more than an outright racial discrimination.” *Id.* at 650 (Murphy, J., concurring). In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Supreme Court again recognized that ancestry or national

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<sup>4</sup> *Accord Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (exclusion from jury service because of ancestry or national origin unconstitutional); *Fusato v. Washington Interscholastic Activities Ass’n*, 93 Wn. App. 762, 771, 970 P.2d 774 (1999) (rule prohibiting foreign exchange student from high school varsity sports because her parents were abroad unconstitutional based on national origin).

origin discrimination can be a proxy for race discrimination and held unconstitutional an Hawaiian law that discriminated against the descendants of those who immigrated to Hawaii after 1778.<sup>5</sup>

Here, the use of a child abductor profile discriminates against American citizen parents who have close ties to a foreign country where they were born and who immigrated here recently. It favors citizen parents whose ancestors came to this country much earlier. As in *Rice*, the profile acts as a proxy for race discrimination. The trial court's error is of constitutional magnitude.

**2. Use of Profiling Evidence As A Basis for Restricting a Parent's Ability to Raise and Educate His Own Children Also Violates the Parent's Substantive Due Process Rights.**

The profiling evidence is also of constitutional magnitude because it was used to justify the imposition of restrictions on Brajesh's fundamental constitutional right to parent his children without state interference. "[T]he interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "[T]he 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children." *Glucksberg v. Washington*, 521 U.S. 702, 720 (1997). See *Opening Brief*, pp. 22-26.

Here, Brajesh wishes to take his children to India so they can learn about their Indian heritage and meet their grandparents and other paternal

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<sup>5</sup> "The State maintains that this is not a racial category at all . . . We reject this line of argument. Ancestry can be a proxy for race. It is that proxy here." 528 U.S. at 514.

relatives. By stopping him from doing so, the travel ban violates substantive due process. *See Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (law prohibiting grandmother from living in same house with her grandson violates substantive due process).

**3. Constitutional Error Is Presumed To Be Prejudicial and Can Be Found Harmless Only if It Is Clear Beyond a Reasonable Doubt It Did Not Affect the Outcome of the Case. When Racial Considerations Are Impermissibly Interjected Into the Trial Court's Decision Making Process, The Error Should be Considered Structural Error, Which is Never Subject to Harmless Error Analysis.**

“Constitutional error is presumed to be prejudicial, and the [opposing party] bears the burden of proving that the error was harmless.” *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error can be deemed harmless only if the appellate court is persuaded beyond a reasonable doubt that the error did not affect the outcome of the trial *and* that the trier of fact would have reached the same result without the error, *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010), assuming the untainted evidence still permits that result. The same constitutional harmless error rule is applied in a civil case where the constitutional right of a parent is implicated.<sup>6</sup> In cases where impermissible considerations of race have been interjected into the thought process of the trier of fact, some courts have treated such error as *per se* reversible error. This Court's recent opinions in *State v. Monday*, 171 Wn.2d 667, \_\_\_ P.3d \_\_\_

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<sup>6</sup> *See, e.g., Dependency of A.W.*, 53 Wn. App. 22, 30, 765 P.2d 307 (1988) (due process error at dependency hearing harmless beyond a reasonable doubt); *In re Welfare of H.S.*, 94 Wn. App. 511, 526, 973 P.2d 474 (1999) (same).

(2011), illustrate the difference between the rules of constitutional harmless error rule and *per se* reversible error.

In *Monday* the trial prosecutor made comments suggesting that African-Americans were predisposed to lie for each other to cover up acts of crime because “black folk don’t testify against black folk.” The conventional, time-worn rule for analyzing the effect of prosecutorial misconduct would have put the burden on the defendant to show that there was a substantial likelihood that the misconduct affected the verdict. *Monday*, at ¶ 22; *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); *Darden v Wainwright*, 477 U.S. 168, 181-83 (1986). But five members of this Court concluded that this test was insufficient. Instead, they applied the constitutional harmless error test:

The gravity of the violation of article 1, section 22 and Sixth Amendment principles by a prosecutor’s intentional appeals to racial prejudices ***cannot be minimized or easily rationalized as harmless***. Because appeals to racial bias necessarily seek to single out one racial minority for different treatment, it fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct. If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.

***Such a test exists: constitutional harmless error.*** [Citations]. Under that standard we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict.

*Monday*, at ¶ 24 (emphasis added). Since these five justices could not hold the appeal to racial prejudice was harmless beyond a reasonable doubt, they vacated the judgment, remanding for a new trial. *Id.*, ¶¶ 25-26. Three other members of this Court concurred in the judgment, but went

further. They stated that when racial prejudice is injected into a trial, an appellate court should apply a rule of *per se* reversible error because a *per se* reversible error rule was necessary to restore the core integrity of the court system. *See Monday*, at ¶ 48 (Madsen, J., concurring).

Chief Justice Madsen cited several cases where courts had held that the injection of race into a trial compelled reversal in all cases and refused to even attempt to analyze the trial under the normal constitutional harmless error rule. One, *United States v. Cabrera*, 222 F.3d 590 (9<sup>th</sup> Cir. 2000), is a case about injecting *national origin* prejudice. In *Cabrera*, a testifying police detective made remarks about Cuban-Americans and suggested that, because of their ties to Cuba they were more likely to be flight risks, and that, once they fled the country and went to Cuba, it would be difficult to arrest them and get them sent back to the U.S. *Id.*, 222 F.3d at 593. This is the same type of flight “risk” based on membership in one’s racial or ethnic group that the trial judge in this case employed and which the Ninth Circuit ruled was unconstitutional for the simple reason that “[p]eople cannot be tried on the basis of their ethnic backgrounds or national origin.” *Id.* at 597 (emphasis added).<sup>7</sup>

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<sup>7</sup> *Accord, United States v. Doe*, 903 F.2d 16, 28 (D.C. Cir. 1990) (testimony and closing arguments about Jamaicans taking over D.C.’s crack cocaine market held reversible error); *United States v. Doe*, 981 F.2d 659, 664 (2d Cir. 1992) (reference to defendant as “the Dominican” and testimony that neighborhood where drug transactions occur had a “very high Hispanic population” required reversal because “Injection of a defendant’s ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial for reasons that need no elaboration”); *United States v. Vue*, 13 F.3d 1206, 1213-13 (8<sup>th</sup> Cir. 1994) (testimony about tendency of Hmong people to smuggle opium into Twin Cities required reversal).

The same must also be true in parenting plan determinations. Parents, no less than criminal defendants, cannot be tried and found to be child abductor risks “on the basis of their ethnic background or national origin.” See *Monday*, ¶ 52, quoting *Cabrera*.

**4. In *Palmore v. Sidoti*, The United States Supreme Court Reversed a Child Custody Decision Because the Trial Judge Considered the Race of the Parties. Similarly, Consideration of a Parent’s National Origin Should Also Lead to a Vacation of the Decision Entered By The Trial Court.**

When racial prejudice injected itself into the trial judge’s child custody decision in the form of a “fear” of a possible “risk” to the child from a racially mixed household in *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court held it violated the Fourteenth Amendment and reversed. 466 U.S. at 431-33. It held that any consideration of the races of the parents was unconstitutional because “the law cannot, directly or indirectly, give [private racial prejudices] effect.” *Id.*, 466 U.S. at 433.

*Palmore* is instructive in at least two respects. *First*, just as racially mixed households may pose “problems,” so do mixed national origin households. The Katare household was “mixed” on both counts; the mother and father have different national origins and are of different races.<sup>8</sup> Just as there was a “risk” in *Palmore* that a child in a racially mixed family *might* suffer emotional stress as a result of his mixed parentage, there is a “risk” that a child of parents with different national

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<sup>8</sup> In drawing this distinction between national origin and “race,” Brajesh in no way wishes to suggest he credits the by now biologically discredited notion that humanity is divided into separate races. The term “race” is used here solely to denote the invidious stereotyping based on traditionally recognized skin color distinctions (“white,” black,” “brown,” “yellow,” “red”).

origins *might* be abducted by the parent who has family ties to relatives in another country. According to the “risk profiles” cited by the Superior Court, that risk existed because Brajesh was born in another country and still had close ties to relatives there. As the Constitution “cannot tolerate” the prejudices based on national origin any more than it can tolerate prejudices based on race, *Palmore* at 433, this Court should hold “the law cannot, directly or indirectly, give effect” to a risk factor explicitly based on a parent’s non-U.S. national origin. *Second*, in *Palmore* the Supreme Court did not engage in harmless error analysis. The plain implication of *Palmore* is that consideration of race can never be harmless error.

**5. The Constitutional Harmless Error Rule Should Be Applied if the *Per Se* Rule is Not.**

If the Court declines to adopt a *per se* reversible error rule, Brajesh respectfully suggests that it should apply the constitutional harmless error rule for at least three reasons: *First*, because discrimination on the basis of national origin violates the Equal Protection Clause. *Second*, because the travel restriction burdens the father’s substantive constitutional right to educate his own children as he sees fit. *Third*, anything less trivializes these core constitutional principles and says they do not apply in family law cases. Application of the *per se* or constitutional harmless error test in this case requires vacating the travel ban and passport controls because there simply is not sufficient competent and admissible evidence to support them, as demonstrated below and referenced in Section B., *infra*.

**B. RCW 26.09.191(3)(g) Requires a Nexus Between a Parent's Established Conduct and Harm to the Children. Unproven Allegations or Fears are Insufficient And May Not Compromise Development of the Children's Complete and Healthy Psychological Identity. Restrictions Require Finding a Substantial Likelihood the Parent *Will* Abduct, Supported by Substantial Evidence, Based on the Parent's Actual Conduct.**

Under RCW 26.09.191(3)(g), a trial court can impose restrictions on a fit parent's activities with his or her children only if the court finds a nexus between proven parental conduct and an actual or likely adverse impact of that conduct on the children which justify the restrictions. *Marriage of Watson*, 132 Wn. App. 222, 233-34, 130 P.3d 915 (2006); *Marriage of Wicklund*, 84 Wn. App. 763, 771-72, 932 P.2d 652 (1996). *See PRV*, pp. 12-13. This is because the statute speaks at the outset in terms of the "parent's involvement or conduct" which may have "an adverse effect on the child's best interests." *See App. H.*

The Court of Appeals ruled in *Katаре I* that the trial court may only impose restrictions under RCW 26.09.191(3)(g) if it makes express findings and the restrictions imposed are reasonably calculated to address the identified harm. 125 Wn. App. at 826. But it did not address the quantum of evidence or conduct required to impose travel restrictions when abduction is raised, noting only that the decision was fact-based and in other states, "where the likelihood of abduction was unlikely, the courts declined to impose preventative measures." *Id.*, 125 Wn. App. at 831, fn.22. *Katаре I* declined to state a rule to the trial courts such restrictions can only be imposed under the statute on a finding supported by substantial evidence based on the parent's actual conduct the parent probably

will abduct.<sup>9</sup> Brajesh submits that proof of, and a finding that he probably will, abduct is a necessary element of the statute's nexus requirement between proven parental conduct that is "adverse to the child's best interest" before restrictions can be imposed that are designed to address the identified, and determined to be probable, harm. *See PRV*, pp. 16-18.

The failure of the Court of Appeals to enforce this requirement in Brajesh's case and strike the restrictions is at odds with both the statute and prior decisions, especially *Watson*. Division II correctly applied the statute which puts the burden of proof on the parent seeking the restrictions when it vacated restrictions on the father's visitation because the restrictions were based there, as here, on "[an] unproven allegation . . . [which] does not provide substantial evidence in support of the visitation restrictions. Moreover, . . . [the father's] failure to disprove the . . . allegation is not substantial evidence that his involvement or conduct will adversely affect" his daughter. *Watson*, 132 Wn. App. at 233-34. *See PRV*, pp. 16-17. Similarly, *Wicklund* vacated restrictions on the father because there was no nexus between the father's established conduct -- homosexuality -- and a likely harm to the child.<sup>10</sup> Any other rule would

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<sup>9</sup> *See, e.g., Marriage of Al-Aouhayli*, 486 N.W.2d 10, 12 (Minn. App. 1992) (finding of "strong probability of abduction" by preponderance of evidence is required to restrict travel). *See also Marriage of Hatzievgenakis*, 434 N.W. 2d 914, 917-18 (Iowa App. 1988) (striking restrictions so child could visit paternal grandparents in Greece because of the importance of visits with extended family in foreign country).

<sup>10</sup> As *Wicklund* held, "[P]arental conduct may only be restricted if the conduct 'would endanger the child's physical, mental, or emotional health.'" *Wicklund*, 84 Wn. App. at 770 (quotation source omitted). This is consistent with *Marriage of Littlefield*, 133 Wn.2d 39, 57, 940 P.2d 136 (1997) (trial court lacked authority to order a parent to live in a geographic area; trial court could not create "ideal circumstances for the family.").

give the court the power to infringe upon a parent's fundamental liberty interest in rearing his or her children without state interference.<sup>11</sup> Thus, under RCW 26.09.191(3)(g), a trial court may not impose foreign travel restrictions for a claimed fear of possible abduction on the basis that such travel is "not in the children's best interests," nor on the basis that it is in their best interests "to have their residential time with their father in the United States," as the trial court did here, CP 156, bullet 1.<sup>12</sup> A foreign travel ban can only be justified on a finding of a substantial likelihood (as opposed to a mere possibility) the parent *will* abduct the child given an opportunity. There is no such evidence or any such finding.

Here the undisputed evidence is that an important "need" in the Katare children's psychological development is to learn and to know at a deep level the Indian side of their extended family due to their mixed-race and mixed-cultural heritage. Parenting evaluator Margo Waldroup testified it "is pretty vital to their knowledge of themselves" to know at a deep level the Indian side of their extended family as their personal awareness and sense of self develops after age five.<sup>13</sup> The best way to get that deep

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<sup>11</sup> *Accord, State v. Ancira*, 107 Wn. App. 650, 653-547, 27 P.3d 1246 (2001) (limits on parent's fundamental rights are constitutional only if they are "reasonably necessary" to protect them from established behavior, striking no-contact provision); *State v. LeTourneau*, 100 Wn. App. 424, 438-44, 997 P.2d. 436 (2000) (same).

<sup>12</sup> This is especially true on this record, where the *only* evidence is the parenting evaluator's expert testimony that it is important to their psychological development as mixed-race, mixed-culture children that they get a deep understanding of their Indian family, culture, and heritage during their childhood after age six as their identities and self-concepts are forming, and which is best obtained by visiting family in India.

<sup>13</sup> See II RP 153-154 and *Katara I* Opening Brief, p. 16; *Katara II*, Opening Brief, pp. 39-41, quoting Waldroup; and *Katara III* Opening Brief, p. 21 & n. 11. This point has been echoed by *amici* since the first petition for review filed in 2005. See Memorandum of  
(footnote continues on next page)

knowledge is to visit their homes and to be family with them. Moreover, as detailed in the merits briefing and PRV, a close analysis of the “red flags,” “risk factors,” and emails between the father and mother that the trial court relied on simply do not establish a substantial likelihood that Brajesh *was likely* to abduct the children at the time of the 2009 hearing.<sup>14</sup>

The Katare children’s best interests have been too long overlooked and their undisputed psychological need for a healthy development ignored. In legal terms, it is fundamental that “[v]isitation rights are to be determined with reference to the needs of the child rather than the...preferences of the parent.” *Marriage of Cabalquinto*, 100 Wn.2d 325, 329; 669 P.2d 886 (1983). In this case, the parental “preference” that should *not* be trumping the needs of the children is Lynette’s “preference” that the children only have contact with her extended family and not be exposed to their Indian half of the family in their homeland, as expressed by her unjustified fear of abduction. That irrational fear cannot be used to deprive the children of an important element to their psychological development.

Finally, the Court must weigh the full history of the case up to the present. That includes the undisputed fact Brajesh is a U.S. citizen who

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Amici Asian Bar Association of Washington and Vietnamese American Bar Association of Washington in Support of Appellant’s Motion for Review” filed in No. 76691-6.

<sup>14</sup> See *Opening Brief*, pp. 35-40 (profiling evidence did not address Brajesh specifically); pp. 43-48 (application of risk factors asserted by Mr. Berry and used by the trial court cannot support a finding Brajesh is likely to abduct, shown by chart); pp.55-57 (Ex. 15, emails of bickering between the father and the mother have no nexus to likelihood the father will abduct as *no evidence, expert or otherwise, shows a correlation between such exchanges and abduction*). *Accord, PRV* at pp. 14-16 & esp. fn. 8, showing the trial court’s conclusions were not supported by the evidence.

has not violated any court orders since Lynette first vacated their home and left him with a dissolution petition and no contact order to find on his return from a business trip, including the initial two-county restriction on visitation in Florida until it was struck in *Katara I*. He has never been late returning the children, nor ever been held in contempt in the long history of this case. Brajesh is now a 12-year employee and general manager at Microsoft supervising hundreds of employees who is fully integrated into this area, and testified he loves his children and knows his children need their mother and they would be devastated if cut off from her. He has dutifully followed the U.S. legal process throughout, never engaging in self-help which is the essence of what abduction is. *See Opening Brief*, pp. 52-53. There is simply no competent evidence to support a finding that Brajesh Katara is now a substantial risk to abduct, or that it is likely he will now suddenly become lawless and abduct. Thus, the restrictions must be vacated even under the non-constitutional error harmless error standard for the erroneous admission of expert testimony of *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980), that “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”<sup>15</sup> In this case, but for the fact that the trial

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<sup>15</sup> *See, e.g., State v. Asaeli*, 150 Wn. App. 543, 579-580, 208 P.3d 1136 (2009) (erroneous admission of gang expert testimony held prejudicial for one defendant but not prejudicial for second defendant); *State v. Carlson*, 80 Wn. App. 116, 129, 906 P.2d 999 (1995) (admission of expert’s opinion that child was sexually abused held prejudicial); *State v. Huynh*, 49 Wn. App. 192, 198, 742 P.2d 160 (1987) (error in admitting expert testimony about results of novel gas chromatography test held prejudicial); *State v. Steward*, 34 Wn. App. 221, 224 n.1, 660 P.2d 278 (1983) (error in admitting profile testimony that babysitting boyfriends are most likely to be child abusers held prejudicial).

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court considered his national origin and ties to family relatives in India, the trial court would never have limited Brajesh's right to take his children with him out of this country because the trial court expressly stated that the evidence did *not* support the notion that Brajesh was likely to abduct his children if he traveled with them to India *until receipt of the profile evidence in 2009*, but up until then had expressly found Brajesh presented "no serious threat of abducting the children."

**C. Hague Convention Status is Neither Determinative nor Relevant, Particularly as to India Which Provides the Much Faster Method of Filing a Writ of Habeas Corpus as Explained in Exhibit 25**

**Which Returned an Abducted Child to the United States Far Faster than the *Five Years* It Recently Took for American Courts to Return an Abducted Child to Chile Under the Hague Convention.**

Hague treaty status was always a critical element in the trial court's determination than any abduction would be "irreversible." *E.g.*, CP 168 & ¶¶ 2.20.1 & 2.20.2; CP 154, bullet 4 & CP 156, bullet 2. Ex. 25 submitted by Lynette and consisting of excerpts on India from a 1998 book titled "International Child Abduction," actually supports Brajesh's position by documenting the availability of the writ of habeas corpus. That book described it as "a legal mechanism, *similar to the [Hague] Convention*, for returning an abducted child to his country of residence." Ex. 25, at p. 111. But, *unlike* the Convention, India's habeas corpus procedure "allows the petitioner to take advantage of the relative speed and superior authority

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of the High Court.” The book also describes the India Supreme Court’s support for its strong remedies for abduction. See Ex. 25, p. 112.<sup>16</sup>

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<sup>16</sup> The existence of foreign orders, interim or final, for return or custody/guardianship is an extremely important evidential factor and *the courts in no way condone the act of abduction, particularly where it is in contempt of a foreign order or legislation.*

\* \* \* \*

The Supreme Court [of India] has firmly expressed the view that the appropriate forum for custody resolution is within the jurisdiction “which has the most intimate contact with issues arising from the case.” [citation omitted]

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**D. This Court Should Strike The Travel Restrictions and Remand to a Different Judge for Entry of a Final Parenting Plan Which Requires the Same Information and Safeguards For Each Parent When They Travel Abroad With the Children.**

*Littlefield, Wicklund and Watson* are appellate decisions which struck improper restrictions in a parenting plan rather than remand to the trial court to re-examine the matter. In each case, as here, the basis for the trial court's restrictions could not be sustained on the record before the appellate court. This Court can and should resolve this long-running

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matter definitively by striking the travel restrictions and passport controls and remanding for entry of the final parenting plan as modified. Alternatively, the Court should remand to a different judge for entry of a plan that this Court directs expressly permits both parents to travel internationally with the children during their normal visitation and vacation times (or as otherwise agreed), subject to one-month advance notice that gives the itinerary and contact information for the trip, and provisions for a \$50,000 bond, as suggested by Brajesh in 2009. CP 53.

### III. CONCLUSION

This Court should reverse the Court of Appeals and the trial court, strike the travel restrictions and passport controls from the parenting plan, and remand for entry of the parenting plan as modified by this Court.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of August, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By Gregory M. Miller

Gregory M. Miller, WSBA No. 14459  
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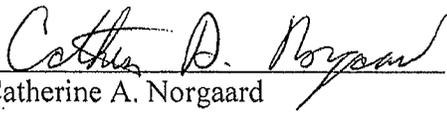
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing Supplemental Brief of Petitioner was efiled with the Supreme Court on August 22, 2011 and a true and correct copy also served on the following counsel:

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Dated this 22nd day of August, 2011 at Seattle, Washington.

  
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Catherine A. Norgaard  
Legal assistant

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Attached for filing is the Supplemental Brief of Petitioner Brajesh Katare in support of his petition for review, transmittal letter explaining Appendices H and I are being mailed to the court.

Case Name: In re the Marriage of Katare  
SCT No. 85591-9 (COA Case No. 63438-1-I)  
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# APPENDIX H

**RCW 26.09.191(3), (6)**

**26. 09. 191. Restrictions in temporary or permanent parenting plans**

**RCW 26.09.191(3)** A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

- (a) A parent's neglect or substantial nonperformance of parenting functions;
- (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
- (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
- (d) The absence or substantial impairment of emotional ties between the parent and the child;
- (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
- (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
- (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

CREDIT(S)

[2007 c 496 § 303, eff. July 22, 2007; 2004 c 38 § 12, eff. July 1, 2004; 1996 c 303 § 1; 1994 c 267 § 1. Prior: 1989 c 375 § 11; 1989 c 326 § 1; 1987 c 460 § 10.]

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(pages 1-37)

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**Subject:** 85591-9 In Re Marriage of Katare - Corrections to Supplemental Brief of Petitioner

To: Supreme Court Clerk

Attached please find Mr. Miller's letter with attached replacement pages to the Supplemental Brief of Petitioner. The letter includes a request to pull the page numbered I-38 to Appendix I.

If you have any questions please don't hesitate to call. Thank you.

Case Name: In re the Marriage of Katare  
SCT No. 85591-9 (COA Case No. 63438-1-I)  
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