RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 APR 11 P 2:30
BY RONALD R. CARPENTER
CLERK

NO. 85591-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 63438-1-I

LYNETTE KATARE,

Respondent,

v.

BRAJESH KATARE,

Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
2011 APR 26 P 2:45
BY RONALD R. CARPENTER
CLERK

MEMORANDUM OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, ASIAN BAR ASSOCIATION OF WASHINGTON, PACIFIC NORTHWEST DISTRICT OF THE JAPANESE AMERICAN CITIZENS LEAGUE, AND VIETNAMESE AMERICAN BAR ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

Lorraine K. Bannai,
WSBA No. 20449
901 12th Avenue
Seattle, WA 98122
(206) 398-4009

Keith A. Talbot,
WSBA No. 32154
One Convention Place, Suite 1525
701 Pike Street
Seattle, WA 98101-3933
(206) 462-6700

Huyen-Lam Q. Nguyen-Bull,
WSBA No. 34690
1191 Second Ave, Suite 1800
Seattle, WA 98101
(206) 816-1427

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. IDENTITY AND INTEREST OF AMICI CURIAE 1

II. INTRODUCTION AND SUMMARY OF ARGUMENT 4

III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 5

A. Courts should not decide cases based on generalizations about foreign legal proceedings absent a strong factual basis about those legal proceedings 5

B. The trial court's erroneous finding and undue reliance on India being a non-signatory to the Hague Convention, if left uncorrected, creates the possibility and perception that national origin can unfairly affect family law decisions 7

C. These errors, if left uncorrected, do not serve the best interests of the Katare children and may have a negative impact on children of bicultural and multicultural marriages 8

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Fernando v. Nieswandt, 87 Wn. App. 103, 940 P.2d 1380 (1997).....9

In re Marriage of Katare, No. 63438-1-I, filed Jan. 10, 2011.....5, 6, 7

CASES FROM INDIA

Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112.....5, 6

WASHINGTON STATUTES

RAP 2.5(a) 4, 5

RAP 13.4(b)(4) 5

RCW 26.09.002 8

RCW 26.09.184 9

OTHER AUTHORITIES

Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, TIAS No. 11,670, 1343 UNTS 49 ("Hague Convention").....4, 8, 9

I. IDENTITY AND INTEREST OF AMICI CURIAE

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that led ultimately to the incarceration of 110,000 Japanese Americans. He took his challenge to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully vacate his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center has a special interest in promoting fairness in the courts of our country. The Korematsu Center does not, in this memorandum or otherwise, represent the official views of Seattle University.

The Asian Bar Association of Washington (ABAW) is the professional association of Asian Pacific American attorneys, judges, law professors, and law students that strives to be a network for its members in Washington State. Created in 1987, ABAW advocates for the legal needs and interests of the APA community and represents over 200 APA attorneys in a wide range of practice areas. It is a local affiliate of the

National Asian Pacific American Bar Association (NAPABA). Through its network of committees, ABAW monitors legislative developments and judicial appointments, rates judicial candidates, advocates for equal opportunity, and builds coalitions with other organizations within the legal profession and in the community at large. ABAW also addresses crises faced by its members and the broader Asian and Pacific Islander community in Washington. The founders created ABAW precisely to address issues like the ones presented in this appeal.

The Pacific Northwest District of the Japanese American Citizens League (PNW-JACL) is a regional affiliate of the Japanese American Citizens League (JACL). The JACL, founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. The JACL has over 100 chapters with members in nearly every state and in Japan, and in the United Sates is divided into seven geographic districts. PNW-JACL includes Alaska, Oregon, the Idaho Panhandle and Washington State and represents nine chapters within the region. During World War II, people of Japanese ancestry were denied their constitutional rights by their forced relocation from the West Coast region and confinement in concentration camps by the United States based solely on their ethnicity and without individual review. Knowing the harm

caused by discrimination and the importance of protecting our constitutional guarantees, PNW-JACL works actively to promote and preserve the heritage, history, and legacy of the Japanese American community. PNW-JACL has weighed in on issues regarding the application of a policy or law that may have a disparate impact on an individual, family, or community because of ethnicity or national origin.

The Vietnamese American Bar Association of Washington (VABAW) is a professional association of attorneys, law professors, judges, and law students involved in issues impacting the Vietnamese American community in Washington State. Formed in 2005, its objectives are to provide mutual support for attorneys in the advancement of their careers, to be a trusted guide and resource for students who aspire towards the legal profession, to serve as a voice for the local Vietnamese American community, and to represent Vietnamese American attorneys within the State Bar. VABAW shares ABAW's interests and participates in similar activities with respect to VABAW's particular constituency. It, too, has a special interest in pursuing the goals of equal opportunity and access to justice. VABAW has a strong interest in issues surrounding the treatment of immigrants in all areas of the legal system, including in family law.

A motion requesting leave to file this memorandum accompanies this memorandum.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae urge that this Court accept review to consider whether the court below appropriately applied RAP 2.5(a) to leave intact the trial court's erroneous conclusion with regard to Indian law and its unjustified reliance on the fact that India is not a signatory to the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, TIAS No. 11,670, 1343 UNTS 49 ("Hague Convention"). Amici offer the following points in order to assist the Court in deciding whether to accept the petition for review:

(1) courts should not decide cases based on findings about foreign legal proceedings absent a strong factual basis about those legal proceedings;

(2) the trial court's erroneous finding and undue reliance on India being a non-signatory to the Hague Convention, if left uncorrected, create the possibility and perception that national origin can unfairly affect family law decisions; and

(3) these errors, if left uncorrected, do not serve the best interests of the Katare children and may have a negative impact on children of bicultural and multicultural marriages.

Because a court's consideration of issues connected to national origin can lead to bias as well as the appearance of bias, we request this Court to provide firm guidance to lower courts regarding determinations of foreign law and the role of national origin in family law proceedings. We believe this Court's guidance on these matters is crucial to safeguard the interests of members of immigrant communities and to permit them to enjoy all the

rights and responsibilities attendant to full membership in our society.

III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Amici urge that this appeal should be heard by this Court pursuant to RAP 13.4(b)(4). This case has great implications for the rights of ethnic minorities and immigrants to enjoy fully their parental rights, as well as the rights of children in bicultural and multicultural families whose best interests require meaningful contact with their cultural roots.

A. Courts should not decide cases based on generalizations about foreign legal proceedings absent a strong factual basis about those legal proceedings.

The trial court finding in 2009 that "proceedings in India do not include summary proceedings," CP 156, is inaccurate and is based on a misreading of Exhibit 25 on which the trial court states it relied. This error was brought to the attention of the court below by amici Korematsu Center, ABAW, and VABAW. Slip Op., pp. 18-19. However, the court below disregarded this error, stating, "To the extent that the two cases cited by amici curiae contradict the court's findings regarding Indian courts' treatment of foreign custody orders, neither was brought to the attention of the trial court." Slip Op., p. 19, n.14 (citing RAP 2.5(a)).

We suggest that RAP 2.5(a) was inaccurately applied because one of the cases cited, Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112,

was in fact before the trial court as part of Exhibit 25 on which the trial relied in making its finding. Further, the inaccuracy of the trial court's finding is evident on the face of the Exhibit 25 on which the trial court relied. Exhibit 25 actually explains that India's Constitution allows the issuance of a writ of habeas corpus to return an abducted child to his country of residence, a procedure that allows the petitioner "to take advantage of the relative speed and superior authority of the High Court." Ex. 25, p. 111. Exhibit 25 later inaccurately states that summary proceedings are not available, even though this is directly contradicted by the Dhanwanti Joshi case excerpt Exhibit 25 relies on for this proposition. A closer reading of Exhibit 25 by the trial court should have revealed this discrepancy.

The trial court's misreading of Exhibit 25 may have been influenced by Ms. Katare's expert, Mr. Berry, who made notations on Exhibit 25. He underlined a point about courts taking into account the paramount importance of the welfare of the child but did not underline the immediately following clause: "unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare." Ex. 25, p. 113. Though the court below held that the trial court "abused its discretion in admitting the [expert] testimony about risk factors and profiles," Slip Op., p. 23, it made no determination about the

admission of the expert's testimony regarding foreign law.

Amici also brought another case to the attention of the court below. Slip Op., p. 19, n.14. Although the court below is correct that this case was not presented to the trial court, we suggest that it is appropriate to consider this case because amici discussed this case because it confirmed that the trial court had misread Exhibit 25 and merely confirms the correct reading of the materials relied upon by the trial court. We urge that courts take great care when characterizing court processes with which they may not have direct familiarity. It is extremely important to avoid unwarranted generalizations that support stereotypes about the alleged backwardness or lawlessness of other legal systems. We urge that this Court give stronger guidance to lower courts regarding findings on matters of foreign law as well as further guidance to lower courts regarding admission of expert testimony on foreign law.

B. The trial court's erroneous finding and undue reliance on India being a non-signatory to the Hague Convention, if left uncorrected, creates the possibility and perception that national origin can unfairly affect family law decisions.

Mr. Katare is a naturalized U.S. citizen of Indian ancestry. Most of his family, except for his children, reside in India. He takes pride in India. XI RP, p.14. He entered into a mixed-culture marriage which ended. The trial court emphasized the untoward consequences that can arise if the

children were abducted to his country of origin, a non-Hague Convention country that is characterized as having inadequate legal procedures. However, undue reliance upon India not being a signatory to the Hague Convention and upon inaccurate characterizations of the civil legal process in India result in petitioners such as Brajesh Katare to be treated unfairly because of his Indian ancestry.

If this error is left uncorrected, and if lower courts are not given strong guidance regarding determinations of foreign law and admission of expert testimony on this subject, it can have an impact that extends beyond Mr. Katare's case, to parents whose national origin is Indian, to parents whose nations of origin are located in Asia, Africa, and the Middle East. Because countries in Asia, Africa, and the Middle East are predominantly the countries that have not yet signed on to the Hague Convention, inaccurate characterizations of foreign law may have a disproportionate impact on immigrants from Asia, the Middle East, and Africa.

C. These errors, if left uncorrected, do not serve the best interests of the Katare children and may have a negative impact on children of bicultural and multicultural marriages.

Courts are required to accord the child's best interests the highest priority in establishing a permanent parenting plan. RCW 26.09.002. This not only means ensuring the child's physical care and safety, but also providing for his or her emotional stability, changing needs as the child

grows and matures, and to otherwise protect the best interests of the child. RCW 26.09.184(a), (b), (c), and (g). Biracial children have an interest in exposure to both sides of their cultural heritage. See, e.g., Fernando v. Nieswandt, 87 Wn. App. 103, 105-06, 940 P.2d 1380 (1997) ("as a mixed race child, [the daughter] needed to learn about her father's culture as well as her mother's").

For most ABAW, PNW-JACL, and VABAW members, meaningful contact with their Asian cultures and families was an essential part of their childhoods. Travel with parents to the lands where the parents were born is an integral part of the development of many Asian Americans. These experiences helped them to form their personal identities and enabled them to understand better themselves as Asians in American society. Creating opportunities to have these experiences and to form these relationships will be particularly important for the Katare children, who must rely completely on one parent in developing their connection to their Indian heritage. Unjustified travel restrictions are not in the best interests of children of bicultural and multicultural families.

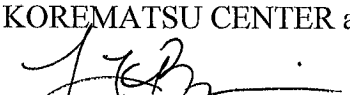
IV. CONCLUSION

A decision that leaves in place incorrect characterizations of foreign law and unjustified weight placed on country not being a signatory to the Hague Convention creates the possibility as well as the appearance

that national origin can unfairly affect family law determinations. Because of the importance of this issue to immigrant parents and to children of bicultural and multicultural families, we urge this Court to accept review.

RESPECTFULLY SUBMITTED this 11th day of April 2011.

KOREMATSU CENTER and PNW-JACL



Lorraine K. Bannai, WSBA No. 20449
Attorney for *Amici Curiae* Fred T. Korematsu Center for Law and Equality and the Pacific Northwest District of the Japanese American Citizens League

ABAW

please see attached

Keith A. Talbot, WSBA No. 32154
Attorney for *Amicus Curiae* Asian Bar Association of Washington

VABAW

Huyen-Lam Q. Nguyen-Bull,
WSBA No. 34690
Attorney for *Amicus Curiae* Vietnamese American Bar Association of Washington

that national origin can unfairly affect family law determinations. Because of the importance of this issue to immigrant parents and to children of bicultural and multicultural families, we urge this Court to accept review.

RESPECTFULLY SUBMITTED this 11th day of April 2011.

KOREMATSU CENTER and PNW-JACL

Lorraine K. Bannai, WSBA No. 20449
Attorney for *Amici Curiae* Fred T. Korematsu Center for Law and Equality and the Pacific Northwest District of the Japanese American Citizens League

ABAW

Keith A. Talbot, WSBA No. 32154
Attorney for *Amicus Curiae* Asian Bar Association of Washington

VABAW

Huyen-Lam Q. Nguyen-Bull,
WSBA No. 34690
Attorney for *Amicus Curiae* Vietnamese American Bar Association of Washington

CERTIFICATE OF SERVICE

On Monday, April 11, 2011, I, Robert S. Chang, delivered the foregoing to the Washington State Supreme Court, Office of Clerk, via messenger to the Temple of Justice Building, Olympia, Washington 98504 on behalf of the Korematsu Center, ABAW, PNW-JACL, and VABAW. On April 11, 2011, I had delivered a copy of the foregoing to:

Gregory M. Miller Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104-7010	___ Facsimile X Messenger ___ U.S. Mail ___ Overnight Mail
Catherine Wright Smith Edwards Sieh Smith & Goodfriend P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101-2988	___ Facsimile X Messenger ___ U.S. Mail ___ Overnight Mail
Gordon W. Wilcox Gordon W. Wilcox, Inc., P.S. 1191 2nd Ave., 18th fl. Seattle, WA 98101-2966	___ Facsimile X Messenger ___ U.S. Mail ___ Overnight Mail

DATED this 11th day of April, 2011

Robert S. Chang