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NO. 63438-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LYNETTE KATARE,

Respondent,

v.

BRAJESH KATARE,

Appellant.

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 APR 29 PM 1:03

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, ASIAN BAR ASSOCIATION OF WASHINGTON, AND VIETNAMESE AMERICAN BAR ASSOCIATION OF WASHINGTON

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

Michele Wong,
WSBA No. 33027
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

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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 ultimately led 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, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring that presumptions based on national origin, ethnicity, and culture not be used to justify unfair restrictions on important family relationships and activities incident to those family relationships. The Korematsu Center does not, in this brief 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. Further, ABAW's interest in this specific matter dates back to 2005 when ABAW submitted Memorandum of Amici Asian Bar Association of Washington and Vietnamese American Bar Association of Washington in Support of Appellant's Motion for Review in In re Marriage of Katare (Supreme Court No. 76691-6 (Court of Appeals No. 52331-6-I)) ("Memorandum of Amici").

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. Further, VABAW's interest in this specific matter dates back to 2005 when VABAW joined with ABAW in submitting Memorandum of Amici in this matter.

A motion requesting leave to file this brief, along with a motion for a two-day extension for filing, was submitted on April 23, 2010.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae urge that this Court reverse the trial court's order restricting Brajesh Katare's two children from international travel with Mr. Katare until they are adults and requiring him to relinquish his passport when he has custody of the children because the order was based on improperly admitted expert testimony and other evidence that relied on

stereotypes, inaccurate characterizations of Indian civil process, and risk profiles that emphasized national origin and culture without sufficient safeguards to avoid bias.

Amici offer the following arguments in order to assist the Court in resolving the issues raised in this appeal:

(1) great care must be taken to avoid bias, as well as the appearance of bias, when testimony and other evidence relies on national origin and culture, especially when the potential repercussions of the case are placed within the context of discrimination against Asian immigrants, including immigrants from South Asia, in the history of Washington and the United States;

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

(3) courts should exercise caution in qualifying and relying on experts who testify with regard to profiles that are based on national origin and culture;

(4) undue reliance on India being a non-signatory to the Hague Convention and inaccurate characterizations of Indian civil process, when combined with improper reliance on stereotypes based on national origin and culture, creates a near per se rule against parents of Indian ancestry in child custody matters; and

(5) courts should be sensitive to what constitutes the best interests of children in bicultural/multicultural families and recognize the harm inflicted through severely limiting exposure of children to family in other countries through strict restrictions on international travel.

Because a court's consideration of national origin and culture can lead to bias as well as the appearance of bias, we request this Court to provide firm guidance to lower courts regarding the role of national origin and

culture in family law proceedings, as well as standards for the use of expert opinion that links traits related to national origin and culture to the substantive issues in any given case. Although Mr. Katare is presented by his attorneys as being highly assimilated, we urge the Court not to rely on this aspect because an individual's level of assimilation might then become overly determinative of parental rights. 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

This case involves undue reliance on national origin and culture in a child custody setting. The 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. Great care must be taken when national origin and culture are part of the basis for a court's decision, especially given the historical treatment of Asian immigrants in Washington and the United States.

It is the official policy of this state that "[t]he right to be free from discrimination because of race, creed, color, national origin . . . is recognized as and declared to be a civil right." Washington Law Against

Discrimination, RCW 49.60.030(1). Recognizing that bias and prejudice have no place in the courtroom, the Conference of Chief Justices and Conference of State Court Administrators issued a joint resolution in which the Conferences "urge judges and court administrators . . . [t]o be vigilant of the various ways in which bias can manifest itself in the justice system." In Support of State Courts' Responsibility to Promote Bias Free Behavior, Joint Resolution of the Conference of Chief Justices and Conference of State Court Administrators, Aug. 3, 2005, available at http://www.consortiumonline.net/Resolutions/CCJRes_No12_8-3-05.pdf.

The need to be vigilant with regard to biases in the justice system is well illustrated by the historical treatment of Asian immigrants, including immigrants from South Asia, in the Territory and State of Washington, as well as in this nation. Immigrants from Asia constituted the largest non-White group that settled in the Territory and State of Washington. Immigrants from India were initially recruited to work in Washington's timber industry, but their presence quickly engendered animosity. One extreme act of violence took place in 1907 when "a band of white workers raided a lumber camp in northern Washington and chased several hundred [Asian] Indian workers across the Canadian border." Bill Ong Hing, Making and Remaking Asian America Through Immigration Policy, 1850-1990, at 72 (1993). Several outbreaks of

violence left only a few South Asians remaining in Washington. Id.

Broader anti-Asian sentiment led to restrictions that severely limited opportunities for Asian immigrants to become full members of our society. See, e.g., Const. art II, § 33 (1889) (restricting property rights of aliens who had not declared their intention to become citizens); United States v. Thind, 261 U.S. 204, 215, 43 S. Ct. 338, 67 L. Ed. 616 (1923) (holding that an Indian immigrant was racially ineligible for naturalization); Wash. Laws, 1921, Ch. 50, §§ 1-11, Wash. Rev. Stat. §§ 10581-92 (Remington 1932) (limiting land ownership and long-term leases of agricultural land for aliens ineligible for citizenship); Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923) (upholding Washington's Alien Land Law); Lubetich v. Pollock, 6 F.2d 237, 238 (W.D. Wash. 1925) (quoting and upholding Section 4, chapter 90, Laws 1923, which prevented Asian immigrants from taking "for sale or profit any salmon or other food or shellfish in any of the rivers or waters of this state"); In re Yamashita, 30 Wash. 234, 236-38, 70 P. 482 (1902) (holding that a Japanese immigrant would not be granted a license to practice law because of his "Japanese race"). These restrictions were based on notions of foreignness that operated to prevent Asian immigrants from becoming full members of our society.

Sixty-eight years ago, in a case painfully familiar to Amici, a

young student at the University of Washington, Gordon Hirabayashi, was arrested in Seattle, Washington, for violating a curfew and an exclusion order imposed against Japanese Americans, orders that ultimately led to their incarceration in desolate camps across the Western interior. The curfew and the later exclusion of Japanese Americans were based on the assumption that certain "racial characteristics" of Japanese Americans supported the conclusion that they were prone to commit acts of espionage and sabotage. See Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375, 96-99, 63 L. Ed. 2d 1774 (1943); Korematsu v. United States, 323 U.S. 214, 217, 65 S. Ct. 193, 89 L. Ed. 2d 194 (1944) (adopting the reasoning in the Hirabayashi case to uphold the constitutionality of orders excluding Japanese Americans from the West Coast). The Supreme Court, in upholding Mr. Hirabayashi's conviction for violating the curfew orders, cited the close relationship that Japanese Americans maintained with their communities and culture. Hirabayashi, 320 U.S. at 96-98. The Court concluded that "[v]iewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions." Id. at 98. The Court, thus, cited evidence of strong ethnic ties to support the conclusion that Japanese Americans would be disloyal.

Just as Japanese Americans were suspected of espionage or sabotage based on their ethnic ties, Mr. Katare has been adjudged a potential abductor based, in large part, on the fact that he is from India and maintains ties with his culture and family. The courts should be very hesitant to consider evidence of cultural ties as proof of propensity to commit a crime or to violate a court's order.

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

The trial court's 2009 finding that "Exhibit 25, p. 113, shows that proceedings in India do not include summary proceedings," CP 156, while factually accurate about what Exhibit 25 states, is an inaccurate description of Indian civil process. This finding of fact, though citing to the exhibit, basically echoes the conclusions of Ms. Katare's expert, Mr. Berry. He stated that, from his knowledge of Indian law, it is not possible to obtain relief on summary proceedings in Indian courts. IX RP, p. 20.[1]

However, Exhibit 25, upon which he relied, 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

[1] We use the convention adopted by Appellant and Respondent and refer to the four volumes of the transcript from the second remand hearing as VIII RP: Jan. 14, 2009 #1; IX RP: Jan.14, 2009 #2; X RP: Jan. 15, 2009 #1; and XI RP: Jan. 15, 2009 #2.

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 case excerpt it relies on for this proposition. Ms. Katare's expert, Mr. Berry, made notations on Exhibit 25. He underlined the 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.

The meaning of this clause becomes clear when the case is read in full. In the paragraphs immediately preceding the one excerpted in Exhibit 25, the Supreme Court of India makes clear that an initial determination must be made as to whether to "conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody." See Dhanwanti Joshi v. Madhav Unde (1998) 1 SCC 112 (available at http://judis.nic.in/supremecourt/chejudis.asp, follow "Citation" hyperlink and enter Journal "SCC"; Year "1998"; Volume "1"; and Page "112"). Under a summary inquiry, "the court would return custody to the country from which the child was removed unless such return could be shown to be harmful to the child"; and under an elaborate inquiry, "the court could go into the merits as to where the permanent welfare lay and ignore the

order of the foreign court or treat the fact of removal of the child from another country as only one of the circumstances." Id. It is important to remember that the Supreme Court of India in Dhanwanti Joshi based its decision to conduct an elaborate inquiry on the specific facts in that case where the abduction took place twelve years before the proceedings and the child had lived in India for twelve years. Id. The court decided that the question of return to the United States required the more elaborate factual inquiry to ascertain what would be in the best interests of the child. Id. The Supreme Court of India noted that courts in the United Kingdom, Canada, Australia, and the United States all use this same approach when dealing with countries that are not signatories to the Hague Convention. Id.

In a recently decided case before the Supreme Court of India, when faced with the question of whether to engage in a summary or elaborate inquiry, the court chose the summary inquiry and ordered the child returned to the United States consistent with the principle of comity and in recognition of the joint custody order granted by the New York State Supreme Court. See Chandran v. Union of India & Ors., WP(CRL) No. 112/2007 (Supreme Court of India Nov. 17, 2009) (available at http://judis.nic.in/supremecourt/chejudis.asp, follow "Date of Judgment" hyperlink; then search 17 Nov. 2009). It is worth noting that the authorities located the mother (abductor) and child (abductee) on October

24, 2009, and that this judgment ordering the return of the child to the United States was issued on Nov. 17, 2009. Id.

A careful reading of Exhibit 25 and the case upon which it relied reveals the correct characterization of Indian civil process, which is confirmed by the 2009 Chandran decision. We note that understanding Indian civil process in these matters can be confusing.[2] 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.

C. Courts should exercise caution in qualifying and relying on experts who testify with regard to profiles that are based on national origin and culture.

Ms. Katare offered Mr. Berry to give his opinion as to whether the court should continue to impose restrictions on Brajesh Katare and his travel with his children. IX RP, p. 53. Though purported to testify as an expert in child abduction, IX RP, p. 12, 14, Mr. Berry went far beyond predicting the risk of abduction in this case, treading dangerously into issues of Indian law and culture. In this Section, we begin with his

[2] We note that an authority with regard to international child abduction in India contains inconsistencies in its own text. See Anil Malhotra and Ranjit Malhotra, India, Inter-Country Parental Child Removal and the Law, in The International Survey of Family Law: 2008 Edition 144, 156 (Bill Atkin ed. 2008) (stating that summary jurisdiction is not the only route courts may take, but later stating "that Indian courts would not exercise summary jurisdiction"). They have yet to comment on the recent Chandran decision.

testimony on Indian law and conditions in India before discussing the most dangerous aspects of his testimony concerning "red flags" and "profiles" based largely on national origin and cultural ties. Courts should exercise extreme caution in considering such expert opinion.

With regard to Indian law, it appears that he relied solely on what he read in materials that we demonstrated in Part III.B., supra, to contain partial and inaccurate statements. He went further to paint a picture of India as a primitive, dangerous, and lawless country. He did all this despite never having been to India. IX RP, p. 49. It can only be assumed that he did this to support his concern that the consequences of abduction were permanent and severe. X RP, p. 19. In his review of State Department material, Ex. 32, he drew particular attention to terrorist activity, X RP, p. 10; outbreaks of tuberculosis, X RP, p. 12; and the dangers of travel by road, X RP, p. 12. As to this last point, he testified about the danger of being attacked by a passerby if one were to hit a pedestrian or cow, which he states would not happen in the United States. X RP, p. 13. He explained that cars are driven fast and recklessly in India. X RP, p. 13. He testified that he was sure that there was no DOT in India like the one in the United States because we do not have the problems that exist in India. X RP, p. 14. He said that he did not think that India has the same constitution as exists in the United States, but acknowledged that he

did not know what the constitution was. X RP, p. 15. Later, he did state something positive about India: "[I]t's common knowledge that India is a bastion of opportunity for those that are in his field, in computer science. They excel in that." X RP, p. 31. The testimony is replete with stereotypes, generalizations, and baseless assumptions, all carrying with them the danger that Mr. Katare would be viewed a danger to his children because he was from this allegedly lawless, dangerous country.

Of even greater concern is Mr. Berry's opinion as to the significance of Mr. Katare's ties to India and Indian culture, even though it is clear from his testimony that he had no specific knowledge about Mr. Katare's specific ties with India and his culture, outside of what he learned from Ms. Katare. X RP, pp. 48-49. Mr. Berry opined on certain "factors" and "red flags" that he believed heightened the risk that Brajesh Katare might abduct his children. In his testimony, Mr. Berry relied on various profiles of parents at risk for abducting their children. One of the high-risk profiles describes "a parent who is a citizen of another country who ends a mixed-cultural marriage." Ex. 28 ("Early Identification of Risk Factors for Parental Abduction"); IX RP, pp. 83 et seq. Mr. Berry testified that this profile applied to Mr. Katare. IX RP, pp. 84-85. Profiling an immigrant parent in a mixed-culture marriage as presenting an increased risk of being a child abductor necessarily reflects bias based on national origin. The

courts should be extremely hesitant to allow opinion that national origin, in and of itself, raises the risk that a person will engage in unlawful conduct.

Mr. Berry further commented on how Mr. Katare's Indian roots increased his risk of being an abductor. For example, he stated that "the cultural aspects of India are very important to Mr. Katare. And I'm not sure that that's a bad thing, but it's an indicator. For example, in the parenting plan, his brother had to come to over to pre-approve the marriage." IX RP, p. 86. Further, "the family living abroad, certainly, his family in India makes that a clear indicator." IX RP, p. 86; X RP, p. 26. And, finally, Mr. Berry noted that, according to Ms. Katare, Mr. Katare's primary social interactions in Washington are with people of Indian culture who maintain an Indian lifestyle. X RP, pp. 48-49. The assertion that Mr. Katare's connection to his culture and family and friends are "red flags" indicating that he is at risk to abduct has frightening implications. Under that reasoning, immigrants or children of immigrants who feel a connection to their culture, retain family in their countries of origin, and have friends who share their ethnic heritage would be at increased risk of abducting their children.

So-called "expert" testimony regarding cultural characteristics and conditions in another country is highly prejudicial and has no probative

value with regard to someone's past, present, or future conduct. The testimony in this case (1) constructs a narrative about the alleged lawlessness, danger, and backwardness of India and (2) seeks to associate Mr. Katare as fitting into a "profile" based on national origin and cultural ties to this allegedly lawless, dangerous, and backwards place. Such testimony presents a danger of racial and ethnic stereotyping that is not a proper basis for legal decision-making. ER 701 and 702 cannot be read to allow such testimony.

D. Undue reliance upon India not being a signatory to the Convention on the Civil Aspects of International Child Abduction and upon inaccurate characterizations of the civil legal process in India, when combined with improper reliance on national origin and culture, creates a near per se rule against parents of Indian ancestry in child custody matters.

Though Mr. Katare is a naturalized U.S. citizen who has renounced his Indian citizenship and has lived in the United States for nearly 20 years, or half his life, he remains of Indian national origin. 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. These characteristics by themselves apparently place him into a high risk profile for international child abduction. See Exhibits 26, 28, 30, 31, and 33 (all of which basically repeat the same red flags and profiles). When this high risk is coupled with the untoward consequences that arise from dealing

with a non-Hague Convention country that is characterized as having inadequate legal procedures, the result is a strong presumption operating against parents of Indian ancestry ending mixed-culture marriages in child custody matters. Because countries in Asia, Africa, and the Middle East are predominantly the countries that have not yet signed on to the Hague Convention, the use of "red flags" and "profiles" based on national origin, ethnicity, and culture may have a disproportionate impact on immigrants from Asia, the Middle East, and Africa. The only way for immigrants from these countries to avoid this disproportionate impact based on national origin and cultural ties is to cut off their ties to their countries of origin. It is also important to remember that this disproportionate impact affects the children of bicultural and multicultural marriages.

E. Courts should be sensitive to the best interests of children in bicultural/multicultural families and recognize the harm inflicted through severely limiting exposure of children to family in other countries through strict restrictions on international travel.

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 and VABAW members, meaningful contact with their Asian cultures and families was an essential part of their childhoods. 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.

Travel with parents to the lands where the parents were born is an integral part of the development of many Asian Americans. The travel restrictions imposed by the trial court essentially guarantee that the Katare children will not have meaningful contact with Indian culture and their Indian family, at least not until they are adults. By that time, their Indian heritage may be as foreign to them as it is to their mother and her family.

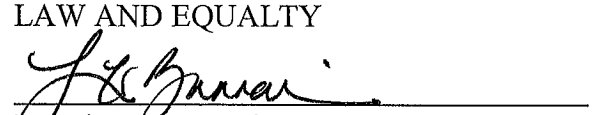
IV. CONCLUSION

The State has come a long way since Ward v. Ward, 36 Wn.2d 143, 216 P.2d 755 (1950), when the Washington Supreme Court held that

the children of a white mother and a Black father were "colored" and would "have a much better opportunity to take their rightful place in society if . . . brought up among their own people." Id. at 755-56. The U.S. Supreme Court put a stop to this kind of thinking in Palmore v. Sidotti, 466 U.S. 429, 433-34, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) (although "a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin," under the Equal Protection Clause, private biases are "impermissible considerations" in custody disputes). Here, the trial court's order with regard to the travel restrictions, based strongly on improper considerations of national origin and culture as well as on inaccurate characterizations of Indian civil process, would, if allowed to stand, be a step backwards. We urge this Court to overturn the trial court's order regarding the travel restrictions and to provide appropriate guidance to safeguard against bias in cases such as this.

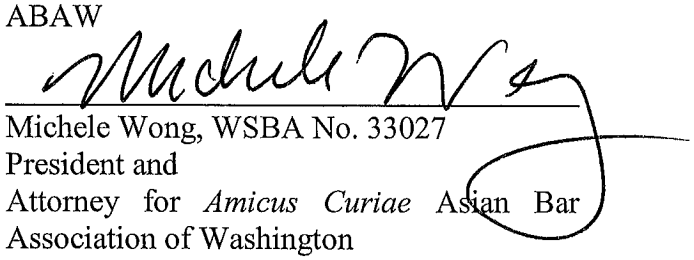
RESPECTFULLY SUBMITTED this 29th day of April 2010.

FRED T. KOREMATSU CENTER FOR LAW AND EQUALTY



Lorraine K. Bannai, WSBA No. 20449
Associate Director and
Attorney for *Amicus Curiae* Fred T. Korematsu Center for Law and Equality

ABAW



Michele Wong, WSBA No. 33027
President and
Attorney for *Amicus Curiae* Asian Bar Association of Washington

VABAW

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

CERTIFICATE OF SERVICE

On Thursday, April 29, 2010, I, Robert S. Chang, had the foregoing delivered via messenger to the Washington State Court of Appeals, Division I, Office of Clerk, at One Union Square, 600 University Street, Seattle, Washington 98101 on behalf of the Korematsu Center, ABAW, and VABAW.

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STATE OF WASHINGTON
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On April 29, 2010, I had delivered via messenger 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 29th day of April 2010

Robert S. Chang