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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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RACHELLE K. BLACK,  
Appellant,

v.

CHARLES W. BLACK  
Respondent.

FILED *E*  
OCT 17 2016  
WASHINGTON STATE  
SUPREME COURT *h*

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AMICI CURIAE BRIEF OF THE FRED T. KOREMATSU  
CENTER FOR LAW AND EQUALITY, THE NATIONAL CENTER  
FOR LESBIAN RIGHTS, PROFESSOR JULIE SHAPIRO, AND  
THE QLAW ASSOCIATION OF WASHINGTON

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## I. INTRODUCTION

Although implicit bias regarding gender and sexuality is often inextricably woven into the fabric of family law and may be difficult to detect, in this case it is impossible to ignore. The trial court ruled that it was “appropriate” to prohibit a mother, Rachelle, from “having further conversations with [her] children regarding religion, homosexuality, or other alternative lifestyles [sic] concepts.” The trial court then entered a parenting plan that placed primary residential time and decision-making authority with the father based on the “belie[f]” that “it will be very challenging for [the children] to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality.” The testimony of the guardian ad litem (“GAL”), upon which the trial court relied, is replete with references to Rachelle’s sexual orientation as a “lifestyle” and a “choice.” These characterizations reflect some of the most pervasive and harmful stereotypes about lesbian, gay, bisexual and transgender (“LGBT”) individuals. Although the Court of Appeals overturned the trial court’s speech and conduct restrictions as unconstitutional, it let the trial court’s residential time decision stand. On at least that issue, the Court of Appeals’ decision should be vacated.

Particularly where decisions implicate the civil and constitutional rights of LGBT parents, appellate courts cannot ignore evidence in the record that suggests bias influenced the outcome. Washington law prohibits courts from making decisions about residential time based upon a parent's sexual orientation. Therefore, a trial court lacks "discretion" to rely on improper and unsubstantiated assumptions regarding gender and sexual orientation in reaching such a decision. Because the record demonstrates that such assumptions affected the trial court's decision here, the interests of justice require this Court to vacate the Court of Appeals' decision and remand for a new trial, with reassignment to a different judge.

## **II. IDENTITY AND INTERESTS OF AMICI**

The interest of the Korematsu Center for Law and Equality, the National Center for Lesbian Rights, Professor Julie Shapiro, and the QLaw Association of Washington in joining as amici curiae in this matter is described in the Motion for Leave to File Amici Curiae Brief filed concurrently with this brief.

## **III. STATEMENT OF THE CASE**

Amici adopt the Statements of the Case set forth in the Appellant's Supplemental Brief filed with this Court on September 30, 2016, the Petition for Review filed on April 7, 2016, and the Brief of Appellant and

Reply Brief of Appellant filed with the Court of Appeals. In addition, amici provide the following summary of how bias may explicitly or implicitly impact family law decisions.

Although social and legal acceptance of overt prejudice has waned, researchers have found that implicit prejudice continues to have a profound impact on our perceptions and conduct both in everyday life and in our legal system.<sup>1</sup> In other words, “discrimination in this day and age is frequently unconscious and less often consciously purposeful.” *State v. Saintcalle*, 178 Wn.2d 34, 48, 309 P.3d 326 (2013). The existence and ubiquity of implicit bias is now widely accepted by jurists and scholars alike.<sup>2</sup> *Id.* at 48. As this Court has acknowledged, “we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them.”<sup>3</sup> *Id.* at 46. Although this Court has previously addressed implicit bias in the context of race, it applies equally to prejudice against other marginalized groups, including the LGBT community.<sup>4</sup>

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<sup>1</sup> Vanessa Ewing, et al., *Student Prejudice Against Gay Male and Lesbian Lecturers*, J. Social Psych. 143(5), 571 (2003).

<sup>2</sup> The most widely accepted mechanism for measuring implicit bias is the Implicit Association Test (“IAT”), available at <https://implicit.harvard.edu/implicit/>.

<sup>3</sup> See also John Bargh, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation in Action*, 71:2 J. Personality and Social Psych. 230, 233 (1996).

<sup>4</sup> Ewing, *supra* note 1, at 570 (“As with other prejudices, negative beliefs towards gay men and lesbians might provide rationalizations for discriminatory actions against

Unlike explicit biases, of which we are aware, implicit biases may affect our behavior without our knowledge, intent, or control.<sup>5</sup> These implicit biases influence the way we process information, which can result in biased decision-making, or discrimination even in the absence of an intent to discriminate. *Saintcalle*, 178 Wn.2d at 48. Implicit biases may, and often do, operate in individuals who are not explicitly biased.<sup>6</sup> In fact, implicit biases affect the decision-making of even those with a professional commitment to equality and fairness.<sup>7</sup> See *State v. Walker*, 182 Wn.2d 463, 488 n.2, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring) (“I do not mean to suggest that only prosecutors are susceptible to making unintentional appeals to race—indeed, criminal defense lawyers and judges can be.”). “To put it simply, good people often discriminate, and they often discriminate without being aware of it.” *Saintcalle*, 178 Wn.2d at 48.

Decision-makers are more likely to make a decision based upon or

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them.”); Rainier Banse, *Implicit Attitudes Toward Homosexuality: Reliability, Validity, and Controllability of the IAT*, *Zeitschrift für Experimentelle Psychologie* (April 2001).

<sup>5</sup> Kristen Moreno, et al., *Intergroup Affect and Social Judgment: Feelings as Inadmissible Information*, 4(1) *Group Processes & Intergroup Relations* 21, 22 (2001) (“[P]eople often turn to subjective affective cues for guidance in judgment and choice.”); Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *Notre Dame L. Rev.* 1195, 1196 (2009) (implicit biases “stereotypical associations so subtle that people who hold them might not even be aware of them.”).

<sup>6</sup> Rachlinski, *supra* note 5, at 1208, 1222.

<sup>7</sup> Nat’l Council of State Courts, *Helping Courts Address Implicit Bias*, \* 2 (2012) (“This phenomenon leaves open the possibility that even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair.”).

influenced by implicit bias if another, ostensibly neutral reason for the decision exists. This Court acknowledged this concept, known as attributional ambiguity, in *Saintcalle*: “people will act on unconscious bias more often if reasons exist giving plausible deniability.” 178 Wn.2d at 49. Researchers have found that negative feelings about a stigmatized group may not be evident unless “these feelings can be misattributed to some seemingly relevant feature other than the target group’s identity.”<sup>8</sup>

Decisions are also more susceptible to implicit bias if they allow or call upon the decision-maker to exercise broad discretion or interpret ambiguity. Researchers have demonstrated that the more ambiguous a situation is, the more likely that we will draw upon implicit biases to understand it.<sup>9</sup> The United States Supreme Court has similarly cautioned that “imprecise legal standards” may “leave determinations unusually open to the subjective values of the judge.” *Santosky v. Kramer*, 455 U.S. 745, 762, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

These concerns are heightened in family law cases, where the guiding principle of determining the best interests of a child requires trial judges to exercise broad discretion and where stereotypes about gender

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<sup>8</sup> K. Moreno, et al., *Intergroup Affect and Social Judgment: Feelings as Inadmissible Information*, 4(1) *Group Processes & Intergroup Relations* 21, 21 (2001); Ewing, *supra* note 1, at 571.

<sup>9</sup> John Dovidio and Samuel Gaertner, *Aversive racism and selection decisions: 1989 and 1999*, 11 *Psychological Science* 315, 319-323 (2000).

and sexuality are particularly likely to influence judicial decision-making.<sup>10</sup> As researchers have noted, LGBT individuals “might face greater discrimination when they are acting in a domain in which stereotype content is relevant rather than irrelevant.”<sup>11</sup> Stereotypes related to gender and sexuality are particularly relevant to family law disputes.<sup>12</sup> Scholars have found that family law decisions involving LGBT parents are often driven by misconceptions that LGBT identity and parenthood are “incompatibl[e]” and focus on “the sexuality of lesbians and gays as their most prominent and defining characteristic.”<sup>13</sup> LGBT identity has been historically misattributed to psychological and emotional instability, and such stereotypes persist.<sup>14</sup> Homosexuality was classified as a mental illness until 1973 and “ego dystonic homosexuality” was classified as a mental illness until 1987.<sup>15</sup> There is also a pervasive stereotype that same-sex relationships are different and less committed than different-sex

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<sup>10</sup> Melissa L. Breger, *The (In)Visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. Rev. L. & Soc. Change 555 (2012); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 Fla. St. U. L. Rev. 891 (1998).

<sup>11</sup> Ewing, *supra* note 1, at 577.

<sup>12</sup> See Breger, *supra* note 10; McNeely, *supra* note 10.

<sup>13</sup> Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36:2 Law & Society Rev. 285, 295, 313 (2002).

<sup>14</sup> Richman, *supra* note 13, at 302, 304.

<sup>15</sup> See R.E. Fox, Proceedings of the Am. Psychological Ass’n, Inc., for the year 1987: Minutes of the Annual Meeting of the Council of Representatives, 43 Am. Psychologist 508-31 (1988), <http://www.apa.org/about/policy/diagnoses-homosexuality.aspx>.

relationships.<sup>16</sup> These stereotypes can be particularly harmful for women who are lesbians, who are often seen as deviating from sex-based stereotypes of how mothers, in particular, should behave. The imposition of these “sex-based stereotypes” often “lead[s] to the application of higher standards of parenting to mothers than to fathers.”<sup>17</sup>

#### IV. ARGUMENT

##### A. Appellate court review of family law decisions should acknowledge and address the influence of implicit bias.

Under Washington law, “the trial court abuses its discretion if it restricts parental rights because the parent is gay or lesbian.” *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996) (citing *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983)). While a trial court has broad discretion to fashion a parenting plan, “that discretion must be exercised within the bounds of the applicable statutes.” *In re Marriage of Chandola*, 180 Wn.2d 632, 658, 327 P.3d 644 (2014). A parent’s sexual orientation is not among the statutory criteria relevant to residential time determinations. See RCW 26.09.187(3); RCW 26.09.191.

Nonetheless, most appellate courts have reviewed residential time decisions only for explicit statements of bias, while ignoring or explaining

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<sup>16</sup> Letitia Peplau and Adam Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 Annual Rev. Psychol. 58:405, 418 (2007).

<sup>17</sup> Breger, *supra* note 12.

away evidence of implicit bias. *See, e.g., Magnuson v. Magnuson*, 141 Wn. App. 347, 352, 170 P.3d 65 (2007).<sup>18</sup> Even where courts overturn components of a parenting plan because they are impermissibly based upon sexual orientation, courts have failed to consider or analyze the extent to which that impermissible basis may have been a silent factor in the other components of the decision. *See, e.g., Wicklund*, 84 Wn. App. at 773. In some cases, appellate courts have sought to rationalize a trial court's apparent reliance on implicit bias by proffering an alternative post hoc rationale, as the Court of Appeals did here. *See Black v. Black*, No. 46788-7-II, slip op. at 10 (Wn. App. Mar. 8, 2016).

This approach fails to recognize that family law decisions untethered from the statutory criteria “leave[] families vulnerable to a trial court's biases.” *Chandola*, 180 Wn.2d at 656; *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984) (“[P]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly,

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<sup>18</sup> In *Magnuson*, the Court of Appeals upheld the trial court's decision awarding residential time to the non-transgender parent. 141 Wn. App. at 352. The trial court had found that the transgender parent's upcoming gender reassignment surgery “may be everything [she] has hoped for, or it may be disastrous. No one knows what is ahead[,] and [t]he impact of gender reassignment surgery on the children is unknown.” *Id.* at 350. Although the trial court found that “the margin is somewhat slim in this particular case,” it awarded residential time to the non-transgender parent on the basis that she “is in a more stable and predictable place in her life right now to act as the children's primary care giver.” *Id.* In upholding the trial court's decision, the Court of Appeals ignored the subjective assumptions about gender identity that informed the trial court's comments and instead emphasized that, “[i]ndeed, the [trial] court found Robbie was ‘undergoing an authentic gender transformation,’ and ‘has a right to be happy in her chosen life ahead.’” *Id.*

give them effect.”). Where a trial court is granted broad discretion to interpret an open-ended legal standard, such as the “best interests of the child,” there is a heightened danger that the court will fall back on subjective assumptions and stereotypes to reach a conclusion. *See Santosky*, 455 U.S. at 762 (“imprecise substantive standards” may “leave determinations unusually open to the subjective values of the judge”). Appellate courts must ensure that residential time determinations are based upon the statutory criteria and are not influenced by unsupported assumptions and stereotypes about parental characteristics, such as sexual orientation.

The broad deference generally given to trial courts in family law proceedings weighs in favor of, not against, more meaningful review. In light of that deference, trial court judges (as well as GALs) wield enormous power in family law cases. GALs are appointed by the court to “investigate and report factual information” and their recommendations are often highly influential. *See* RCW 26.12.175. As the sole trier of fact, trial courts have broad discretion in fashioning a residential schedule and parenting plan. This reality heightens the need for appellate courts to exercise oversight and protect against the permeation of implicit bias into the trial court’s decision-making process.

In *Palmore*, the Court discussed the extent to which “the reality of private biases and the possible injury they might inflict” were “permissible considerations” for a custody decision. 466 U.S. at 433. In that case, the trial court offered an ostensibly neutral reason for removing a child from its mother’s custody after she entered into an interracial relationship, citing concerns that the mother “tended to place gratification of her own desires ahead of her concern for the child’s future welfare.” *Id.* at 431. But the trial court also expressed concern for “what it regarded as the damaging impact on the child from remaining in a racially mixed household.” *Id.* at 431-32. The Court reversed, finding that “taking the court’s findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.” *Id.* Where the “outcome” of a case is influenced by private biases, as here, the trial court’s decision should be vacated.<sup>19</sup>

A trial court’s consideration of private biases is of special concern where the decision involves fundamental rights, such as the constitutional right to parent. Parents have a “fundamental liberty interest” in “the care,

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<sup>19</sup> The GAL in this case couched her concerns in similar terms. At trial, the GAL stated that “the choice to leave the marriage when you have three children and then to establish a relationship with a same sex partner when you’ve had kids raised in a very conservative parochial environment can be very controversial and people can be very mean.” I VRP 44. The GAL’s speculation that other people could “be very mean” because Rachelle has a same sex partner is an unconstitutional consideration for a residential time decision. *See Palmore*, 466 U.S. at 433.

custody, and management of their children.” *Matter of K.M.M.*, No. 91757-4, 2016 WL 4703517, at \*4 (Wash. Sept. 8, 2016); *see also Jarrett v. Jarrett*, 449 U.S. 927, 929, 101 S. Ct. 329, 66 L. Ed. 2d 155 (1980) (Marshall and Brennan, J., dissenting) (“the interest of a parent in the companionship, care, custody, and management of his or her children, cannot be determined by the evidentiary shortcut of a conclusive presumption”). The fundamental right to parent cannot and should not be trammled by the implicit biases of a trial judge.

Consideration of the influence of implicit bias is consistent with the meaningful review required in other instances of discrimination. In the context of peremptory challenges, this Court has emphasized that review for only “purposeful” discrimination is not enough: instead, review of such challenges should “necessarily account[] for and alert[] trial courts to the problem of unconscious bias, without ambiguity or confusion.” *Saintcalle*, 178 Wn.2d at 54. The same is true in the family law context, where pervasive stereotypes and subjective assumptions about gender and sexuality often have profound impacts on the outcome.<sup>20</sup> As another example, in cases involving housing discrimination, courts recognize disparate impact claims to “permit[] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as

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<sup>20</sup> Breger, *supra* note 12.

disparate treatment.” *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2512, 192 L. Ed. 2d 514 (2015). Family law decisions similarly require meaningful review to ensure that implicit biases do not influence a trial court’s exercise of discretion and result in decisions that improperly restrict the civil and constitutional rights of LGBT parents.

**B. This Court should vacate and remand for a new trial because there is evidence in the record sufficient to infer that subjective assumptions and stereotypes about sexual orientation influenced the trial court’s decision.**

This case illustrates the profound need for this Court to provide clear guidance to the appellate courts regarding evidence of bias in residential time decisions. The record here is replete with evidence that unfounded stereotypes and assumptions about sexual orientation shaped both the GAL’s recommendation and the trial court’s residential time decision.

Although the trial court made no factual findings that Rachelle’s sexual orientation could harm the children, it nonetheless found it “appropriate” to restrict both the amount and nature of Rachelle’s contact with her children on that basis.<sup>21</sup> CP 40-41, 49, 73-75. The trial court’s

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<sup>21</sup> The trial court entered the following restrictions: “Ms. Black is ordered to refrain from having further conversations with the children regarding religion, homosexuality, or other alternative lifestyles [sic] concepts and further that she is prohibited from exposing the children to literature or electronic media; taking them to movies or events; providing

restrictions were premised on “concerns” raised by a therapist and the GAL that the children are “naïve and have trouble coping with change and need stability.” CP 74.<sup>22</sup> The trial court presumed that learning about their mother’s sexual orientation would harm the children, stating that it “believe[s] it will be very challenging for [the children] to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality.” CP 40-41. Such subjective biases about sexual orientation are an improper basis for a residential time decision.

That the parenting plan restricts only the ability of the gay parent to talk to her children about religion and homosexuality further suggests that the trial court’s decision is intended to shield the children not from those topics, but from Rachelle’s perspective on them. Although the GAL expressed concern about Rachelle’s “boundary issues” related to these topics, the GAL did not draw similar conclusions from Charles’s

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them with symbolic clothing or jewelry; or otherwise engaging in conduct that could reasonably be interpreted as being related to those topics unless the discussion, conduct or activity is specifically authorized and approved by [the children’s therapist].” CP 49.

<sup>22</sup> Neither the GAL nor the children’s therapist testified that specific harm would result if the children talked to their mother about her sexual orientation. Instead, the GAL simply stated that Rachelle’s sexual orientation is a “confusing concept[.]” for the children and that “there is just too much happening at once,” and that “it may take a while for the kids to really be in a place where they can fully appreciate and understand [Rachelle’s] current lifestyle.” I VRP 37, 39. The fragility of these assumptions is underscored by the GAL’s lack of preparation. In completing her report, she met with two of the children only briefly the day after they had learned that their parents were getting divorced, and did not meet with one child (C.) or Rachelle’s partner at all. I VRP 25-27, 31.

conduct—including his outing Rachelle to her parents, their pastor, other church members, her children’s principal, and their friends and calling her a “militant lesbo.”<sup>23</sup> II VRP 311: 19-21, 312: 18-20, 314: 7-10. This is particularly concerning given Rachelle’s testimony that Charles threatened to “take the kids away” if she filed for divorce because “he won’t have them exposed to gay people.” I VRP 174. But under the terms of the parenting plan and as recommended by the GAL, Charles was allowed to converse freely with his children about sexual orientation and religion, without the need for therapeutic supervision.

Both the trial court and the GAL couch their conclusions in terms of Rachelle’s “stability” alone, apart from her relationship with her children. The suggestion that coming out is somehow inherently destabilizing echoes pervasive stereotypes about the emotional and psychological stability of LGBT individuals.<sup>24</sup> The court’s and the GAL’s concerns about the “stability” of Rachelle’s committed relationship with Ms. Van Hoose also invoke the stereotype that same-sex relationships are different and less committed than different-sex relationships.<sup>25</sup> Other than biased generalizations, there is no evidence in the record, and the trial

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<sup>23</sup> The GAL did not disagree that those events occurred. Instead, she explained his outing Rachelle “not as . . . an attempt to gossip or disparage, but as someone who was hurt” and “confiding” in a “friend” and his homophobic comments as an unfortunate expression that “[h]e may not like [Rachelle’s] lifestyle.” I VRP 40, 41.

<sup>24</sup> *Supra*, notes 13-16.

<sup>25</sup> *Supra*, note 16, at 418.

court made no findings of fact, that either Rachelle's coming out or her committed relationship with Ms. Van Hoose impair Rachelle's relationship with her children, impede her ability to perform parenting functions, or would cause her children harm. Conclusory statements about "stability" should not be used as a basis to disfavor the parent who has come to a different understanding about his or her sexual orientation.

The GAL's testimony indicates that her conclusions were informed by the discredited misconception that sexual orientation is volitional.<sup>26</sup> The GAL admits that in her report she stated that "while [her] intent is not to cast judgment on Ms. Black's lifestyle choice, the fact remains that it is a choice that can result in significant controversy." I VRP 44 (emphasis added). She also referred to sexual orientation and gender identity as "alternative lifestyle concepts." I VRP 47. This characterization of Rachelle's sexuality as a "lifestyle" or "choice" is hardly innocuous. The concept of choice, cited by opponents to marriage equality among others, casts Rachelle as complicit or in part to blame for "choosing" a sexual identity that may cause her children harm and result in the breakup of her marriage. The United State Supreme Court soundly rejected the idea that sexual orientation is a choice in *Obergefell v. Hodges*, holding that sexual orientation is "immutable." 135 S. Ct. 2584, 2596, 192 L.Ed.2d 609

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<sup>26</sup> Mr. Black's attorney also used the term "lifestyle" numerous times and referred to Ms. Black's coming out as a "decision[]." II VRP 284: 1-19.

(2015). That the trial court relied upon the report and testimony of a GAL that included such fundamental misconceptions about sexual orientation is alone enough to require vacating the trial court's decision.

Like the trial court in *Cabalquinto*, the trial court's unnecessary preoccupation with Rachelle's sexual orientation bolsters the conclusion that implicit bias affected the trial court's decision. 100 Wn.2d at 329 (finding that "[w]hile the findings and conclusions of law suggest the homosexuality of the father was not the determining factor the unfortunate and unnecessary references by the trial court to homosexuality generally indicate the contrary."). For example, the witness record, filed by the trial court, describes Ms. Van Hoose as "petitioner's gay partner." CP 34. And the trial court describes Rachelle's coming out as her "proclamation that she was a lesbian." CP 40.<sup>27</sup> The record is replete with evidence that the trial court's subjective assumptions about LGBT parents improperly influenced its decision. Accordingly, the interests of justice require that this Court vacate the Court of Appeals' decision and remand for a new trial.

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<sup>27</sup> Charles echoes that problematic language in his supplemental brief filed with this Court. He refers to Rachelle "sorting out her sexual orientation"—a suggestion that is dismissive of the process of coming out as LGBT—and refers to the "radical change the children were facing"—a suggestion that being LGBT is something extreme. Supp. Br. at 5, 16.

**C. Where there is evidence in the record sufficient to infer that implicit bias affected a residential time decision, reassignment on remand is required.**

Reassignment may be sought on appeal where “the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal.” *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) (citing *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004)). Specifically, courts will remand a case with instructions that it be reassigned to a different judge where (1) the original judge harbors personal bias against a party, (2) “the original judge would reasonably be expected . . . to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous,” (3) “reassignment is advisable to preserve the appearance of justice,” or (4) “reassignment would [not] entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.” *Ellis*, 356 F.3d at 1211 (internal citation omitted). Under certain circumstances, a reviewing court may provide specific instructions to the new judge to ensure that the error that required remand is not repeated. *See, e.g., United States v. Mikaelian*, 168 F.3d 380, 391 (9th Cir. 1999).

The need for reassignment to a different judge is heightened where, as here, there are significant concerns that a trial court’s initial decision was informed by implicit bias. A judge would necessarily have

difficulty putting those biases out of his or her mind because they are, by definition, subconscious. See, e.g., *United States v. Huckins*, 53 F.3d 276, 280 (9th Cir. 1995) (remanding to new judge based upon finding that original judge “would likely have substantial difficulty in putting out of his mind the views and findings which we have held to be erroneous.”); *United States v. Hanna*, 49 F.3d 572, 578 (9th Cir. 1995) (same).

The proceedings on remand following this Court’s decision in *Cabalquinto* illustrate some of the challenges posed by returning the case to the original judge in cases involving implicit or express bias. In *Cabalquinto*, the trial court severely restricted a father’s visitation with his son, without referencing the father’s sexual orientation as a basis for that decision. 100 Wn.2d at 327-28. The trial court had stated that “a child should be led in the way of heterosexual preference, not be tolerant of this thing [homosexuality]’ and that ‘it can[not] do the boy any good to live in such an environment.’” *Id.* at 328. Although the Court of Appeals found that “[o]rdinarily, with the facts as presented heretofore, we would find no manifest abuse of discretion and would affirm the trial court,” the trial court’s comments gave this Court pause. *Id.* Reaffirming that “homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation,” this Court remanded the case to the original judge to determine the basis for his ruling. *Id.* at 329.

Ignoring this Court's holding, the trial court ruled on remand that the son was permitted to visit his father only if his father did not "associate with his homosexual companion" to the extent that his son understood them to be living together or in a relationship. *In re Marriage of Cabalquinto*, 43 Wn. App. 518, 519, 718 P.2d 7 (1986). The Court of Appeals struck that portion of the decree. *Id.* The Court of Appeals reasoned that, whether implied or expressly stated (as on remand), presumed harm to a child from knowledge of a parent's sexual orientation was an improper basis for a visitation decision. After six years of litigation, Mr. Cabalquinto's son was finally permitted to visit his father without restriction.<sup>28</sup>

Although the trial judge in *Cabalquinto* simply reframed his visitation decision to make implicit biases explicit, one can imagine a different scenario where a judge fails to recognize the influence of implicit bias and unknowingly attributes a biased decision to another, ostensibly neutral reason. Where, as in *Cabalquinto*, a reviewing court has serious concerns about the propriety of a trial court's decision, the interests of justice and judicial economy require that the case be reassigned to a different judge on remand.

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<sup>28</sup> Mr. Cabalquinto filed the motion for clarification that was the basis for this appeal in 1980. 100 Wn.2d at 326-27.

## V. CONCLUSION

Amici do not seek to disturb the generally broad discretion afforded to trial courts in fashioning parenting plans. At the same time, when it comes to one of the most precious relationships in our society, the bond between parent and child, implicit bias should not play a role in a residential time decision. For the reasons above, amici respectfully request that this Court vacate the Court of Appeals' decision and remand for a new trial, with reassignment to a different judge.

RESPECTFULLY SUBMITTED this 7th day of October, 2016.

PACIFICA LAW GROUP LLP

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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RACHELLE K. BLACK,  
Appellant,

v.

CHARLES W. BLACK  
Respondent.

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**CERTIFICATE OF SERVICE**

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I, Michelle Bouchard, declare under penalty of perjury under the laws of the State of Washington, that on October 7, 2016, I caused to be served the following documents as indicated below

***Motion for Leave to File Amici Curiae Brief***

***Amici Curiae Brief of the Fred T. Korematsu Center for Law and Equality, the National Center for Lesbian Rights, Professor Julie Shapiro, and the QLaw Association of Washington***

***Certificate of Service***

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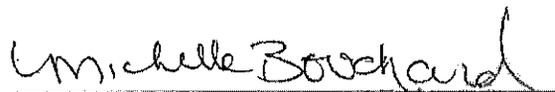
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Dated this 7<sup>th</sup> day of October, 2016 at Seattle, Washington.



Michelle Bouchard

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Dear Clerk of the Court:

On behalf of Alanna Peterson (WSBA No. 46502) and Matthew Segal (WSBA No. 29797), attorneys for the Fred T. Korematsu Center for Law and Equality, the National Center for Lesbian Rights, Professor Julie Shapiro, and the QLaw Association of Washington, attached for filing in this case are the following documents:

- Motion for Leave to File Amici Curiae Brief
- Amici Curiae Brief of the Fred T. Korematsu Center for Law and Equality, the National Center for Lesbian Rights, Professor Julie Shapiro, and the QLaw Association of Washington
- Certificate of Service

Thank you,

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