No. 92994-7

NO. 46788-7-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

In re the Marriage of:

RACHELLE K. BLACK

Appellant,

and

CHARLES W. BLACK

Respondent.

BRIEF OF AMICUS CURIAE
NATIONAL CENTER FOR LESBIAN RIGHTS,
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
AND PROF. JULIE SHAPIRO

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF *AMICI* 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 1

A. COURTS MAY NOT BASE CUSTODY DECISIONS ON A PARENT'S SEXUAL ORIENTATION OR INVOLVEMENT IN A SAME-SEX RELATIONSHIP BECAUSE THOSE FACTORS ARE UNRELATED TO THE BEST INTERESTS OF THE CHILDREN. 2

1. Washington and the Vast Majority of Other States Explicitly Prohibit Consideration of a Parent's Sexual Orientation in Custody and Visitation Decisions. 2

2. The Trial Court Impermissibly Based Its Decision on Rachelle's Sexual Orientation. 9

B. RESTRICTING A PARENT'S ABILITY TO DISCUSS HER SEXUAL ORIENTATION AND RELIGION WITH HER CHILDREN, AND PREVENTING A SAME-SEX PARTNER FROM HAVING CONTACT WITH THE CHILDREN, VIOLATES THE PARENT'S FUNDAMENTAL RIGHT TO DIRECT THE UPBRINGING OF THEIR CHILDREN AND IS PROHIBITED BY WASHINGTON'S AND OTHER STATES' LAWS. 14

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207 (1980) 4

Blew v. Verta, 420 Pa. Super. 528, 617 A.2d 31 (1992) 8, 16, 17

Boswell v. Boswell, 352 Md. 204, 721 A.2d 662 (1998) 4

Conkel v. Conkel, 31 Ohio App. 3d 169, 509 N.E.2d 983 (1987) 8, 17

Damron v. Damron, 2003 ND 166, 670 N.W.2d 871 (2003) 5

Fatemi v. Fatemi, 339 Pa. Super. 590, 489 A.2d 798 (1985) 18

Fox v. Fox, 1995 OK 87, 904 P.2d 66 (1995) 6

Guinan v. Guinan, 102 A.D.2d 963, 477 N.Y.S.2d 830 (1984) 5

Hassenstab v. Hassenstab, 6 Neb. 13, 570 N.W.2d 368 (1997) 4

Hicks v. Hicks, 2005 Pa. Super. 58, 868 A.2d 1245 (2005) 16, 17

In re Marriage of Birdsall, 197 Cal. App. 3d 1024, 243 Cal. Rptr. 287 (1988) 7

In re Marriage of Cabalquinto, 100 Wn.2d 325, 669 P.2d 886 (1983) 2, 3, 13

In re Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644 (2014) 15, 16

In re Marriage of Collins, 183 Or. App. 354, 51 P.3d 691 (2002) 5

In re Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997) 13

In re Marriage of R.S., 286 Ill. App. 3d 1046, 677 N.E.2d 1297 (1996) 4

In re Marriage of Wicklund, 84 Wn. App. 763, 932 P.2d 652 (1996) 3, 7, 17

In the Marriage of Dorworth, 2001 DCJAR 4428, 33 P.3d 1260 (Colo. App. 2001) 7

Inscoe v. Inscoe, 121 Ohio App. 3d 396, 700 N.E.2d 70 (1997) 8

Jacoby v. Jacoby, 763 So. 2d 410 (Fla. Dist. Ct. App. 2000) 6, 8

M.P. v. S.P., 169 N.J. Super. 425, 404 A.2d 1256 (1979) 9, 16, 17

M.S.P. v. P.E.P., 178 W. Va. 183, 358 S.E.2d 442 (1987) 5

Maxwell v. Maxwell, 382 S.W.3d 892 (Ky. Ct. App. 2012) 5, 6

McGriff v. McGriff, 140 Idaho 642, 99 P.3d 111 (2004) 4

Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) 15

Mongerson v. Mongerson, 285 Ga. 554, 678 S.E.2d 891 (2009) 3

Munoz v. Munoz, 79 Wn.2d 810, 489 P.2d 1133 (1971) 6

N.M. ex rel. Human Servs. Dep't (Matter of Jacinta M.), 107 N.M. 769, 764 P.2d 1327 (1988) 4

Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) 7, 8, 13

Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2013), *cert. denied* 134 S. Ct. 2871 (2014) 12

S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985) 3

Stroman v. Williams, 291 S.C. 376, 353 S.E.2d 704 (1987) 6

Taylor v. Taylor, 353 Ark. 69, 110 S.W.3d 731 (2003) 3

Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) 14, 15

Van Driel v. Van Driel, 525 N.W.2d 37 (S.D. 1994) 5

Statutes

RCW 26.09.002 16

RCW 26.09.187(3)(a) 3

RCW 26.09.187(3)(a)(i) 10

RCW 26.09.187(3)(iii) 3, 10

RCW 26.09.187(3)(iv) 3

RCW 26.09.191(3) 16

Other Authorities

GLAAD, *GLAAD Media Reference Guide – Terms to Avoid*, www.glaad.org/reference/offensive 12

Polikoff, Nancy D., *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in*

Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 461 (1990) 16

I. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici* are set forth in the Motion for Leave to File *Brief of Amici Curiae*, filed herewith.

II. STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case.

III. ARGUMENT

The trial court severely restricted the parenting time of a stay-at-home mother based on impermissible grounds related to her sexual orientation. Despite finding that Appellant Rachelle Black was the children's primary caregiver from the time of their birth and that over the last two years she has been home with the children at least 80% of the time, the court restricted her parenting time to four days every two weeks, reasoning that because the children had been raised religiously, it would be difficult for them to accept their mother's sexual orientation. Opening Br. 7, 11-13; CP 40-41. The court also unconstitutionally restricted Rachelle's ability to parent her children by prohibiting her from discussing "homosexuality" or religion with her children, and by barring the children from any contact with Rachelle's same-sex partner without prior approval of a court-designated counselor despite a lack of any evidence that contact with her partner is harmful to the children. Opening Br. 12.

Amici support Appellant's argument that the trial court's decision to severely limit Rachelle's parenting time was contrary to Washington law. *Amici* submit this brief to explain that the trial court's reasoning and decision are also contrary to the laws of the vast majority of other states, which have explicitly prohibited courts from basing custody decisions on societal or religious concerns about how children will react to a parent coming out as gay or lesbian. Additionally, *amici* explain that custody restrictions that prohibit a parent from discussing her sexual orientation or religion, and that prohibit a parent's significant other from having contact with the children without any evidence of harm, violate a parent's fundamental right to direct the care and custody of their children, and are prohibited by Washington's and other states' laws.

A. COURTS MAY NOT BASE CUSTODY DECISIONS ON A PARENT'S SEXUAL ORIENTATION OR INVOLVEMENT IN A SAME-SEX RELATIONSHIP BECAUSE THOSE FACTORS ARE UNRELATED TO THE BEST INTERESTS OF THE CHILDREN.

1. Washington and the Vast Majority of Other States Explicitly Prohibit Consideration of a Parent's Sexual Orientation in Custody and Visitation Decisions.

It is well-established under Washington law that "homosexuality . . . is not a bar to custody or to reasonable rights of visitation." *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). A Washington "trial court . . . may not restrict residential time because of the parent's sexual orientation." *In re Marriage of Wicklund*, 84 Wn. App.

763, 772, 932 P.2d 652 (1996). Nor may "custody and visitation privileges . . . be used to penalize or reward parents for their conduct." *Cabalquinto*, 100 Wn.2d at 329. Instead, "[i]n fashioning a Parenting Plan, the trial court determines the residential arrangement that will serve the best interests of the child." The factors relevant to the best interests of the child in making residential provisions each child are determined by statute, with "the *greatest* weight" being given to "[t]he relative strength, nature, and stability of the child's relationship with each parent." RCW 26.09.187(3)(a), (a)(i) (emphasis added). Other relevant factors include "[e]ach parent's past and potential for future performance of parenting functions . . . including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child," and "the emotional needs and developmental level of the child." RCW 26.09.187(3)(iii), (iv).

Nearly every other state has similarly held that a parent's sexual orientation or the fact that a parent is in a same-sex relationship cannot be considered in custody cases unless there is evidence that the parent's conduct is directly harmful to the child. *See, e.g.*, *S.N.E. v. R.L.B.*, 699 P.2d 875, 877 (Alaska 1985) ("Mother is a lesbian, [but] there is no suggestion that this has or is likely to affect the child adversely."); *Taylor v. Taylor*, 353 Ark. 69, 83, 110 S.W.3d 731 (2003) ("We further disagree that a decision can be based on perceptions and appearances rather than concrete proof of likely harm."); *Mongerson v. Mongerson*, 285 Ga. 554, 556, 678 S.E.2d 891 (2009) ("arbitrary classification based on sexual

orientation flies in the face of our public policy"); *McGriff v. McGriff*, 140 Idaho 642, 648, 99 P.3d 111 (2004) ("[o]nly when there is a nexus between harm to the child and a parent's homosexuality, can that parent's sexual orientation be a factor in determining custody"); *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1055, 677 N.E.2d 1297 (1996) ("Illinois' approach to child custody determinations is sexual orientation neutral."); *Teegarden v. Teegarden*, 642 N.E.2d 1007, 1009 (Ind. Ct. App. 1994) ("homosexuality standing alone . . . does not render the homosexual parent unfit . . . to have custody"); *Boswell v. Boswell*, 352 Md. 204, 237, 721 A.2d 662 (1998) ("The only relevance that a parent's sexual conduct or lifestyle has in . . . visitation . . . is where that conduct or lifestyle is clearly shown to be detrimental to the children's emotional and/or physical wellbeing."); *Bezio v. Patenaude*, 381 Mass. 563, 579, 410 N.E.2d 1207 (1980) ("In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record."); *Hassenstab v. Hassenstab*, 6 Neb. 13, 18, 570 N.W.2d 368 (1997) ("a parent's sexual activity is insufficient . . . to justify[] a change in custody absent a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity"); *N.M. ex rel. Human Servs. Dep't* (*Matter of Jacinta M.*), 107 N.M. 769, 771, 764 P.2d 1327 (1988) ("Disapproval of morals or other personal characteristics cannot be used to determine the fitness of a person to care for a child."); *Guinan v.*

Guinan, 102 A.D.2d 963, 963, 477 N.Y.S.2d 830 (1984) ("whether [the mother] had engaged in sexual relationships with other women is not determinative of this custody dispute"); *Damron v. Damron*, 2003 ND 166, ¶ 12, 670 N.W.2d 871 (2003) ("a custodial parent's homosexual household is not grounds for modifying custody"); *In re Marriage of Collins*, 183 Or. App. 354, 358-59, 51 P.3d 691 (2002) ("The fact that mother's companion was of the same sex may have been significant to father . . . [b]ut it is not and cannot be significant to this court."); *Van Driel v. Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994) (rejecting argument that mother's "cohabitation with a woman in a lesbian relationship was *per se* not in the best interests of the children"); *M.S.P. v. P.E.P.*, 178 W. Va. 183, 186, 358 S.E.2d 442 (1987) ("Adverse effects upon the children must be demonstrated before a divorcing parent's subsequent associations, standing alone, can be the basis for finding a parent who is the primary caretaker, unfit").

The mere fact that a parent is in a same-sex relationship does not have a negative impact on her children and cannot justify a restriction of custody. For example, in *Maxwell v. Maxwell*, 382 S.W.3d 892 (Ky. Ct. App. 2012), the Kentucky Court of Appeals reversed as "clearly erroneous" the trial court's order awarding the father sole custody where the court noted, regarding the mother's same-sex relationship, "[l]ike it or not, [the mother's same-sex relationship] will impact her children in ways that she may not have fully considered and most will be unfavorable." *Id.* at 897. The Court of Appeals noted, "no factual findings were provided

that supported [the mother]'s actions as harmful to the children" and harm "now or in the future. . . . cannot be assumed." *Id.* at 899. As the District Court of Appeal of Florida in *Jacoby v. Jacoby,* 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000), explained: The court is prohibited from "assum[ing]" that a parent's same-sex relationship will have a negative impact on the children, and instead must demonstrate "an evidentiary basis" for concluding that there is a negative impact on the children stemming directly from the parent's conduct. *Id.* "'[T]he mere possibility of negative impact on the child is not enough.'" *Id.*

Custody also cannot be restricted because the children have been raised in a religion that disapproves of same-sex relationships. *Cf. Munoz v. Munoz*, 79 Wn.2d 810, 812-13, 489 P.2d 1133 (1971) ("American courts are forbidden from interfering with religious freedoms or to take steps preferring one religion over another."). As the Oklahoma Supreme Court explained, allegations that a parent's same-sex relationship "is contrary to the children's moral and religious values and to their psychological and emotional stability" are not a sufficient basis upon which to curtail a parent's custodial time. *Fox v. Fox*, 1995 OK 87, 904 P.2d 66, 68 (1995); *see also Stroman v. Williams*, 291 S.C. 376, 379, 353 S.E.2d 704 (1987) ("Although the father claims the younger daughter has been substantially affected by the mother's lesbian relationship . . . he points to no evidence that supports his claim.").

Similarly, generalized concerns that a child may be unable to adjust to a parent's same-sex relationship are insufficient to curtail a

parent's visitation or custody. *Wicklund*, 84 Wn. App. at 770-72 ("Problems with adjustment are the normal response to the breakup of a family."); *see also In re Marriage of Birdsall*, 197 Cal. App. 3d 1024, 1030, 243 Cal. Rptr. 287 (1988) (court's belief that child's "exposure to 'completely opposite lifestyles,' i.e, his father's homosexuality and his mother's religion, 'could impair the child's emotional development'" "is insufficient"); *In the Marriage of Dorworth*, 2001 DCJAR 4428, 33 P.3d 1260, 1261 (Colo. App. 2001) (mother's "concern[] that the child would be confused because she had been reared in a conservative religious environment and perceived a family as being comprised only of a mother, father, and child" insufficient to support restrictions on father's custody). A court errs when it restricts a parent's time with a child on the grounds that such limitations are "necessary in order to protect the children from the conflict between homosexuality and their religion." *Wicklund*, 84 Wn. App. at 771.

Nor are fears that the children will suffer societal stigma as a result of living with a parent in a same-sex relationship a legitimate basis for limiting the parenting time of a fit parent. As the U.S. Supreme Court has directed, "private biases and the possible injury they might inflict" are not permissible factors in making a custody determination. *Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984). Courts across the country have applied *Palmore's* edict that "[t]he Constitution cannot control such prejudices but neither can it tolerate them" to bar consideration of community prejudice against lesbian and gay parents. *Id.*

For example, the Ohio Court of Appeals explained, in considering whether a parent's sexual orientation has a direct negative impact on a child, "[c]ourts may not consider adverse impact on a child that flows from the unpopularity of gays and lesbians in our society." *Inscoe v. Inscoe*, 121 Ohio App. 3d 396, 415, 700 N.E.2d 70 (1997) (discussing *Conkel v. Conkel*, 31 Ohio App. 3d 169, 173, 509 N.E.2d 983 (1987). The Florida District Court of Appeal also recognized, "*even if* the [trial] court's comments about the community's beliefs and possible reactions were correct *and supported by evidence in this record*, the law cannot give effect to private biases." *Jacoby*, 763 So.2d at 413 (citing *Palmore*, 466 U.S. at 433) (emphasis added). Rather than concerning itself with possible religious or community disapproval of Rachelle's sexual orientation, the duty of the trial court was "to facilitate and guard a fundamental parent-child relationship" between the children and both their parents. *Conkel*, 31 Ohio App. 3d at 173 (discussing *Palmore*, 466 U.S. 429).

Indeed, even if evidence in the record reflected that a child is "embarrassed, confused and angry over other people's reactions to his mother and [her girlfriend's] relationship. . . . the merits of a custody arrangement ought not to depend on other people's reactions." *Blew v. Verta*, 420 Pa. Super. 528, 536, 617 A.2d 31 (1992). No matter how surprising to the children it might be, "one of life's realities is that one of [their] parents is a homosexual. . . . [L]imiting [their] relationship with that parent fails to permit [them] to confront [their] life situation." *Id.* at 537. "It is just as reasonable to expect that they will emerge" from this

transition "better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice." *M.P. v. S.P.*, 169 N.J. Super. 425, 438, 404 A.2d 1256 (1979). Denying Rachelle primary residential custody of her children "can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead." *Id.*

2. The Trial Court Impermissibly Based Its Decision on Rachelle's Sexual Orientation.

In determining what custody arrangement was in the best interests of the children, the trial court disregarded the statutory best interests factors and instead impermissibly based its decision on Rachelle's sexual orientation. The trial court's reasoning that the children would have difficulty accepting their mother's sexual orientation and needed to be in the custody of their father, the restrictions the court placed on Rachelle's ability to discuss her sexual orientation with the children or introduce them to her same-sex partner, and its reliance on the apparently biased recommendations of the Guardian Ad Litem (GAL) demonstrate that bias based on sexual orientation influenced the decision.

First, although no evidence had been introduced about the actual religious beliefs of the children, *see* Opening Br. 20-21; Reply Br. 7-8, the

trial court assumed that "it will be very challenging for [the children] to reconcile their religious upbringing with the changes occurring within their family over issues involving . . . homosexuality," and that the children should be placed with Charles, "who is clearly the more stable parent in term of the ability to provide for the needs of these children . . . in maintaining their religious upbringing." CP 40-41. The trial court's conclusion that Rachelle, who had been "a traditional stay-at-home mother for the majority of this 21 year marriage," should have minimal residential time lacks any tenable evidentiary basis. CP 41. Statutorily, *the most important* factor that should have guided the trial court in devising the residential schedule was the court's finding that Rachelle has a "strong and stable relationship with the children." *Id; see* RCW 26.09.187(3)(a)(i). The trial court acknowledged Rachelle's "past . . . performance" as a stay-at-home mother and her "good potential for future performance of parenting functions," CP 41; *see* RCW 26.09.187(3)(a)(iii), yet designated Charles as the primary residential parent, and approved the Parenting Plan Charles proposed. CP 41, 46, 40.

The trial court's failure to fairly and equally consider the time each parent has spent caring for the children further demonstrates that the decision was based on Rachelle's sexual orientation, rather than on the statutory best interest factors. The trial court relied on a calculation that "[Rachelle] was away approximately 20% of the time" after the parties' marriage broke down to find that "[Charles] has taken on greater parental responsibility due to the absences of [Rachelle] from the residence." CP

41. The parties focus much of their briefing on the accuracy of the court's calculation. However, regardless of what the "correct" calculation would show, the trial court's sole focus on a slight reduction in Rachelle's presence in the home and the corresponding absence of any similar inquiry into Charles' presence in the home gives the appearance that Rachelle was being held to a different standard. It is impossible to conclude that both parents were being fairly and equally assessed as residential parents when Rachelle's presence in the home at least 80% of the time was considered inferior to Charles's presence in the home for much less time given that he works full-time. In the two prior years, Charles may have taken on greater parental responsibility than he did before, when Rachelle was around approximately 100% of the time, but there is no evidence that at any time he bore greater parental responsibilities than Rachelle.

Additionally, as discussed in Section II, the trial court adopted a Parenting Plan that prohibited Rachelle from talking to her children about her sexual orientation or discussing religion, including her view that her religion does accept gay and lesbian people, and from having her children meet her same-sex partner unless approved by a court-appointed therapist despite the lack of any evidence or allegation that Rachelle's partner is engaging in behavior that is harmful to the children. CP 41, 49. There can be no reason for these restrictions other than an assumption that there is something wrong with a parent being gay or lesbian and that it is in the best interests of children to attempt to conceal a gay or lesbian parent's sexual orientation.

Finally, the court appeared to rely on the GAL's biased recommendations. The language the GAL used to describe Rachelle's sexual orientation and same-sex relationship—"alternative lifestyle," "homosexual lifestyle," "lifestyle choice," and "gender preference"—reveals a bias against Rachelle based on her sexual orientation.[1] *See* Reply Br. 10. These terms demonstrate a view that lesbian and gay people have "chosen" to live an "alternative" and less acceptable "lifestyle," rather than recognizing that sexual orientation is a core part of a person's identity. *See* GLAAD, *GLAAD Media Reference Guide – Terms to Avoid*, www.glaad.org/reference/offensive, last visited Apr. 22, 2015 ("The term 'sexual preference' is typically used to suggest that being lesbian, gay or bisexual is a choice and therefore can and should be 'cured.'" "The phrase 'gay lifestyle' is used to denigrate lesbians, gay men, and bisexuals suggesting that their orientation is a choice and therefore can and should be 'cured.'"). Indeed, the mental health and psychological community has universally recognized that it is not possible to change a person's sexual orientation and that attempts to do so are extremely psychologically harmful. *See Pickup v. Brown*, 740 F.3d 1208, 1223-24 (9th Cir. 2013), *cert. denied* 134 S. Ct. 2871 (2014) (discussing the "prevailing opinion of the medical and psychological community that [sexual orientation change efforts] ha[ve] not been shown to be effective and that it creates a potential risk of serious harm").

---

[1] Similar terminology is also used in the court's Parenting Plan. CP 49.

The GAL was also critical of Rachelle for acknowledging her sexual orientation, implying that Rachelle should have chosen to deny her sexual orientation and remain married to Charles for the sake of her children: "What I'm saying is the choice to leave the marriage when you have three children and then establish a relationship with a same sex partner when you've had kids raised in a very parochial environment can be very controversial and people can be very mean." Resp't Br. 27.[2] The GAL's comments indicate her recommendations were based on concern about third parties' potential reactions to Rachelle's sexual orientation, but *Palmore* makes clear such bases are impermissible. *See Palmore,* 466 U.S. at 433.

The GAL's other statements further demonstrate bias. For example, she described Rachelle's innocuous, common, and healthy behaviors, such as playing in or attending basketball games, as negative behaviors. Resp't Br. 5. The GAL's criticisms of Rachelle's behavior over 20 years ago when Rachelle was a teenager, which predated not only the births of her children, but also her long-time marriage, have no bearing on the custody determination. Opening Br. 8-9.

---

[2] This reasoning also directly contradicts the well-established rule that "custody and visitation privileges are not to be used to penalize . . . parents for their conduct." *Cabalquinto*, 100 Wn.2d at 329. Holding a parent's decision to seek a divorce against them in a custody determination would undermine Washington's policy of no-fault divorce. *See In re Marriage of Littlefield*, 133 Wn.2d 39, 50, 940 P.2d 1362 (1997) ("when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted") (internal quotation omitted).

Because the trial court's decision was based on bias against gay and lesbian parents and unsupported by evidence of any legitimate ground for designating Charles as the primary custodian, the custody determination should be reversed.

B. RESTRICTING A PARENT'S ABILITY TO DISCUSS HER SEXUAL ORIENTATION AND RELIGION WITH HER CHILDREN, AND PREVENTING A SAME-SEX PARTNER FROM HAVING CONTACT WITH THE CHILDREN, VIOLATES THE PARENT'S FUNDAMENTAL RIGHT TO DIRECT THE UPBRINGING OF THEIR CHILDREN AND IS PROHIBITED BY WASHINGTON'S AND OTHER STATES' LAWS.

The trial court also imposed extensive, unconstitutional restrictions on Rachelle's parenting rights. These restrictions, as well as the court's order that Rachelle's children not have contact with her partner absent prior approval of the children's therapist, and giving the therapist ongoing oversight power to determine when and how such contact should occur, CP 49, violate Rachelle's fundamental constitutional right to direct her children's upbringing.[3] *See Troxel v. Granville*, 530 U.S. 57, 68, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Likewise, the restrictions on Rachelle's ability to communicate openly and honestly with her children, and to "expos[e] the children to literature or electronic media . . . movies

---

[3] As discussed at length in Appellant's briefing, the court's prohibition on her having "conversations with [her] children regarding religion, homosexuality, or other alternative lifestyles," CP 49, violates her First Amendment rights to free speech and to free exercise of religion. *See* Opening Br. 16-26; Reply Br. 15-19.

or events . . . symbolic clothing or jewelry," CP 49, violates her constitutional "right . . . to instruct [her] children" as she sees fit. *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

The Supreme Court has explained that the Due Process Clause protects a fit parent's "fundamental right to make decisions concerning the rearing" of her children, such as who may have contact with them. *Troxel*, 530 U.S. at 68. "[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69. It is for this reason that before imposing Parenting Plan restrictions, a Washington court must find that they are "necessary to 'protect the child from physical, mental, or emotional harm.'" *In re Marriage of Chandola*, 180 Wn.2d 632, 648, 327 P.3d 644 (2014). In the absence of any evidence that contact with Rachelle's partner would harm the children, "the decision whether such [a] . . . relationship would be beneficial in any specific case is for the parent to make in the first instance." *Troxel*, 530 U.S at 70.

Restraints on constitutionally-protected parental decision making cannot be lightly imposed and cannot be imposed on the basis of sexual orientation. Not only do the court's restrictions fail to protect the children from any actual, present harm, they *inflict* harm upon the constitutionally-protected parent-child relationship. "It is . . . important that . . . the [parent] and the children be permitted to work through the conflict in

developing their post-divorce relationships. Restrictions on this process may themselves generate stress from the artificial or incomplete nature of the parent-child exchange." *Hicks v. Hicks*, 2005 Pa. Super. 58, 868 A.2d 1245, 1250 (2005). Courts should not "perpetuate the fiction of family homogeneity at the expense of children whose reality does not fit this form." *Blew*, 420 Pa. Super. at 537 (quoting Polikoff, Nancy D., *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L.J. 461, 469 (1990)); see also *M.P.*, 169 N.J. Super. at 439 ("[C]hildren's best interests will be disserved by undermining . . . their growth as mature and principled adults.").

Indeed, as explained more fully in Appellant's Opening Brief (at pages 19-21), recognizing these constitutional limitations, Washington statute specifically requires that any restrictions on parental conduct be based on a "particularized finding of harm." RCW 26.09.191(3); *see also Chandola*, 180 Wn.2d at 652 ("restrictions . . . apply only where necessary 'to protect the child from physical, mental, or emotional harm'") (quoting RCW 26.09.002). The court made no findings of harm, but nevertheless imposed restrictions based on its belief that the children might find it "challenging . . . to reconcile their religious upbringing with the changes occurring within the family over issues of divorce involving marriage and dissolution as well as homosexuality." CP 40-41. Washington courts similarly prohibit restrictions on lesbian and gay parents regarding the introduction of their new partners to their children. *See Wicklund*, 84 Wn.

App. at 765 (vacating a restriction on gay father's exhibiting affection for his same-sex partner in the presence of his children). "[R]estrictions on a parent's conduct designed to artificially ameliorate changes in a child's life are not permissible." *Id.* "[W]here the only harm [to the child] is adjustment, the remedy is counseling, not restrictions on the parents' lifestyle." *Id.* The constitutional infirmity of restrictions such as those imposed by the court below has also been recognized by other states. *See, e.g.*, *Conkel*, 31 Ohio App. 3d at 171 ("The bond between parent and child has been accorded constitutional protection."); *Hicks*, 868 A.2d at 1252 n.1 ("the parent has the right to raise their child as he or she sees fit, which includes the practice of religion").

Rather than serving the best interests of the children, the restrictions imposed upon Rachelle by the trial court, if allowed to go into effect, are more likely to prevent the children from coming to terms with their mother's sexual orientation and from developing strategies to adapt to that new reality. "[T]here is little to gain by creating an artificial world where the children may dream that life is different than it is." *M.P.*, 169 N.J. Super. at 436. The court could should have served the children's "best interest . . . by exposing [them] to reality and not fostering in [them] shame" for their mother. *Blew*, 420 Pa. Super. at 538. As the Pennsylvania Superior Court explained:

> Courts ought not to impose restrictions which unnecessarily shield children from the true nature of their parents unless it can be shown that some detrimental impact will flow from

> the specific behavior of the parent. The process of children's maturation requires that they view and evaluate their parents in the bright light of reality. Children who learn their parents' weaknesses and strengths may be able better to shape lifelong relationships with them.

Fatemi v. Fatemi, 339 Pa. Super. 590, 596, 489 A.2d 798 (1985).

The restrictions prohibit Rachelle from speaking openly and honestly with her children about her sexual orientation. Even if the children initiate the conversation, she cannot respond to their questions. Instead of honestly engaging with her sons, Rachelle must request permission from a court-designated psychologist about how to respond to each and every inquiry or comment they might raise. These restrictions limit Rachelle's ability to parent her children and infringe on her fundamental right to determine how she raises and cares for them.

IV. CONCLUSION

For the foregoing reasons, *Amici* agree with Appellant that the trial court's order granting Charles primary residential custody of the children and imposing restrictions on Rachelle's communication with the children and time spent with them in the presence of her same-sex partner must be reversed.

SUBMITTED this 1st day of May, 2015.

Raegen N. Rasnic
WSBA No. 25480
SKELLENGER BENDER, P.S.
Attorneys for *amici*
National Center for Lesbian Rights
Fred T. Korematsu Center for Law and Equality
Prof. Julie Shapiro

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 1, 2015, I arranged for service of the foregoing Amicus Curie Brief to the court and to the parties to this action as follows:

COUNSEL FOR RESPONDENT
CHARLES W. BLACK

Kenneth W. Masters Shelby R. Frost Lemmel 241 Madison Avenue North Bainbridge Island, WA 98110 (206) 780-5033 Email: ken@appeal-law.com; shelby@appeal-law.com	_X_ Via U.S. Mail ___ Via Messenger ___ Via Facsimile _X_ Via Email
Steven Levy PO Box 1247 Graham, WA 98338 (253) 670-4119 Email: stevenlevyattorney@gmail.com	_X__ Via U.S. Mail ___ Via Messenger ___ Via Facsimile _X_ Via Email

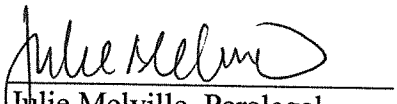
COUNSEL FOR APPEALANT
RACHELLE BLACK

Amanda Beane Kelly Moser Julie Wilson-McNerny PERKINS COIE LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101 (206) 359-8000 Email: abeane@perkinscoie.com; jwilsonmcnerny@perkinscoie.com; kmoser@perkinscoie.com	_X__ Via U.S. Mail ___ Via Messenger ___ Via Facsimile _X_ Via Email

David Ward
Legal Voice
907 Pine Street
Seattle, WA 98101
(206) 682-9552
Email: dward@legalvoice.org

_X_ Via U.S. Mail
___ Via Messenger
___ Via Facsimile
_X_ Via Email

DATED at Seattle, WA, this 1st day of May, 2015.

By: 

Julie Melville, Paralegal
Skellenger Bender, P.S.
1301 5th Ave, Suite 3401
Seattle, WA 98101
(206) 623-6501

KL GATES LLP

May 01, 2015 - 2:04 PM

Transmittal Letter

Document Uploaded: 3-467887-Amicus Brief~2.pdf

Case Name: Black v. Black
Court of Appeals Case Number: 46788-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Amicus__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Angela P Oconnor - Email: angela.oconnor@klgates.com

A copy of this document has been emailed to the following addresses:

laura.clinton@klgates.com
alanna.peterson@klgates.com
kendra.nickel-nguy@klgates.com