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No. 92994-7

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

Rachelle K. Black

Appellant,

v.

Charles W. Black

Respondent.

ANSWER TO BRIEF OF *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

MASTERS LAW GROUP, P.L.L.C.
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033
Attorney for Respondent

 ORIGINAL

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INTRODUCTION

As has been a consistent theme, Amici shift tactics, asserting for the first time that the trial court's decision is the result of "implicit bias." As they have throughout their many briefs filed in this matter, Amici attempt to support their arguments with single phrases removed from the context of the trial court's thoughtful and thorough decision. They then ignore the appellate court's holding rejecting Rachele's allegations of bias, accusing the appellate court of ignoring implicit bias, while omitting that the issue was not raised on appeal. As a result, Chuck Black is again left addressing a bevy of assertions and arguments that have little to do with the case before the Court.

Amici ask this Court to examine a trial judge's unconscious cognitive function on a cold record. Even assuming the Court could do so to any reasonable degree of assurance, there is no basis for such an undertaking here. The trial court's decision closely follows the controlling statute. It is based on considerable testimony from the children's therapist and the GAL appointed to look after their best interests. It is properly focused on the children, their needs, and how their needs will best be met.

This Court should affirm.

ANSWER TO *AMICI* ARGUMENTS

A. Background relevant to *Amici's* implicit bias arguments.

Before delving into *Amici's* lengthy discussion of implicit bias, most of which Chuck agrees with, it is important to note the metamorphosis of the bias claims raised against Judge Orlando.¹ Before the appellate court, Rachelle did not raise implicit bias or directly argue judicial bias. Rather, she argued that the trial court was improperly focused on her sexual orientation and improperly relied on the GAL, whom Rachelle accused of bias. BA 28-29, 49. Chuck first raised the law governing judicial bias, noting that appellate courts presume trial courts "are fair and will properly 'discharge[] [their] official duties without bias or prejudice.'" *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 904, 232 P.3d 1095 (2010) (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004)) (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967); *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993)). The party asserting judicial bias "must provide specific facts establishing bias." *In re Davis*, 152

¹ As has been the custom throughout this matter, Chuck Black uses first names to avoid confusion. No disrespect is intended.

Wn.2d at 692. "Judicial rulings alone almost never constitute a valid showing of bias." 152 Wn.2d at 692.

Rachelle failed to directly take up the bias issue in reply, arguing only that an appellate court may remand to a new trial judge without finding bias or prejudice. Reply at 23. Amici also did not directly address implicit bias in the Court of Appeals.

Rachelle's Petition for Review followed suit. Although her Petition alleges "discrimination," Rachelle failed to address the applicable law or the appellate court's holding on judicial bias. Pet. 4-5, 9-12. Her Petition does not address implicit bias or this Court's case law addressing implicit bias. Rachelle directly raised implicit bias for the first time in her Supplemental Brief. Supp. BA 8-9.

Implicit bias is the single subject of the Korematsu amici brief. Amici do not address the Court of Appeals' holding that Rachelle failed to establish bias:

Rachelle and amici give no specific evidence in support of their arguments that the trial court was biased, and we find nothing in the record or the trial court's rulings to support their claims. Amici based their generalized arguments on bald accusations of bias absent any evidence, and rely on a myriad of studies and broad generalizations regarding gay and lesbian parents to support their arguments. Because a judicial ruling alone is not valid evidence of bias, this argument fails.

In re Marriage of Black, No. 467887-7-II at 18-19 (2016).

B. Chuck does not disagree with Amici's general assertions regarding implicit bias. (Amici 2-12).

As this Court explained in *State v. Saintcalle*, implicit bias is the cognitive function by which the human mind processes information with the aid of "schemas, categories, and cognitive shortcuts." 178 Wn.2d 34, 47, 309 P.3d 326 (2013) (quoting Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and The Peremptory Challenge*, 85 B.U. L. Rev. 155 (2005)). These shortcuts can lead to the formation of stereotypes that "affect us even when we are aware of them and reject them." *Id.* at 48. Biased decision-making – "discrimination" – then results from these unconscious stereotypes. *Id.*

As Amici state it, implicit bias can affect decision-making without knowledge, intent, or control. Amici at 4. It is, in other words, discrimination absent the intent to discriminate. *Id.* at 5. Chuck does not disagree with this basic concept.

Chuck also does not disagree with Amici's assertion that appellate courts should "acknowledge and address" implicit bias, *if it is raised*. Amici at 7-8. That said, any suggestion that the appellate courts are somehow unfamiliar with implicit bias would require this

Court to assume that the appellate courts are unfamiliar with this Court's recent binding precedent. **State v. Walker**, 182 Wn.2d 463, 488 n.2, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring); **Saintcalle**, 178 Wn.2d at 47; **State v. Meredith**, 178 Wn.2d 180, 189-90 fn 3, 4, 306 P.3d 942 (2013) (Gonzalez, J., dissenting); **State v. Chacon Arreola**, 176 Wn.2d 284, 296, 290 P.3d 983 (2012).

Citing only two cases, Amici make the unfounded leap that "most appellate courts" ignore implicit bias in the context of addressing residential provisions in parenting plans. Amici 7-8 (citing **Magnuson v. Magnuson**, 141 Wn. App. 347, 170 P.3d 65 (2007); **In re Marriage of Wicklund**, 84 Wn. App. 763, 772, 932 P.2d 652 (1996). Neither **Magnuson** nor **Wicklund** addresses implicit bias by name, and Amici give no indication that the issue was ever raised. These two cases do not suggest that "most appellate courts" are unaware that bias is often not overt, but unconscious (**Saintcalle**, 178 Wn.2d at 46), or suggest an unwillingness to address implicit bias when it is raised.

Amici also accuse the appellate court in this matter of adopting a "post hoc rationale" for Judge Orlando's alleged implicit bias. Amici at 8 (citing **Black**, No. 467887-7-II at 10). Amici's citation is confusing at best, where the appellate court addressed bias at pages 18-19,

holding that Rachelle and Amici put forward only "bald accusations of bias absent any evidence." **Black**, No. 467887-7-II at 18-19. The appellate court did not address implicit bias by name, nor was it asked to. *Id.* In any event, two or three cases failing to address an issue that apparently was not raised do not establish an endemic flaw in appellate court review.

To the extent that the Amici suggest only that appellate courts "should *acknowledge and address* the influence of judicial bias," Chuck agrees that our courts should consider the potential impact of implicit bias when the issue is raised. Amici at 7 (emphasis added). But our courts "are not in the business of inventing unbriefed arguments for parties sua sponte." **Saintcalle**, 178 Wn.2d at 52 (quoting **In re Pers. Restraint of Coats**, 173 Wn.2d 123, 138, 267 P.3d 324 (2011) (quoting **State v. Studd**, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999))).

Amici seem to suggest that appellate courts should apply a more exacting standard of review for implicit bias in family law cases than might be warranted when less discretion is afforded to the trial court. Amici 9-10. All courts, regardless of the subject matter, should recognize that bias may not be as overt as it once was. **Saintcalle**, 178 Wn.2d at 46. But implicit bias is likely dealt with best through

education and training. And many judicial decisions are afforded great deference across all subject matters. This Court should be reticent to adopt a heightened standard of review for particular subject matters.

Amici fail to articulate exactly what they are asking appellate courts to do: examine on a cold record a trial judge's unconscious. That is not only impractical it is likely impossible to any reasonable degree of assurance. In any event, great caution would be required.

Finally, Amici's reliance on *Palmore v. Sidoti* is misplaced. Amici at 10 (citing 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984)). At issue there is not implicit bias, but whether or to what extent a trial court may base a custody decision on one parent's "private biases" regarding the other's choice of a partner. *Palmore*, 466 U.S. at 433. There, a caucasian father petitioned to modify a prior custody order, alleging that the caucasian mother's circumstances had changed because she had married a black man. *Id.* at 430. While the father also alleged that the mother did not properly care for the child, the trial court made no findings with respect to those allegations, finding instead that both parents were devoted to the child, provided a safe home environment and had "respectable[]" new spouses. *Id.* But the court also found that

mother's decision to begin a sexual relationship with her husband prior to marrying him suggested that she placed her own desires above the child's needs and that the child would suffer "social stigmatization" in the future due to her mother's interracial marriage. *Id.* The Court held that the trial court erroneously removed custody from the mother based on the father's "private biases" and the possibility of future harm to the child. *Id.* at 433.

Palmore is inapposite, where the trial court's decision was plainly based on the father's overt bias. ***Palmore*** does not support Amici's implicit bias arguments.

In sum, Chuck does not disagree that appellate courts should be mindful that bias is often unconscious. There can be little doubt that Washington's appellate courts are aware of this issue. But where, as here, implicit bias is not asserted, a court cannot be faulted for resolving claims of bias and prejudice without expressly addressing implicit bias.

C. The evidence before this Court reveals sound legal decision-making and amply-supported fact-finding. (Amici 12-20).

Amici next assert that the record 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.” Amici 12. Again, Amici neglect to address the appellate court decision rejecting this claim. **Black**, No. 467887-7-II at 18-19. Although Chuck has answered these same assertions repeatedly, he again addresses them briefly here.

Amici first raise the limitation on Rachelle’s conversations with the children and their time spent with Rachelle’s partner. Amici at 12-13. Chuck conceded on appeal that this limitation is improper and the appellate court correctly agreed. **Black**, No. 467887-7-II at 8-14. But Amici’s failure to acknowledge the context in which the limitation arose, or its intent, is telling.

The trial court heard considerable testimony from multiple sources that the parties’ children were “shut down.” RP 25, 32-33, 46-48, 57-59, 61, 345, 355. The parties considered divorce to be “an adult concept” and did not discuss it with the kids. RP 164. After the parties told the children that they planned to divorce – the day before the GAL arrived to interview them – the children remained under the impression that the family would continue living together in the same home. RP 358. They did so through the trial. RP 25, 352. The children lacked even a “basic understanding” of what a family looks like after divorce, and their therapist, Jennifer Knight, had to explain

that "sometimes kids live with one parent [and] visit another parent."
RP 357-58.

Similarly, the children had no context for understanding Rachelle's sexual orientation. RP 45, 346-47, 358. Rachelle acknowledged that she herself was "uninformed." RP 115-16. The family did not know any openly gay people, and did not discuss sexuality, including homosexuality. RP 116, 165-66.

Knight felt compelled to temporarily suspended therapy before trial, opining that the kids were "very closed down" and "wouldn't even answer basic questions." RP 345, 355. The children were confused, withdrawn, and afraid to talk about their feelings. RP 25, 46-48, 57-59, 61. They did not know what the next day would look like, or how they fit into the life Rachelle was planning with Van Hoose. RP 48, 58. They were uncomfortable with the information Rachelle was giving them, but were afraid to tell her so. RP 58-59. They were questioning the things they had been taught, and facing "lots of, lots of, lots of changes in a very short time." RP 48. The kids simply lacked the life experience to "come to terms with" what was happening. RP 46.

Knight understood Rachelle's desire to teach the kids about "diversity" and to spend time with them together with Van Hoose. RP

347, 353-54, 361. She viewed this is a process, so that the kids could have time and therapy. RP 361.

Rachelle and Van Hoose seemed to be receptive to Knight's recommendation during therapy that they live separately for a period of time. RP 361. She wanted Rachelle to have time to bond with the children alone, and does not think that it is "ever healthy" to move from the family home into a new partner's home. RP 353-54. Knight and GAL Kelley LeBlanc agreed that the children were not ready for either parent to have a new partner, regardless of gender. RP 33-34, 353-53, 361.

Rachelle testified repeatedly that she and Van Hoose planned to follow Knight's recommendations, taking it "as slow as it needs to go." RP 170-71, 249-51, 261-62. But Knight, LeBlanc and Chuck remained concerned that Rachelle was not internalizing the children's need for time. RP 32-33, 33, 356, 361-62, 385. Thus, LeBlanc recommended a parenting plan provision requiring a therapist to oversee the rapidity at which the children were given new information and spent time with Van Hoose. RP 32-33.

The limitation was never intended to be perpetual. RP 32-34, 39, 46, 76, 360-61. Knight felt that the children were "starting to get more used to the idea" of Rachelle being in a same-gender

relationship. RP 350. Months after trial, Knight okayed Rachelle and the children spending all of their residential time with Van Hoose. BA 20-21.

While Chuck does not defend the limitation as it was constitutionally infirm, the underlying intent was sound: to give the kids time that they had not been given before trial. RP 76. Rachelle had nearly three years to come to understand that she is a lesbian, a period she described as "very rough," "a little bit of a crisis," and a process of questioning the things she thought she believed. RP 410. The evidence before the trial court was that the children also needed time – in a therapeutic setting – to understand and adjust to the changes in their family. RP 32-34, 39, 46, 76, 360-61.

Amici incorrectly suggest that the therapist and GAL recommended the limitation based on an abstract concern that the children have trouble coping with change. Amici at 13. That concern is not an assumption nor speculation. *Id.* Again, there was copious testimony that the children were deeply troubled and incapable of processing or even taking about what was going on. RP 25, 32-33, 46-48, 57-59, 61, 344-45, 350.

Amici incorrectly state that the trial court "presumed" that learning about Rachelle's sexual orientation would "harm" the

children, where the court found that the kids would find it challenging to reconcile their religion with divorce and homosexuality. Amici at 13. The court did not presume "harm," and declined to make any findings about "harm." But there was considerable testimony that the children were in fact finding it "challenging" to reconcile their religious upbringing with the changes in their family. RP 25, 32-33, 46-49, 57-59, 61, 344-45, 350. The children were questioning what they had been taught, did not know what was right, and did not want to feel the fear, confusion and uncertainty they were experiencing RP 48-49, 59. Candidly recognizing the challenges the kids were facing is not evidence a "subjective bias" about sexual orientation, but an accurate and amply supported factual finding about what the kids were actually experiencing.

Amici take issue with the fact that only "the gay parent" was restricted from talking to the kids about religion and homosexuality. Amici at 13-14. The limitation was born from a concern that Rachelle was not internalizing the children's need for time. RP 32-33, 356, 361-62, 385. There was no similar concern for Chuck, who deferred to the therapist. RP 46-47. Nonetheless, the GAL recommended a reciprocal limitation if there was a concern. *Id.*

The Amici highlight a few isolated instances where Chuck "outed" Rachelle or regrettably used hurtful language in moments of anger. Amici at 14. Chuck told a few people what the family was going through, either because it was apparent that something was going on, or because he needed someone to talk to. RP 311-15. Chuck explained his one-time derogatory text message to a favorite cousin, stating that he had a particularly rough day, but did not feel that way about Rachelle. RP 382. Rachelle herself testified that neither she nor Chuck "put down" or "joked about" LGBT people. RP 165-66. Chuck is committed to the children having a loving relationship with their mother – a few comments made in weakness or anger do not prove otherwise.

Amici next claim that "both the trial court and the GAL couch their conclusions in terms of Rachelle's 'stability' alone, apart from their relationship with her children," indicating an assumption that "coming out" is "inherently destabilizing." Amici at 14. That is false. The GAL and therapist each provided considerable testimony that the children very much need stability and that Chuck provided stability for the past three years, and is more capable of providing stability in the future. RP 15, 55, 71, 352-353. There was no discussion about Rachelle's "stability" apart from her ability to

provide a stable environment for the kids. *Id.*; CP 40-41. That is, the entire conversation about stability is in relation to the children's best interests. Amici at 14.

No one doubted Rachelle's relationship with Van Hoose or assumed that it is unstable because they are the same gender. Amici at 15. Knight opined that she "always" has concerns about a parent leaving a marriage for a new relationship, regardless of gender. RP 352-53, 354. The court shared her concern, also stating that it had nothing to do with the gender of Rachelle's partner. CP 41.

As they have throughout this matter, Amici attack the GAL, alleging that she viewed sexual orientation as a choice. Amici at 15. When asked whether she believed that "it's a choice that Ms. Black made to realize that she's lesbian," the GAL unequivocally answered "No." RP 43. This is consistent with the recognition that sexual orientation is an immutable characteristic. Amici at 15.

Amici argue that the trial court was unduly preoccupied with Rachelle's sexual orientation, citing a reference to Van Hoose as Rachelle's "gay partner," and to coming out as a "proclamation" that Rachelle is a lesbian. Amici at 16. Two references plainly do not establish a preoccupation with Rachelle's sexual orientation. Amici ignore that the appellate court expressly rejected this argument,

holding that references to Rachelle's sexual orientation were "in the context of providing the factual context of the Blacks' relationship, and [were] not a basis of any of the trial court's decisions." **Black**, No. 467887-7-II at 19 n.8.

Amici next attack Chuck's supplemental brief, arguing that the statement that Rachelle was "sorting out her sexual orientation" is dismissive of the process of "coming out as LGBT." Amici at 16 n. 27 (citing Supplemental BR at 5). Chuck's briefing amply demonstrates that he has never been dismissive of the difficult process Rachelle went through in coming to understand that she is a lesbian. BR 3-4; Response to Amici (court of appeals) 8-13, 16-19.

In a similar vein, Amici claim that Chuck's statement that the children were facing "radical change" suggests that "being LGBT is something extreme." Amici at 16 n. 27. Again, there is copious evidence the children were facing more change than they had the capacity to deal with. RP 32, 50-51, 55, 71, 352. Referring to that "change" as "radical" in no way indicates a belief that "being LGBT is extreme." Amici at 16 n. 27. This tactic exemplifies Amici's willingness to take words completely out of context to label all opponents biased.

Finally, Rachelle argues that this Court should remand to a new judge. Amici 17-20. Amici again fail to recognize the gravity of their request: appellate court review of a trial judge's unconscious for the purpose of ferreting out bias, which if found would require remand to a different judge who does not harbor the same unconscious bias. There is no sound legal basis for such a request.

In re Marriage of Cabalquinto, in no way supports Amici's request. Amici at 19 (citing 100 Wn.2d 325, 329, 669 P.2d 886 (1983)). There is nothing "implicit" about the bias replete in the *Cabalquinto* trial court's ruling that a child should be "led in the way of heterosexual preference, not to be tolerant of this thing." *Cabalquinto*, 100 Wn.2d at 328. Those statements plainly prefer heterosexuality and refer to homosexuality as a "thing." 100 Wn.2d at 328. If that were not bad enough, the court continued that "it can [not] do the boy any good" to have visitation with his father, who "the trial court had determined . . . to be a kind, loving person, exemplary in every way except that he lived with another male in a homosexual relationship." *Id.*; *In re Marriage of Cabalquinto*, 43 Wn. App. 518, 591, 718 P.2d 7 (1986). *Cabalquinto* is inapposite.

In sum, Judge Orlando's factual findings are well supported by the record, and his legal ruling on parenting closely follows the

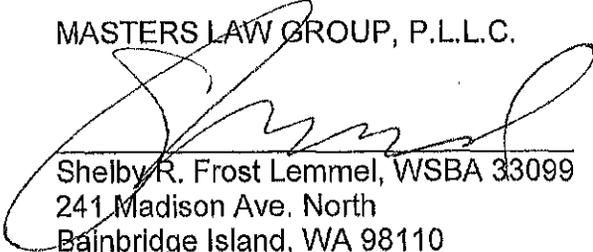
applicable statute. The parenting plan is based on the recent history of parenting, and who is now best capable of parenting the children moving forward. This Court should affirm.

CONCLUSION

This Court should affirm.

RESPECTFULLY SUBMITTED this 3rd day of November, 2016.

MASTERS LAW GROUP, P.L.L.C.



Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

I certify that I caused to be mailed via U.S. mail, postage prepaid, and/or emailed, a copy of the foregoing **ANSWER TO BRIEF OF 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** on the 3RD day of November 2016, to the following counsel of record at the following addresses:

Counsel for Respondent

Steven R. Levy
P.O. Box 1427
Graham, WA 98338
stevenlevyattorney@gmail.com

U.S. Mail
 E-Mail
 Facsimile

Counsel for Appellant

Julie Wilson-McNerney
Amanda Beane, Kelly Moser
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
JWilsonMcNerney@perkinscoie.com
ABeane@perkinscoie.com
KMoser@perkinscoie.com

U.S. Mail
 E-Mail
 Facsimile

David Ward
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101
DWard@LegalVoice.org

U.S. Mail
 E-Mail
 Facsimile

**Amicus Curiae American Civil Liberties
Union Of Washington & Foundation**

Roger A. Leishman
P.O. Box 1763
Seattle, WA 98111
rogerleishman@reachfar.net

U.S. Mail
 E-Mail
 Facsimile

Nancy Talner
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
talner@aclu-wa.org

U.S. Mail
 E-Mail
 Facsimile

Jill Mullins-Cannon
600 Winslow Way E, Suite 232
Bainbridge Island, WA 98110
jill@justiceandequalityls.com

U.S. Mail
 E-Mail
 Facsimile

Lenora Lapidus
Gillian Thomas
Leslie Cooper
ACLU Foundation
125 Broad St.
New York, NY 10004
LLapidus@aclu.org
LCOOPER@aclu.org

U.S. Mail
 E-Mail
 Facsimile

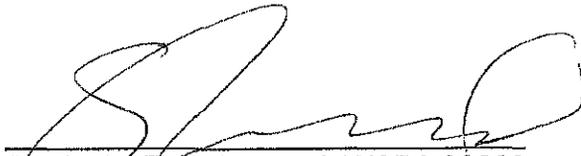
Daniel Mach
Heather L. Weaver
ACLU FOUNDATION
915 15th St. NW
Washington, D.C. 20005
dmach@aclu.org

U.S. Mail
 E-Mail
 Facsimile

Amici National Center for Lesbian Rights
Fred T. Korematsu Center for Law and
Equality Prof. Julie Shapiro

Raegen N. Rasnic
SKELLENGER BENDER, P.S.
1301 5th Ave, Suite 3401
Seattle, WA 98101
RRasnic@skellengerbender.com

U.S. Mail
 E-Mail
 Facsimile



Shelby R. Frost Lemmel, WSBA 33099
Attorney for Respondent

MASTERS LAW GROUP

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- talner@aclu-wa.org
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- gthomas@aclu.org
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- KMoser@perkinscoie.com
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