No. 92994-7

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

RACHELLE K. BLACK,

Appellant,

v.

CHARLES W. BLACK,

Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. IDENTITY AND INTEREST OF *AMICI*

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the preservation of civil liberties. ACLU-WA is an affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan public-interest organization with approximately 500,000 members.

ACLU-WA and ACLU are dedicated to defending our civil liberties as guaranteed by the Washington and U.S. Constitutions and the Nation's and State's civil-rights laws. Through the Women's Rights Project (WRP), the ACLU advocates for women's equality in state and federal courts across the country and has long worked to ensure that our laws do not discriminate against women based gender stereotypes. Through the Program on Freedom of Religion and Belief (PFRB), the ACLU continues its long history of defending the fundamental right to religious liberty. PFRB routinely brings cases designed to protect the right to religious exercise and expression while recognizing the importance of government neutrality on matters of faith. Finally, through the Lesbian, Gay, Bisexual, Transgender, and HIV Project (LGBT Project), the ACLU has been at the helm of litigation across the country that aims to combat discrimination based on sexual orientation and gender identity. The ACLU

has participated in cases too numerous to count around the country on these issues, and ACLU-WA has participated in numerous cases involving these issues, including *Witt v. U.S. Dep't of Air Force*, 739 F. Supp. 2d 1308 (W.D. Wash. 2010); *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 669 P.2d 886 (1983; and *In re Marriage of Wicklund*, 84 Wn. App. 763, 932 P.2d 652 (1996.

II. STATEMENT OF THE CASE

Amici rely on the facts set forth in Appellant Ms. Black's briefs, and the particular facts from the lower court rulings referenced below.

III. ISSUES AND SUMMARY OF ARGUMENT

Trial courts are asked to make difficult decisions in family law cases about how to allocate residential time and decision-making authority between two fit parents while promoting the best interest of the children. But whatever exact allocation is ordered when exercising discretion in making these decisions, state and federal authorities require the court to remain neutral as to gender, religion, and sexual orientation. Here, the lower court rulings failed to do so on all three counts.

Under the guise of concern for financial, religious, and emotional stability, the lower courts granted preferences to the father as to residential time with the children and as to educational decision-making: "Mr. Black is clearly the more stable parent in terms of ability to provide for the needs

of these children, both financially as well as emotionally and in maintaining their religious upbringing." CP 40; *Black v. Black*, Slip Op., No. 46788-7-II at 17 (Wash. Ct. App. Div. II, Mar. 8, 2016).

As this brief explains, the lower court rulings perpetuate gender stereotypes and bias by approving a double standard for "financial stability" that faults the woman for having been a stay-at-home mother and favors the father based on his fulltime employment. The lower court rulings also fail to maintain the religious neutrality required by law. First, the court relied on unfounded assumptions about the mother's sexual orientation (discussed by other *Amicus*), speculating that the children will have difficulty reconciling their religious upbringing with their mother's same-sex relationship. Second, the court allowed the father's maintenance of the children's past religious upbringing to be considered, and given undue weight, in the allocation of residential time and educational decision-making. Instead of protecting the mother's right to diversity of religious beliefs, she was given less residential time and deprived of educational decision-making. The lower courts' failure to adhere to the neutrality required by law as to gender stereotypes and religion necessitates reversal.

IV. ARGUMENT

A. The Lower Courts' Rulings Perpetuate Gender Stereotypes and Bias by Granting Preference to the Father's "Financial Stability" Due to His Fulltime Employment and Weighing the Mother's Stay-at-Home Parenting Against Her

1. State and federal law strongly prohibit reliance upon gender stereotypes.

Washington's laws strongly condemn gender discrimination and the gender stereotypes that contribute to such discrimination. Washington has adopted the Equal Rights Amendment (ERA) in the state Constitution, which mandates that legal rights and responsibilities shall not be denied or abridged on account of sex. Wash. Const. art. 31, § 1. The Washington Law Against Discrimination (WLAD), RCW 49.60.010 et seq., likewise provides robust protections against sex discrimination. As this Court has explained, Washington has a "strong and clear" public policy against sex discrimination; "'[T]he purpose of the [WLAD] is to deter and to eradicate discrimination in Washington' which has been recognized as 'a policy of the highest priority.'" *Roberts v. Dudley*, 140 Wn.2d 58, 66, 993 P.2d 901 (2000) (quoting *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996)).

The federal courts have also consistently rejected government action – whether statutes or court rulings - that discriminate on the basis of sex and perpetuate gender stereotypes. Starting in 1971, in several cases

brought by Ruth Bader Ginsburg – founding director of the ACLU Women's Rights Project – the Supreme Court held that the 14th Amendment's Equal Protection Clause prohibits sex discrimination, including action based on gender stereotypes. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 255 (1971) (statutory preference for men over women to serve as estate administrators violates equal protection); *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) (legal standard that burdens one gender and not the other on the basis of sex stereotypes, when they are otherwise similarly situated, constitutes prohibited sex discrimination under the Constitution, and requirement that female service members prove a spouse's dependency in order to qualify for housing benefits, while assuming male service members had a dependent spouse without having to prove it discriminates on basis of sex); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975) (availability of Social Security benefits for female widows to care for child, but not male widowers violates equal protection.). Twenty years later, as a Justice on the Supreme Court, Justice Ginsburg issued the decision in *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996), holding that the all-male Virginia Military Institute's (VMI) discriminatory admissions policy – based on gender stereotypes – violates equal protection. Ten years

later, in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003), the Court upheld the Family Medical Leave Act, finding that the Act's guarantee of leave to all workers, regardless of their sex, broke down the gender stereotype that caregiving is a woman's responsibility rather than a man's. As Chief Justice Rehnquist wrote for the Court, the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id*. at 729.

Consistent with this precedent and Washington's statutory and constitutional protections, Washington's Parenting Act, Chapter 26.09 RCW, was designed to be gender neutral. To that end, the Washington State Legislature has crafted gender neutral laws around parenting that prohibit favoring one parent over the other based on assumptions about gender roles, focusing instead on specific criteria that define the best interest of the child. For example, in discussing stability generally, RCW 26.09.002 states "[t]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care." The statute further provides that: (1) the court's objective should be to "[m]aintain the child's emotional stability," RCW 26.09.184(1)(b); (2) the court must "make residential provisions for each child that encourage each parent to maintain a loving, stable, and

nurturing relationship with the child . . .” RCW 26.09.187(3)(a); and (3) the court must “consider the relative strength, nature and stability of the child’s relationship with each parent” – the factor to be given the most weight RCW 26.09.187(3)(a)(i).

2. The lower court rulings impermissibly rely on gender stereotypes.

The lower courts violated these principles by allowing differential treatment based on gender to be part of the consideration of “stability” in the parenting plan. While RCW 26.09.184(1)(c) and 26.09.187(a) require consideration of “stability,” the trial court here held the mother and father to different standards and burdens instead of making its decision without regard to gender. The court, for instance, penalized Ms. Black for supposedly “having done nothing to prepare herself for life as a single parent since 2011 other than to claim that her current girlfriend will provide for her.” CP 41. The court also favored the father’s fulltime employment as evidence of “stability” but failed to value Ms. Black’s plan to minimize the disruption to her children by continuing to be a stay-at-home parent with the support of her partner of two and half years. CP 41. Similarly, the court speculated that Ms. Black’s part-time or future employment would interfere with her ability to parent, while favoring the father’s existing full-time employment as evidence of “financial stability.”

CP 41 (“Her search for employment or participation in an educational program would impact her ability to be a full-time parent.”).

Finally, another double standard implicating sex discrimination was the trial court’s undervaluing of Ms. Black’s role as a stay-at-home parent for almost the entirety of the children’s lives. As the trial court acknowledged, during the lengthy time period from the children’s infancy up to when the divorce process began, she performed most of the parenting duties: “Ms. Black performed the bulk of the parenting functions up until December 2011 at which time Mr. Black assumed many of her responsibilities when she was away from the home.” CP 40. She continued in that role even after the divorce process began; the trial court found she was only away from home 20% of the time in that period (although Ms. Black disputes the percentage was that high). CP 40. Ms. Black’s past and ongoing involvement in the children’s lives, both at home and school, should have weighed heavily in her favor, given the time she spent nurturing and building bonds with the children. But instead the trial court gave undue weight to the fact that, after Ms. Black said she might be a lesbian and the divorce process began, Mr. Black belatedly took on some child-care responsibilities. CP 40. In effect the trial court assumed that parenting was entirely Ms. Black’s responsibility, counting it as a negative factor against her for doing slightly less after the divorce process began,

while the father was rewarded for contributing in any way after the divorce process began.

The trial court's undervaluing of Ms. Black's contributions as a parent during the entirety of the children's lives while favoring the father's alleged stability after the divorce process began conflicts with the meaning of "stability" under the statute. The statute looks at the entirety of the relationship and not simply the time period during the divorce. RCW 26.09.187(3)(a). Similarly, while there is no presumption in favor of the primary caregiver, as the Court of Appeals recognized, *Black*, slip op. at 16, that does not mean Ms. Black's significant role in caring for the children can carry little to no weight.

3. Reliance on gender stereotypes in custody decisions results in disparate treatment that harms women.

The trial court's approach in undervaluing Ms. Black's role as a stay-at-home parent also conflicts with the ERA's provision that legal rights and responsibilities cannot be denied or abridged on "account of" sex, the WLAD's ban on sex discrimination, and the federal case law condemning gender stereotypes. The discrimination arises because women are more often stay-at-home parents. As of 2012, approximately 29 percent of mothers are stay-at-home parents (an increase from 23 percent in 1999), as compared to roughly six percent of families where the mother

works full time and the father works part time or is not employed. Eileen Patten, *How American Parents Balance Work and Family Life When Both Work*, Pew Research Center (Nov. 4, 2015), http://www.pewresearch.org/fact-tank/2015/11/04/how-american-parents-balance-work-and-family-life-when-both-work/; D'Vera Cohn *et al.*, *After Decades of Decline, A Rise in Stay-at-Home Mothers*, Pew Research Center (Apr. 8, 2014) http://www.pewsocialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers/. Devaluing the mother's stay-at-home role in favor of a father's fulltime employment under the guise of financial stability thus has a disproportionate impact on women, perpetuating disparate treatment. *See*, Mary Jean Dolan & Daniel J. Hynan, *Fighting Over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity Over Quality in Child Custody Decisions*, 38 Law & Psychol. Rev. 45 (2013).

It is also well documented that women are more often economically disadvantaged after a divorce than men, so allowing a parent to be favored in residential time allocation for their "financial stability" likewise perpetuates gender disparity to the detriment of women:

> [T]he standards of living of many women decline precipitously at divorce. Moreover, many divorced women experience difficulty finding work, remain trapped in low-paying jobs, and/or work two jobs to survive. . . . Discrimination against women in the workplace helps

> explain women's financial vulnerability at divorce, but many other factors contribute as well. . . . [F]ormal equality rhetoric . . . [has] produced custody law that places fathers on better than equal legal footing with mothers and fails to honor the caretaking mothers typically provide for their children. . . . [T]rial courts hold mothers to higher moral and parenting standards than fathers. Courts also sometimes punish a mother who has limited financial resources. Yet if the mother works outside the home, courts perceive her work as in conflict with the children's best interests. In contrast, judges see the father's employment as beneficial to the children. Courts credit the father's higher income and his ability to provide a more stable environment, while ignoring that the instability of the mother's home necessarily results from the divorce.

Penelope Bryan, *Reasking the Woman Question at Divorce*, 75 Chicago-Kent Law Rev. 713, 713-14, 725-26 (2000).

To avoid furthering such discrimination, courts in other states have made clear that family law parenting plan determinations should not be based on the relative economic position of the parents, and should be reversed for abuse of discretion when relative economic position is considered. As one California court explained, "[s]uch a factor improperly presumes that children should live in the community of the parent who is wealthier. This factor has nothing to do with the best interests of the child." *In re Marriage of Fingert*, 221 Cal.App.3d 1575, 1581, 271 Cal.Rptr. 389 (Cal. 1990). *Accord*, *Gould v. Gould*, 116 Wisc.2d 493, 501, 342 N.W.2d 426 (Wisc. 1984) (financial ability not a criteria for custody, noting a comparison between the wealth of parents would discriminate

against women). The pay gap between men and women is hardly a relic of the past; a recent Census Bureau report showed women in Washington being paid 76 cents on the dollar compared to men. Jim Davis, *Gender Pay Gap Persists Even in Progressive Washington*, The Everett Herald (Sept. 28, 2016) http://www.heraldnet.com/business/gender-pay-gap-persists-even-in-progressive-washington/. This Court should follow the *Fingert* and *Gould* courts' guidance and overturn the trial court's application of the "financial stability" factor in this case; it cannot be reconciled with state and federal law requiring neutrality as to gender.

B. The Trial Court Failed to Apply the Religious Neutrality Required by the Constitution by Giving the Father Greater Residential Time and Sole Educational Decision-making Authority on the Basis of Alleged Religious "Stability"

1. The requirement of religious neutrality in family law decisions is well settled.

Both within and outside of the family law context, the law has long required that courts respect "absolute freedom of conscience," Wash. Const. art. 1, § 11, as well as remain neutral with respect to religion, U.S. Const. amend. I. This Court has recognized that the Washington Constitution protects religious freedom even more strongly than the First Amendment. *City of Woodinville v. Northshore Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009). That protection from government interference as to religion extends to family law cases, where Washington

courts clearly require religious neutrality in family law decisions. This Court in *Munoz v. Munoz*, 79 Wn.2d 810, 814, 489 P.2d 1133 (1971), explained how family courts should handle parenting decisions when the parents have different religious views: "[W]here the trial court does not follow the generally established rule of noninterference in religious matters in child custody cases without an affirmative showing of compelling reasons for such action, we are of the opinion that this is tantamount to a manifest abuse of discretion." In words that provide significant insight to the issues before the Court in this case, the *Munoz* Court, 79 Wn.2d at 815, stated "[w]e are not convinced, in absence of evidence to the contrary, that duality of religious beliefs, per se, creates a conflict upon young minds."

The *Munoz* Court, *id.* at 812, reversed a restriction in a divorce case prohibiting the father from "taking the children to any Catholic Church services or to any instructional classes sponsored by the Catholic Church." There was no affirmative showing that it would be detrimental to the children's well-being to allow the father to take them to Catholic Church but the lower court speculated that the parents' different faiths would be confusing to the parties' six-year-old son. The Court recognized that "noninterference" in religion is required in order to protect both parents' constitutional rights to religious freedom: "The obvious reason

for such a policy of impartiality regarding religious beliefs is that, constitutionally, American courts are forbidden from interfering with religious freedoms or to take steps preferring one religion over another." *Id.* at 812-13. *See also In re Marriage of Jensen-Branch*, 78 Wn. App. 482, 490, 899 P.2d 804 (1995). As *Munoz* said, 79 Wn.2d at 813, "the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child."

The religious neutrality required by *Munoz* applies under Washington's Parenting Act. *Jensen-Branch*, 78 Wn. App. at 490. Neither preference for a particular religion nor preference for religion over non-religion is permitted. *Id.* at 490 n.2: "[A] parent's lack of religious belief receives the same protection as any particular religious belief." *See also Bonjour v. Bonjour*, 592 P.2d 1233, 1243 (Alaska 1979) ("According a preference in child custody proceedings to parents who are members of an 'organized religious community' violates that strict neutrality which the branches of government, including the judiciary, must assume in considering religious factors."). *See also* Note, *The Establishment Clause*

and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation, 82 Mich. L. Rev. 1702 (1984).

Although the *Jensen-Branch* Court's discussion of neutrality as to parents' religious beliefs occurred in the context of religious decision-making, its reasoning and that of *Munoz* apply to the way the trial court here based its allocation of residential time and education decision-making authority on a determination of which parent would maintain the children's previous religious upbringing. The educational decision-making issue was inextricably intertwined with the religion issue because the children had attended religious schools. As *Jensen-Branch*, 78 Wn. App. at 491-92, and the *Munoz* courts recognized, a family court is properly concerned with harmful exposure of the children to parental conflict. But the reasoning of those cases does not authorize a court to use religious stability to grant greater residential time and full control of education decision-making to the parent who will most keep the children's religious experiences exactly the same as they have been in the past. "The constitutional right to free exercise of religion does not allow sole decisionmaking in this area, even if the parents are not capable of joint decisionmaking, if leaving each parent free to teach the children about religion independently would not cause actual or potential harm to the children." *Jensen-Branch*, 78 Wn. App. at 492. *See also Munoz*, 79 Wn.2d

at 814-15 (holding that diversity of parents' religious beliefs and exposure of the children to that diversity does not, by itself, establish an adverse effect upon children).

2. The religious neutrality requirement was violated here.

The trial court mentioned religion throughout its parenting plan ruling and granted primary residential placement to the father with only limited parenting time—three and one-half days every two weeks—for Ms. Black based in significant part on the speculation that the children would have difficulty reconciling their religious upbringing with Ms. Black's same-sex relationship. The court stated that the father is "clearly the more stable parent in terms of the ability to provide for the needs of these children . . . in maintaining their religious upbringing," and 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." CP 40-41. Moreover, the trial court restricted Ms. Black's communication with her children regarding her sexual orientation and religion and imposed restrictions on her children having contact with her partner. Although the Court of Appeals properly reversed these restrictions, they show the central and improper role that sexual orientation and religion played in the trial court's ruling.

The *Munoz* standard for judicial interference in religious matters, 79 Wn.2d at 813-14, was not met here. There was no evidence here of the kind of harmful exposure to parental conflict with which the law is properly concerned. In the absence of the kind of harm required by the case law, the trial court's rulings stating that the father would better "maintain stability in the children's religious upbringing" failed to adequately protect Ms. Black's constitutional right to free religious exercise. Despite the trial court finding that both parents are fit, loving parents with good relationships with their children, its designation of the father as the primary residential placement and giving Ms. Black far less residential time than she had previously had violated the neutrality requirement. The trial court's giving educational decision-making authority to the father as part of "maintaining stability in the children's religious upbringing" likewise violated the religious neutrality and "noninterference" principles that cases like *Munoz* require.

The Court of Appeals' analysis of this issue was similarly flawed. *Black*, Slip Op. at 18. It characterized the trial court's consideration of the children's religion as being in accordance with RCW 26.09.184(3), which merely allows consideration of the children's religion. But "consideration" does not justify failing to remain neutral as to religion and also failing to adequately protect a parent's right to diversity of religious views. The

inquiry into "stability" cannot mean that a parent's residential time may be reduced unless they hold religious views that are identical to what the children have been exposed to in the past. This interpretation would mean that any parent who chooses to follow different religious views than the family has followed in the past would be at risk of losing residential time with their children.

As *Amici* explained in their brief in the Court of Appeals at p. 11, this would also mean that any parent who comes out as LGBT in a conservative religious family would be at risk of losing residential time and decision-making authority because the other parent would be viewed as better "maintaining stability in the children's religious upbringing." This is incompatible with the federal and state courts' commitment to equal protection for LGBT people, yet that is the logical outcome of the lower courts' reasoning, a result which conflicts with the religious neutrality required by the case law and constitution, justifying reversal by this Court. *See, e.g.*, *Pierson v. Pierson*, 143 So.3d 1201 (Fla. App. 2014) (recognizing, where the parents followed different faiths, that the First Amendment's protections for religious exercise and prohibition ban on religious establishment require divorce courts to accommodate both parents' religious beliefs); *Zummo v. Zummo*, 394 Pa.Super. 30, 574 A.2d 1130, 1132-35, 1150-52 (Pa. 1990) (holding that respect for the First

Amendment and religious diversity of the United States require a trial court's neutrality as to religion in parenting plans).

It is therefore necessary to reverse the residential placement and education decision-making rulings below and remand for application of the legal analysis required by the cases cited above.

V. CONCLUSION

Washington's Constitution and laws have long mandated neutrality as to gender and faith. Gender discrimination and interference with religious matters do not comport with our commitment to equal rights for all. All families will be harmed if the lower courts' rulings on the issues discussed herein are allowed to stand. The trial court's order concerning residential placement and awarding sole educational decision-making to Mr. Black should be reversed in its entirety and remanded with instructions to apply the principles discussed in this brief, Ms. Black's briefs, and the other brief of *Amici*.

Respectfully submitted on October 7, 2016.

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