No. 46788-7-II

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

RACHELLE K. BLACK,

Appellant,

v.

CHARLES W. BLACK,

Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

ACLU OF WASHINGTON FOUNDATION

Roger A. Leishman, WSBA No. 19971
rogerleishman@reachfar.net
P.O. Box 1763
Seattle, WA 98111

Nancy Talner, WSBA No. 11196
talner@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amicus Curiae*

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INTRODUCTION AND ISSUES ADDRESSED BY *AMICUS*

Washington law now allows Rachelle Black to marry the woman she loves. That fact—unimaginable just a few years ago—is a happy testament to the law's recognition of the dignity of all lesbian, gay, bisexual, and transgender individuals and their relationships.

Nevertheless, despite recent changes in society at large, the process of "coming out" remains a distinctly personal journey. For LGBT individuals like Rachelle who come from conservative religious backgrounds, the process of gradual self-discovery and eventual disclosure to others often occurs only after years of conformity with majority gender roles, including the birth of children while married to different-sex spouses. Divorce requires governmental involvement in decisions about child custody and parental decision making. However, as discussed in this brief, those judicial decisions cannot violate First Amendment speech and religious rights, nor the right to be free of discrimination on the basis of sexual orientation.

For two decades, including after the couple began the process of separating, Rachelle was a stay-at-home mother while Chuck worked full time out of the home. Despite Rachelle's close bonds with each of their three sons, the trial court nevertheless disregarded the "strength, nature, and stability of the child[ren]'s relationship with" their mother. RCW

26.09.187(3)(a)(1). Instead, the court concluded that Chuck offered "stability" in "maintaining their religious upbringing." CP 40. This conclusion was based on a mischaracterization of the statutory "stability" factor and on a legally erroneous interpretation of "harm" and the best interests of the children. It also improperly favored the religious and discriminatory biases of one parent. As a result of these legal errors, the trial court imposed severe restraints on Rachelle's speech and conduct that Chuck does not even attempt to defend on appeal, and radically reduced her parenting time to just four days out of every two weeks.

Contrary to the trial court's reasoning, however, every marital dissolution involves change, and every family has to adjust when an LGBT parent or child comes out. As Division I of this Court held almost twenty years ago in the case of a divorcing gay parent from a similarly conservative religious background, when "the problem is adjustment, the remedy is counseling." *In re Marriage of Wicklund*, 84 Wn. App. 763, 765, 932 P.2d 652 (1996). The trial court's erroneous approach to "stability" in this case conflicts with the ruling in *Wicklund*, discriminates against LGBT parents who divorce, errs by favoring one religious view of homosexuality, and improperly intrudes on Rachelle's free speech and religious freedom rights. This Court should reverse the judgment below.

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the preservation of civil liberties, including free speech and religious freedom. The ACLU strongly supports equal treatment of lesbian, gay, bisexual, and transgender individuals and their families, as well as governmental respect for and neutrality among religious beliefs. It has participated in numerous LGBT-related cases as counsel to parties and as *amicus curiae*, including *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 669 P.2d 886 (1983), and *In re Marriage of Wicklund*, *supra*.

STATEMENT OF THE CASE

Amicus adopts Appellant's Statement of the Case.

ARGUMENT

A. The Trial Court's Patently Unconstitutional Limits on Rachelle's Speech and Conduct and its Related Restriction of her Parenting Time Misapplied Washington and First Amendment Law.

As Chuck acknowledges, "the children's 'dogmatic, fundamentalist' religious upbringing" was "a principal basis for the trial court's decisions." Resp. Br. 2. Concluding that Chuck offered more "stability" to the children than Rachelle, the trial court limited her parenting time to four days out of each fortnight and took away from her

parenting and decision-making authority as to decisions about the children's education, day care, and religion. CP 39-51. The court also entered Chuck's proposed order prohibiting Rachelle from any future conduct or "conversations with the children regarding religion, homosexuality, or other alternative lifestyles concepts," including any contact between the children and her partner, unless specifically pre-approved by the boys' therapist. CP 49. Rachelle assigned error to each of these rulings. App. Br. 1-2.

Briefs submitted to this Court by both Rachelle and *amicus curiae* National Center for Lesbian Rights *et al*. provide extensive authority demonstrating that the trial court's speech and conduct restrictions—already temporarily stayed pending this appeal—are manifestly unconstitutional and contrary to First Amendment and Washington law. The *amicus* brief of the Washington State Psychological Association *et al*. also demonstrates that far from protecting the children's best interests, these restrictions likely harmed them. *Amicus* ACLU agrees with all those points and, based on its expertise with defense of constitutional rights even when they conflict, offers additional authority on the merits of these issues.

First, this Court should make clear just how far from the accepted legal standards the restrictions on Rachelle are in this case. Although

temporarily stayed, the extraordinary restrictions on Rachelle's speech and conduct remain part of the final judgment; Chuck merely states that he currently "sees no reason to enforce this provision in the future." Resp. Br. 22. Yet Chuck offers no authority or argument in support of the continuing legal restriction he demanded below, instead characterizing it as "moot." *Id.* To the contrary, he has *abandoned* his contention that such limitations on the boys' mother are legally justified, and thus necessarily concedes that the judgment should be reversed at least in part. *See, e.g.*, RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Second, even if the passage of time has mooted some aspects of the parenting plan restrictions, the draconian limits on Rachelle's speech and conduct present issues of substantial continuing public interest that warrant consideration and explicit rejection by this Court on the grounds set forth by Rachelle and *amici*. *See, e.g.*, *In re Pers. Restraint of Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983). Unconstitutional restrictions on a spouse's free speech rights impact the public interest, and even in divorces where children are involved, the best interests of the child standard does not by itself justify a violation of free speech rights. *In re Marriage of Suggs*, 152 Wn.2d 74, 93 P.3d 161 (2004); *In re Marriage of Olson*, 69 Wn. App. 621, 850 P.2d 527 (1993) ("Although the welfare of

children is the State's paramount concern in dissolutions, restraining speech merely on the basis of content presumptively violates the First Amendment. [citation omitted.]"). The restrictions here implicate fundamental principles of free speech law: prior restraints, viewpoint and content discrimination, religious speech, and failure to consider less restrictive alternatives. *Id*.; U.S. Const. amend. I; Wash. Const. art. 1, sec. 5. For a comprehensive analysis of these issues in the context of parenting plan restrictions, see, Eugene Volokh, "Parent-Child Speech and Child Custody Speech Restrictions," 81 N.Y.U. Law Review 631 (2006). As discussed below in Section B, these same issues are likely to arise in other cases where a parent comes out after years of marriage in other families from conservative religious traditions. The likelihood of recurrence of the issue and the involvement of several significant constitutional rights demonstrates the impact on the public interest.

The trial court's related restriction of Rachelle's parenting time and decision-making authority is based on the same erroneous focus on preserving the "stability" of the boys' fundamentalist upbringing, and likewise fails as a matter of law. *See In re Marriage of Hadeen*, 27 Wn. App. 566, 581, 619 P.2d 374 (1980) (recognizing trial court ruling on other issues in divorce had to be reversed when custody ruling was reversed because the issues were "intertwined inextricably"). As Chuck

acknowledges, such "stability was a key factor" in the GAL's and therapist's recommendation to make him the "primary residential parent." Resp. Br. 9; *see also id.* at 3 (characterizing "the children's upbringing as 'a very dogmatic fundamentalist situation'"). But a "trial court abuses its discretion if it restricts parental rights because the parent is gay or lesbian." *Wicklund*, 84 Wn. App. at 770 (citing *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983)); *see also* 84 Wn. App. at 772 (courts "may not restrict residential time because of the parent's sexual orientation").

In *Wicklund*, the parents had "voluntarily and diligently raised their four children within the Jehovah Witness faith," which considered the "practice of homosexuality is an abomination." *Id.* at 769. Years later the father came out as gay, and the couple divorced. The court overturned restrictions on his parental rights that were intended to "protect the children from the conflict between homosexuality and their religion," concluding that "[i]f the problem is adjustment, the remedy is counseling." *Id.* at 765. Applying the same standard, the court nevertheless affirmed a typical residential schedule that placed the children primarily with their mother during the school year rather than alternating weeks as requested by the father, concluding that the trial court's decision was tenable because it was based on evidence that "the children found it hard going

back forth between the two houses," rather than "because of his sexual orientation." *Id.* at 772-73.

In contrast, here the trial court not only imposed untenable limitations on Rachelle's speech and conduct, but also improperly restricted Rachelle's residential time *because of her sexual orientation*—concluding that the children should be placed with their father rather than their mother because it would be "very challenging to reconcile their religious upbringing with the changes occurring within their family over issues involving marriage and dissolution, as well as homosexuality," and that Chuck offered "stability" in "maintaining their religious upbringing." CP 40-41. As divorcing spouses with shared Christian beliefs, Rachelle and Chuck were identically situated with respect to "issues involving marriage and dissolution." *Id.* at 41. By explicitly distinguishing between the parties based on Rachelle's "homosexuality," *id.*, the trial court improperly "restrict[ed] residential time because of the parent's sexual orientation." *Wicklund*, 84 Wn. App. at 772-73.

Decades before the legislature and voters adopted marriage equality, Washington courts already recognized that parenting plans cannot discriminate on the basis of sexual orientation, and that LGBT parents who come out of the closet should be able to get divorced without sacrificing their relationship with their children—regardless of the

family's religious background. Tellingly, Chuck's brief does not even refer to *Wicklund* or *Cabalquinto.* This Court should apply established Washington and First Amendment law, and reverse the trial court's erroneous decisions as to restrictions on Rachelle's speech and conduct, decision-making, and custody.

B. The Trial Court's Erroneous "Stability" Standard Used in its Custody and Decision Making Rulings Discriminates Against LGBT Individuals, Unconstitutionally Favors Certain Religious Beliefs, and Harms Washington Families.

If affirmed and followed by other judges, the trial court's approach to the dissolution of mixed-orientation marriages is likely to harm other individuals and families. As numerous commentators have observed, societal attitudes toward LGBT individuals and their relationships have dramatically changed in a remarkably short period of time. *See, e.g.*, Gary Langer, "Support For Gay Marriage Reaches Record High," ABC News (April 23, 2015).[1] But those shifts are not uniform across all demographic groups. *See, e.g.*, Robert P. Jones *et al*., "A Shifting Landscape: A Decade of Change in American Attitudes about Same-Sex Marriage and LGBT Issues," Public Religion Research Institute (2014).[2] In particular,

[1] Available online at http://abcnews.go.com/Politics/support-gay-marriage-reaches-record-high/story?id=30507803, last accessed April 30, 2015.
[2] Available online at http://publicreligion.org/research/2014/02/2014-lgbt-survey/#.VUJcas59Pol, last accessed April 30, 2015.

adherents of many religious denominations continue to hold similar views regarding homosexuality as the Blacks' "fundamentalist" congregation. *Id.* at 1, 10-11, 42. In adjudicating disputes arising from civil marriage, family law courts may not discriminate on the basis of sexual orientation, nor enter orders intended to favor one spouse's religious beliefs. *See, e.g.*, *Munoz v. Munoz*, 79 Wn.2d 810, 812-13, 489 P.2d 1133 (1971) (reversing a restriction prohibiting the father from "taking the children to any Catholic Church services or to any instructional classes sponsored by the Catholic Church" where 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 only speculation that it was confusing to the parties' six-year-old son). The Washington Supreme Court held in *Munoz* "We are not convinced, in absence of evidence to the contrary, that duality of religious beliefs, per se, creates a conflict upon young minds." *Munoz*, 79 Wn.2d at 815.

Despite the increase in visibility and extraordinary transformation of the LGBT community's role in society in the last twenty-five years, "coming out" remains a very personal process. Each LGBT person must come out in his or her own way, regardless of whether it happens in youth, adolescence, mid-life, or old age. Some people are always going to take a bit longer than others. *See, e.g.*, Ritch C. Savin-Williams, . . . *And Then I*

Became Gay: Young Men's Stories (Routledge 1996). Perhaps most significantly, LGBT individuals are born to all kinds of parents and grow up in all kinds of households, including evangelical Christians, Mormons, Orthodox Jews, and conservative Muslims. Indeed, many of the very attributes that fundamentalist communities share are likely to generate cases like the Blacks' for many years to come: limited information available to youths about sexuality, prohibitions on premarital sex, and pressure to marry and have children at comparatively young ages, with LGBT parents finally coming out to themselves and their family as lesbian, gay, bisexual, or transgender only after years of marriage. As they shepherd the parties through the dissolution of such marriages, judges cannot slam the closet door closed, punish the LGBT parent, nor "artificially ameliorate changes in a child's life." *Wicklund*, 84 Wn. App. at 771.

The trial court's ruling not only erred by promoting bias on the basis of sexual orientation, but also improperly favored one parent's religious beliefs without the legally required showing of harm to the children. As a Florida court recently recognized in *Pierson v. Pierson*, 143 So.3d 1201 (Fla. App. 2014):

> As explained by the United States Supreme Court, parents have the right to direct the religious upbringing of their children. *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 32 L. Ed.

> 2d 15 (1972). Restrictions upon a noncustodial parent's right to expose his or her child to his or her religious beliefs have consistently been overturned in the absence of a clear, affirmative showing that the religious activities at issue will be harmful to the child. *Mesa v. Mesa*, 652 So.2d 456, 457 (Fla. App. 1995). As explained by the Fourth District in *Mesa*, "[a]llowing a court to choose one parent's religious beliefs and practices over another's, in the absence of a clear showing of harm to the child, would violate the [F]irst [A]mendment [of the United States Constitution]." *Id.* … See also *Gerencser v. Mills*, 4 So.3d 22, 24 n. 2 (Fla. App. 2009) ("Without a showing of harm to the children, the court should not infringe on either parent's free exercise of his or her religious beliefs."); *Abbo v. Briskin*, 660 So.2d 1157, 1158 (Fla. App. 1995) (reversing the trial court's restriction that the mother "not interfere in the development of the child's Jewish religious training and upbringing, nor should she actively influence the religious training of the child in any other direction, other than the Jewish faith" and noting that "[a]s with married parents who share diverse religious beliefs, the question of a child's religion must be left to the parents even if they clash").

143 So.2d at 1202-03. *Pierson* involved one parent who was Catholic and the other was a Jehovah's Witness. The court recognized that First Amendment freedom of religion rights and the First Amendment's ban on government establishment of religion required divorce courts to accommodate both parents' religious beliefs. *Id.*

Similarly, in *Zummo v. Zummo*, 394 Pa.Super. 30, 574 A.2d 1130, 1132 (1990), the appellate court held that an order prohibiting a father from taking his children to Catholic religious services that were "contrary to the Jewish faith" during periods of lawful custody or visitation violated his constitutional rights and was an abuse of discretion. The appellate

court noted that parents who are married may have differing opinions on the issues of politics and religion, and that government intervention is permitted only upon a showing of a substantial risk of harm to a child. *Id*. at 1140. The court saw no reason to treat such disagreements between divorced parents differently and held that the requirement of a substantial threat of physical or mental harm to a child is applicable to proposed restrictions on a parent's post-divorce parental rights regarding the religious upbringing. *Id*. at 1140–41.

In *Zummo*, the court explained at length that its reasoning was supported by the history of the First Amendment and the framers' inclusion of both a free exercise clause and an establishment clause, as well as by the current religious diversity of the United States. 574 A.2d at 1133-35. The court further explained that these constitutional provisions as well as the parent's right to direct the religious upbringing of their children have no less force simply because a court must rule on a parenting plan for divorcing parents; "Rather, intervention is permitted only upon a showing of a substantial risk of harm to the child in absence of intervention, and that the intervention proposed is the least intrusive means adequate to prevent the harm." 574 A.2d at 1139-40 (citing *Wisconsin v. Yoder, supra*). Harm in this context means a "substantial threat" of "physical or mental harm to the child." *Id*. A lesser standard of

harm entangles the trial court in determining religious questions in violation of the First Amendment. *Id*. at 1146. "Stability," confusion, and the children's best interests all fail to justify a court's ruling which favors one parent's religion over another. *Zummo* at 1150-52.

The Washington Supreme Court recognizes the same rule as *Pierson* and *Zummo*: courts cannot resolve conflicts between the religious beliefs of divorcing parents by unconstitutionally favoring one parent's religious views and infringing on the other parent's beliefs. *Munoz v. Munoz, supra.* The Court of Appeals in Washington has similarly recognized that family court orders addressing the religious diversity of divorcing parents are unlawful when they favor one parent's religion to the detriment of the other parent under the guise of preventing potential "harm" to the children. *In re Marriage of Hadeen, supra*. "Since the trial court did not find that the church membership of the mother posed a threat to the mental or physical welfare of the children, it would be improper to consider the religious involvement of the mother as in ingredient in the decision as to the award of custody." *Hadeen*, 27 Wn. App. at 581 (citing *Munoz*). Stress to the children from exposure to the parents' conflicting religious views is insufficient to authorize restrictions on one parent or judicial favor to the other parent. Recognizing the following was a "cogent observation," the *Zummo* Court agreed: "Courts ought not 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 a child's maturation requires that they view and evaluate their parents in the bright light of reality." 574 A.2d at 1155.

Moreover, just as the trial court was not constitutionally permitted to favor one parent's religion over the other, it was also not permitted to use the family's religious beliefs to discriminate against Rachelle's sexual orientation. As a governmental actor, the court is no more permitted to discriminate under the guise of religious belief than a private business would be. *Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983); *Elane Photography LLC v. Willock*, 309 P.2d 53 (N.M. 2013); RCW 49.60.215. The trial court's approach to the rights of LGBT parents and their children violated established legal and constitutional principles, and would result in continued discrimination if applied to other divorcing parents from conservative religious traditions.

CONCLUSION

Regardless of when a lesbian or gay parent comes out, judges may not restrict parental rights based on sexual orientation, in the name of "stability" or under the guise of the religious beliefs held by some members of the family. Rather than applying established Washington and

First Amendment law and recognizing Rachelle's bond with each of her sons, the trial court erroneously attempted to perpetuate unchanged the children's sheltered fundamentalist upbringing. This Court should reject the trial court's discriminatory and unconstitutional approach to "stability," and reverse the judgment below.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

By: ACLU OF WASHINGTON FOUNDATION

/s/Roger A. Leishman
Roger A. Leishman, WSBA No. 19971
P.O. Box 1763
Seattle, WA 98111
rogerleishman@reachfar.net
Cooperating Attorney for ACLU-WA

/s/Nancy Talner
Nancy Talner, WSBA No. 11196
ACLU of Washington Foundation
talner@aclu-wa.org
rogerleishman@reachfar.net
901 Fifth Avenue, #630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amicus Curiae*
American Civil Liberties Union of Washington

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on May 4, 2015, I caused to be served a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON** on the following via the method of service indicated below:

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	☐ Via U.S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☐ Via Overnight Mail ☒ Via email
Steven Levy PO Box 1427 Graham, WA 98338 (253) 670-4119 Email: stevenlevyattorney@gmail.com	☐ Via U.S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☐ Via Overnight Mail ☒ Via email

COUNSEL FOR APPELLANT RACHELLE K. BLACK

Amanda J. Beane Kelly F. Moser Perkins Coie LLP 1201 Third Avenue Suite 4900 Seattle, WA 98101 (206) 359-3965 Email: abeane@perkinscoie.com kmoser@perkinscoie.com	☐ Via U.S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☐ Via Overnight Mail ☒ Via email

David Ward
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101
(206) 682-9552
Email: dward@legalvoice.org

☐ Via U.S. Mail
☐ Via Legal Messenger
☐ Via Facsimile
☐ Via Overnight Mail
☒ Via email

DATED at Seattle, Washington, this 4th day of May, 2015.

By: 

Edward Wixler
Legal Assistant

ACLU OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 600
Seattle, WA 98164
Telephone: 206.624.2184
Facsimile: 206.624.2190

Attorneys for *Amicus Curiae*

ACLU OF WASHINGTON

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Comments:

Brief of Amicus Curiae American Civil Liberties Union

Sender Name: Nancy L Talner - Email: talner@aclu-wa.org

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

ken@appeal-law.com
shelby@appeal-law.com
stevenlevyattorney@gmail.com
abeane@perkinscoie.com
kmoser@perkinscoie.com
dward@legalvoice.org
ewixler@aclu-wa.org

rogerleishman@reachfar.net