No. 88062-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES KUMAR, RANVEER SINGH, ASEGEDEW GEFE, and ABBAS KOSYMOV,

Petitioners,

v.

GATE GOURMET, INC.,

Respondent.

BRIEF OF AMICUS CURIAE LEGAL VOICE

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INTRODUCTION

Under the Washington Law Against Discrimination (WLAD), employers have a duty to reasonably accommodate the religious practices of their employees. Interpreting the WLAD to include that duty is a reasonable interpretation of the statutory language—and is the only interpretation that fully effectuates the statute's purpose.

This Court should also use this case to delineate the limits of that duty. In keeping with the limits established by Title VII case law, this Court should hold that the duty of reasonable accommodation is just that—reasonable. The duty is not a license for employees to degrade or offend customers or other employees, to discriminate based on race, gender, or sexual orientation, or to prevent equal access to important basic services such as health care.

IDENTITY AND INTEREST OF AMICUS

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of women and girls through litigation, legislation, and the provision of legal information. Since its founding in 1978 as the Northwest Women's Law Center, Legal Voice has been dedicated to protecting and advancing women's legal rights, including the right to equality in the workplace and the right to be free from discrimination in health care and in other public accommodations.

Toward that end, Legal Voice has advocated for legislation and has participated as counsel and as amicus curiae in cases in the Northwest and around the country to ensure strong enforcement and interpretation of antidiscrimination laws so that women, and indeed all people, are free from discrimination.

As part of this mission, Legal Voice has an interest in ensuring that women are free from religious discrimination. In addition, Legal Voice has an interest in making sure that religious freedom does not become a license to discriminate against women based on their gender, sexual orientation, or gender identity, or other protected status.

ISSUES ADDRESSED BY AMICUS

1. Under the WLAD, does a covered employer have a duty to reasonably accommodate an employee's sincere religious beliefs?
2. Under the WLAD, what is a covered employer required—and *not* required—to do in order to reasonably accommodate an employee's sincere religious beliefs?

STATEMENT OF THE CASE

The Petitioners are or were employees of Gate Gourmet, Inc., the Respondent.[1] Pet. Br. 8; Resp. Br. 7. Petitioners hold spiritual and philosophical beliefs that restrict their diets. Pet. Br. 9. Because the motion to dismiss only raised the cognizability of a reasonable accommodation

[1] The parties appear to disagree about whether all of the Petitioners are current employees of Gate Gourmet. *Compare* Pet. Br. 8, *with* Resp. Br. 7.

claim, Gate Gourmet does not challenge the fact that Petitioners are within the groups protected by the WLAD. Resp. Br. 7 n.1; Pet. Br. 8.

Petitioners are not allowed to bring their own food to the job or to leave for meals. Pet. Br. 8. Instead, Gate Gourmet supplies meals. Pet. Br. 8; Resp. Br. 7. Many of the meals are not prepared consistently with Petitioners' beliefs. Pet Br. 10–11; Resp. Br. 7–8. It appears that the preparation of the meals forced Petitioners not simply to forego certain food options, but to forego meals altogether during their shifts. Pet. Br. 12.

Several of the Petitioners asked Gate Gourmet to change their food preparation policies and "suggest[ed] inexpensive" alternatives. Resp. Br. 8. While Gate Gourmet changed one aspect of its practices (provided turkey meatballs), the change was short lived, and subsequent requests for accommodation were ignored. Pet. Br. 11–12.

ARGUMENT

I. The WLAD's prohibition against discrimination includes a duty to reasonably accommodate religion.

The WLAD makes it an "unfair practice" to "discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status," or

disability.[2] RCW 49.60.180(3). This case asks a question of statutory interpretation: does the phrase "discriminate against" include a failure to make reasonable accommodation for an employee's sincere religious beliefs? The answer to that question, Amicus believes, is "yes."

In interpreting a statute, the first step is to determine whether it is ambiguous. *See, e.g.*, *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963–64, 977 P.2d 554 (1999). A statute is ambiguous if it "is subject to more than one reasonable interpretation." *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993). If it finds ambiguity in a statute, this Court will adopt the interpretation "that best fulfills the legislative purpose and intent." *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996).

This Court has already held that "discriminate against" is an ambiguous term. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 686, 72 P.3d 151 (2003). Thus, the question becomes whether the phrase "discriminate against" may reasonably be interpreted to include the failure to make a reasonable accommodation. *Marriage of Kovacs*, 121 Wn.2d at 804.

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[2] Note that the WLAD protects employees from discrimination because of "creed"; it does not use the word "religion." RCW 49.60.130(3). Because the parties use the term "religion" throughout their briefs, this Brief will do the same. Amicus takes no position on the precise meaning of "creed," but the term at least *includes* religion.

The U.S. Supreme Court has already considered precisely this question—and has answered it in the affirmative. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court held that interpreting a prohibition on discrimination based on religion to include a duty to accommodate is reasonable. While *Hardison* was decided after Title VII was amended to explicitly include a duty to reasonably accommodate, the version of Title VII that *Hardison* applied was the pre-amendment version of the statute—the version that included no explicit duty to accommodate. *See id.* at 76 n.11 ("We thus need not consider whether § 701(j)"—the amendment that included a duty to reasonably accommodate—"must be applied retroactively to the facts of this litigation."). That pre-amendment version of Title VII, in words that are nearly identical to the WLAD's, prohibited employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." *Id.* at 72 (quoting 42 U.S.C. § 2000e-2(a)(1)). *Hardison* held that the EEOC's interpretation of these words—an interpretation that "impos[ed] on TWA the duty of 'reasonable accommodation' in the absence of 'undue hardship'"—was "a defensible construction of the pre-1972 statute." *Id.* If that interpretation was a defensible construction of pre-amendment Title VII, then it is also a defensible construction of the WLAD. *Accord Wondzell v. Alaska Wood*

Prods., 583 P.2d 860, 864 (Alaska 1978) ("We are persuaded that a duty of reasonable accommodation should be read into the Alaska statute. As the Supreme Court noted in *Trans World Airlines, Inc. v. Hardison*, . . . such a duty can be found as a defensible construction of the analogous federal statute.").

The next question is then whether this reasonable interpretation of the WLAD "best fulfills the legislative purpose and intent." *Marquis*, 130 Wn.2d at 108. The WLAD itself requires that it be "construed liberally for the accomplishment of [its] purposes." RCW 49.60.020. The statute's core purpose "is to deter and to eradicate discrimination in Washington," a "policy of the highest priority." *Marquis*, 130 Wn.2d at 109.

This Court can fully effectuate that policy against discrimination only by interpreting the WLAD to place on employers a duty to reasonably accommodate. Indeed, this Court has recognized that in certain circumstances an employer must take affirmative steps to prevent discrimination. *See Holland v. Boeing Co.*, 90 Wn.2d 384, 388–89, 583 P.2d 621 (1978) (duty to accommodate disability required positive steps because "an interpretation to the contrary would not work to eliminate discrimination"); WAC 162-30-020(4)(a) (effectuating the WLAD's antidiscrimination purpose by requiring employers to "provide a woman a leave of absence for the period of time that she is sick or temporarily

disabled because of pregnancy or childbirth"); *see also Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 363, 172 P.3d 688 (2007) (Madsen, J., concurring) (acknowledging pregnancy regulations requiring employers to accommodate pregnancy-related disabilities and childbirth). This case presents one of those circumstances. The fact that—as here—an employer's policy does not explicitly single out a religious group for different treatment does not prevent that policy from acting as a barrier to real equality of opportunity among all employees. *Cf. Shannon v. Pay 'N Save Corp.*, 104 Wn.2d 722, 733, 709 P.2d 799 (1985) (noting that the WLAD prohibits employment practices that are "fair in form but discriminatory in operation"). To ensure that all employees in Washington share the same opportunities regardless of their religious beliefs, the Court should interpret the WLAD to require employers to reasonably accommodate those beliefs.

II. Reasonable accommodations do not degrade or offend customers or other employees, lead to other kinds of discrimination, or impede access to important basic services such as health care.

In determining the scope of the duty to accommodate religion, this Court should be guided by the WLAD's purpose: the deterrence and eradication of discrimination. *Marquis*, 130 Wn.2d at 109. That purpose cannot be served if the duty to accommodate itself promotes

discrimination. Thus, the duty to accommodate must be carefully circumscribed to prevent religion from becoming a license for other forms of discrimination.

In defining the limits of a reasonable accommodation, this Court may look to federal case law for guidance. *See Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406 n.2, 693 P.2d 708 (1985) (noting that federal case law under Title VII, though "not binding," was "instructive"). Under Title VII, the undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a "more than *de minimis*" cost or burden. By comparison, this is a significantly easier standard for an employer to meet than the reasonable accommodation standard of the Americans with Disabilities Act. Equal Emp. Opportunity Comm'n, *Compliance Manual* § 12-IV (2008) (citing 42 U.S.C. § 2000e(j)).

Title VII does not give an employee the right to insist on a specific accommodation; rather, it requires only a "reasonable" accommodation. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) (stating that an employer need not "choose any particular reasonable accommodation," and that the only requirement is for the accommodation to be reasonable). Nor does Title VII preempt a law or regulation that precludes a particular

accommodation, even if there is no other accommodation or it results in an employee losing his or her job. *See Hardison*, 432 U.S. at 84.

Guided by these standards, the Court should, at a minimum, make clear what the duty to reasonably accommodate does *not* require employers to do: (1) to allow their employees' religious beliefs to offend or degrade others; (2) to discriminate; or (3) to impede access to important health care services.

A. Reasonable accommodations do not require that employers enable their employees to offend or degrade others.

The federal courts have uniformly held that the duty to reasonably accommodate religion does not license employees to offend or degrade fellow employees or customers. Moreover, it does not prevent employers from pursuing important goals such as encouraging diversity and discouraging discrimination.

In *Peterson v. Hewlett-Packard Co.*, for example, an evangelical Christian employee posted anti-gay biblical verses in response to Hewlett-Packard's diversity campaign, which featured gay-positive posters. 358 F.3d 599, 601–02 (9th Cir. 2004). The employee "hoped that his gay and lesbian co-workers would read the passages, repent, and be saved." *Id.* at 602. In discussions with managers, the employee said he would remove the biblical verses only if Hewlett-Packard removed the posters. *Id.* If the

posters remained up, the employee said, the anti-gay verses would have to remain. *Id.* The court held that both allowing the anti-gay verses to remain and removing the posters would unduly burden Hewlett-Packard. Hewlett-Packard was not required to allow the anti-gay verses to remain because an employer "need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce." *Id.* at 607–08. Taking down the posters was not required because "it would have infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce." *Id.* at 608. Hewlett-Packard was not required to do anything that compromised its desire to attract and retain gay and lesbian employees, and to make those employees feel welcome.

Similarly, in *Hall v. Tift County Hospital Authority*, No. 7:12-CV-12(HL), 2013 WL 2484089 (M.D. Ga. June 10, 2013), a federal court dismissed a complaint filed by a nurse at a government-run hospital who was disciplined for harassing a lesbian coworker. The plaintiff, a nursing supervisor, put religious pamphlets in her coworker's locker and sent her an email warning, "[s]odomy is a sin, gay people live in sin. . . . We will all die. We will stand before the Lord and he will hold us accountable for lack of witnessing and other sins." *Id.* at *3. The plaintiff was disciplined for violating the hospital's antidiscrimination policy by being placed on

probation for six months, removed from supervisory duties, and told to refrain from discussing personal beliefs that coworkers consider discriminatory. The district court granted summary judgment to the hospital on the plaintiff's claims under Title VII, the Equal Protection Clause, and the First Amendment, concluding that the plaintiff was not targeted or treated differently because of her religious beliefs, but was disciplined for violating the hospital's policy prohibiting harassment and discrimination.

In *Wilson v. U.S. West Communications*, 58 F.3d 1337 (8th Cir. 1995), the Eighth Circuit also approved of limits to the duty to reasonably accommodate an employee whose behavior deeply offended co-workers. There, a Catholic employee had taken a religious vow to wear a graphic anti-abortion button "until there was an end to abortion." *Id.* at 1339. The button upset and offended many of her fellow employees, so U.S. West offered her three options: she could wear the button only while in her own cubicle, cover the button while at work, or wear an anti-abortion button with the same message but without a photograph. *Id.* The employee rejected these proposals, believing that they would prevent her from being the "living witness" she had vowed to be. *Id.* The Eighth Circuit, however, held that the three proposals were reasonable accommodations that "respected the desire of co-workers not to look at the button." *Id.* at

1342. The employer was not required "to allow an employee to impose his religious views on other[]" employees. *Id.*

Nor, for that matter, is an employer required to allow an employee to impose his religious views on customers. In *Johnson v. Halls Merchandising, Inc.*, a retail employee had "religious beliefs which required her to preface nearly every sentence she spoke with the phrase 'In the name of Jesus Christ of Nazareth.'" No. 87-1042-CV-W-9, 1989 WL 23201, at *2 (W.D. Mo. Jan. 17, 1989). The court ruled that accommodating these beliefs would have been an undue hardship on the employer's need "to operate a retail business so as not to offend the religious beliefs or non beliefs of its customers." *Id.*)

This Court should adopt the teaching of these cases: an employer need not accommodate an employee's religious beliefs if the accommodation would allow the employee to offend or degrade co-workers or customers, particularly if such behavior contravenes the employer's antidiscrimination policy.

B. Reasonable accommodations do not require employers to discriminate or segregate based on race, sex, or sexual orientation.

The federal courts have also held that the duty to reasonably accommodate does not require employers to discriminate or segregate. Such holdings are in keeping with the underlying purpose of

antidiscrimination laws: deterring and eradicating discrimination. This Court should likewise ensure that the duty to accommodate under the WLAD is sufficiently narrow to effectuate this purpose.

That means, for example, that an employer need not accommodate an employee's racial harassment. Thus, an employer can forbid an employee from displaying a "recently obtained tattoo on his forearm of a hooded figure standing in front of a burning cross," even when the employee claims the tattoo is in service of his religious beliefs. *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976, 978 (N.D. Ind. 2000); *cf. also Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) ("This court refuses to lend credence or support to [the Defendant's] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."), *rev'd on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 389 U.S. 815 (1967).

Another court recognized analogous limitations on the duty to reasonably accommodate when a male emergency medical technician scheduled for overnight shifts refused on religious grounds to sleep in the same room as a woman. *Miller v. Drennon*, No. 3:89-1466-0, 1991 WL 325291 (D.S.C. June 13, 1991). There, the employer put up folding walls and allowed the employee to sleep in an alternative place, but refused to

reschedule his shifts, noting that "federal and state laws require the County to make no distinction based on gender in making EMS work assignments." *Id.* at *2. The court found that the County had gone beyond "its minimum statutory duty by installing folding walls" and by authorizing him to sleep in another place, and that it had no duty to reschedule the employee's shifts. *Id.* at *8.

Finally, in *Knight v. Connecticut Department of Public Health*, the Second Circuit rejected the reasonable accommodation of a nurse who, during a nursing visit to "the home of a same-sex couple, one of whom was in the end stages of AIDS," told the couple that salvation was only through faith in Christ and that God "doesn't like the homosexual lifestyle." 275 F.3d 156, 161 (2d Cir. 2001). In response to the couple's complaint, the nurse's employer required her to create a management-approved "Plan of Correction" before resuming home visits to patients. *Id.* The nurse filed suit, arguing that she should be allowed to evangelize to patients. The Second Circuit held that the employer was not required to permit the nurse to evangelize while providing services. The court reasoned that permitting the nurse to evangelize "would jeopardize the state's ability to provide services in a religion-neutral manner"—i.e., in a nondiscriminatory manner. *Id.* at 168.

As did the courts in these cases, this Court should hold that an employer is not required to accede to an accommodation that would itself result in discrimination. Setting such a limit would assist in furthering the paramount goal of the WLAD: "to deter and to eradicate discrimination in Washington." *Marquis*, 130 Wn.2d at 109.

C. Reasonable accommodations cannot bar equal access to health care services.

The duty to reasonably accommodate does not license employees to infringe the pateints' rights to nondiscriminatory health care and mental health services. A purportedly religious refusal to provide health care because of race, gender, sexual orientation, gender identity, or other protected characteristics is itself discrimination,[3] and hence contravenes the WLAD's purpose of prohibiting discrimination.

Such discrimination is not merely hypothetical; rather, incidents of refusals to provide necessary health care based on religious objections are well-documented. Health care providers have cited religious beliefs in denying critical medical treatment in numerous contexts, including end-of-life counseling and reproductive and other basic health care, and basic

[3] For example, regardless of the employee's basis in religious belief, courts have found that refusing service based on sexual orientation is an act of discrimination that violates antidiscrimination law. *See, e.g.*, *Elane Photography, LLC v. Willock*, --- P.3d ----, 2013 WL 4478229 (N.M. Aug. 22, 2013) (concluding that a photography company that refused to photograph a same-sex couple's commitment ceremony because of the company owners' religious beliefs violated a state law prohibiting discrimination in public accommodations).

health care for lesbians and gays. For example, some religious hospitals have denied necessary reproductive health care on the basis of religious restrictions, endangering patients' health as well as engaging in discriminatory practices.[4] Discriminatory health care treatment for LGBT and transgender patients is particularly widespread. According to a recent study, 21% of all LGBT respondents—and 53% of transgender respondents—reported being refused services by healthcare professionals or their staff.[5] For example, in 1995, Tyra Hunter, a transgender woman, bled to death after paramedics halted emergency treatment when they discovered she was transgender. *See* Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 Law & Sexuality 123, 137 (2007). And in 2001, Robert Eads, a transgender man, was refused treatment by twenty doctors after being diagnosed with cervical and ovarian cancer. *Id.*

Given this background of unequal access to health care, it is all the more important that the duty to accommodate under the WLAD not impede health care providers who *do* wish to offer nondiscriminatory

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[4] *See, e.g.*, Nat'l Health Law Program, *Health Care Refusals: Undermining Quality Care for Women* (2010), *available at* http://healthlaw.org/images/stories/Health_Care_Refusals_Undermining_Quality_Care_for_Women.pdf.

[5] One Colorado Education Fund, *Invisible: The State of LGBT Health in Colorado* 19 (2011), *available at* http://www.one-colorado.org/wp-content/uploads/2012/01/OneColorado_HealthSurveyResults.pdf.

health care. The analogous reasonable accommodation mandate of Title VII certainly provides no such impediment.

A case from the Third Circuit shows how Title VII's reasonable accommodation duty has been interpreted in the health care context. There, a nurse for a public hospital refused on religious grounds to participate in any medical procedure that terminated a pregnancy, saying that she was forbidden from "ending a life." *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 222 (3d Cir. 2000). After the plaintiff refused to participate in two emergency procedures—in one of which she caused the treatment of a patient, "standing in a pool of blood," to be delayed half an hour—the hospital offered her a lateral transfer from the hospital's Labor and Delivery section to its newborn ICU. *Id.* at 223. Shelton refused to accept the transfer based on her belief that, in that new position, she would have to participate in ending an infant's life. *Id.* As a result, she was fired. *Id.* at 224.

In ruling on Shelton's reasonable accommodation claim, the Third Circuit held that the lateral transfer would have been a reasonable accommodation, reasoning:

> It would seem unremarkable that public protectors such as police and firefighters must be neutral in providing their services. We would include public health care providers among such public protectors. Although we do not interpret Title VII to require a presumption of undue burden, we

> believe public trust and confidence requires that a public hospital's health care practitioners—with professional ethical obligations to care for the sick and injured—will provide treatment in time of emergency.

Id. at 228. The Third Circuit thus held that public employers who provide health care services have no duty to compromise the public safety to accommodate the religious beliefs of their employees. Private providers of health care do not have such a duty either, because they are governed and regulated by the same professional and ethical standards as public health care providers.

Nor does an employer have to arrange staffing to accommodate a pharmacist's religious objections to dispensing birth control. The Seventh Circuit has already reached this conclusion. *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 585 (7th Cir. 2007). And this conclusion can be seen as merely an application of a broader principle: that the duty to accommodate is not itself a license for discrimination. Under Title VII, an employer that provides a comprehensive prescription drug plan cannot exclude coverage for prescription contraceptives. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1273 (W.D. Wash. 2001). Therefore, it follows that the duty to accommodate also cannot bar equal access to

contraceptives—access that the United Nations has identified as a basic human right.[6]

To ensure that the WLAD will indeed serve its purpose of preventing discrimination, this Court should hold that the duty to reasonably accommodate does not allow race, gender, sexual orientation, or other discrimination in the provision of health care,

CONCLUSION

This Court should hold that the WLAD includes a duty to reasonably accommodate employees' sincere religious beliefs. This Court should also hold, however, that this duty does not require employers (1) to permit their employees to offend or degrade others; (2) to discriminate or segregate based on race, gender, sexual orientation, or other protected characteristics; or (3) to impede equal access to important health care services. This Court should then resolve this appeal in accordance with those holdings.

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[6] United Nations Population Fund, *The State of World Population 2012 – By Choice, Not By Chance: Family Planning, Human Rights and Development* at ii ("Family planning is a *human right.* It must therefore be available to all who want it."), *available at* http://www.unfpa.org/webdav/site/global/shared/swp/2012/EN_SWOP2012_Report.pdf.

Respectfully submitted this September 20, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on September 20, 2013, I caused a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* LEGAL VOICE** to be delivered via e-mail as follows:

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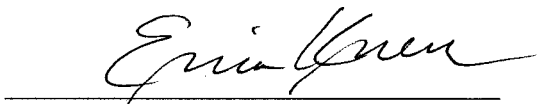

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