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IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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ADELINA GABRIELA SUAREZ,  
Respondent/Cross-Petitioner,

v.

THE STATE OF WASHINGTON, TAMMY WINEGARD and  
her community property, JULIANNE MOORE and her  
community property, and TAMMY MASTERS and her  
community property,  
Petitioners.

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MEMORANDUM OF *AMICI CURIAE*  
WASHINGTON STATE HOSPITAL ASSOCIATION,  
WASHINGTON STATE MEDICAL ASSOCIATION, AND  
AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF  
THE STATE'S PETITION FOR REVIEW

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%20Work%20Activities&text=The%20CDC%20strongl y%20recommends%20that,encourage%20them%20to% 20get%20vaccinated .....	13
<i>Vaccine Requirements for Healthcare Workers During the Coronavirus (COVID-19) Pandemic, 2021-2022,</i> Ballotpedia.org, <a href="https://ballotpedia.org/Vaccine_requirements_for_health&lt;br/&gt;care_workers_during_the_coronavirus_(COVID-&lt;br/&gt;19)_pandemic,_2021-2022">https://ballotpedia.org/Vaccine_requirements_for_health care_workers_during_the_coronavirus_(COVID- 19)_pandemic,_2021-2022</a> .....	14

## I. INTRODUCTION

Washington State Hospital Association (WSHA), Washington State Medical Association (WSMA), and American Medical Association's (AMA) Litigation Center respectfully submit this memorandum in support of the State's Petition for Review. Division III's decision in this case will have adverse effects on Washington's already overburdened and understaffed healthcare system, where religious accommodation requests have recently proliferated.

Division III rejected this Court's "undue hardship" test, which required accommodation unless it would impose more than a "*de minimis*" cost on the employer, to now require religious accommodations unless they would cause "significant difficulty or expense." This heightened standard comes from an inapplicable regulation intended to apply only to State employers for employee unpaid holiday leave requests of up to two days per year. The unwarranted expansion of that undue hardship

definition to *all* Washington employers, for *any* religious accommodation requests, will have huge ramifications, especially for healthcare employers that are already struggling with staffing shortages, financial instability, and caring for patients during a “tridemic” of COVID-19, respiratory syncytial virus (“RSV”) and influenza.<sup>1</sup> Patient access to specialized services such as pediatric ICUs and diagnostic imaging services, as well as Critical Access Hospitals serving rural communities with few other resources, is at risk. This is a matter of public interest, affecting the health and safety of all Washington residents.

## **II. IDENTITY AND INTEREST OF *AMICI CURIAE***

WSHA is an association of over 100 hospitals and health systems, and seeks to improve the health of Washington’s communities, advocating on matters affecting the delivery,

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<sup>1</sup> Elise Takahama, *Dealing With the Flu or a Cold? You’re Not Alone. Here’s What We Know*, Seattle Times (Dec. 5, 2022, 6:00 AM), <https://www.seattletimes.com/seattle-news/health/dealing-with-the-flu-or-a-cold-youre-not-alone-heres-what-we-know/>.

quality, accessibility, and continuity of healthcare. WSHA provides a unique voice on issues facing hospitals and health systems. Washington's Legislature has recognized in statutes WSHA's key role in public discourse on healthcare. *E.g.*, RCW 70.225.040 and 74.09.5225(2)(b)(iii).

WSMA is the statewide association of physicians, surgeons and physician assistants, with over 12,400 members. WSMA provides physician-driven, patient-focused advocacy as a knowledgeable and interested party in matters impacting the practice of medicine and the availability of health services for patients. WSMA works with Washington's lawmakers on legislation and has participated in court cases as a party and as *amicus curiae* on issues affecting the practice of medicine.

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Founded in 1847, it promotes the science and art of medicine and the betterment of public health. The AMA and WSMA appear on



their own behalves and as representatives of the AMA Litigation Center, a coalition among the AMA and medical societies of every state. The AMA Litigation Center is the voice of America's medical profession in legal proceedings across the country. Its mission is to represent the interests of the profession in the courts. It brings lawsuits, files *amicus* briefs, and participates in litigation of importance to physicians.

*Amici* have a direct interest in the outcome of this case, which presents an issue of enormous importance to hospitals, providers and the wellness of Washington's entire population. Healthcare facilities are suffering huge financial losses and are overburdened, understaffed, and struggling to meet the public's needs. Simultaneously, religious accommodation requests have increased substantially since the COVID-19 outbreak. These are not limited to unpaid leave requests; the imposition of vaccination and mask mandates has spawned a flood of religious accommodation requests, and facilities of all sizes are struggling

to maintain necessary staffing to keep up with demand. The lower court's expanded definition of "undue hardship" will add more burden—further reduction in staff available for patient care, more demands and stress on staff trying to cover yet more shifts, increased administrative complexity, and financial expense—to a system that is already beyond capacity.

Division III's "undue hardship" standard will significantly alter the administration of religious accommodation requests for all employers in Washington and create unworkable financial and administrative hurdles for hospitals and providers. The ruling jeopardizes the availability of care that is crucial to the health and wellbeing of all Washingtonians. To ensure the broadest access to adequate care while balancing the need to protect religious freedoms, this Court should accept review, reverse the Court of Appeals, and reaffirm the *de minimis* "undue hardship" standard as articulated in *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014).

### III. ARGUMENT

#### A. Division III’s Untenable Expansion of the “Undue Hardship” Standard Warrants Review.

This Court should grant review pursuant to RAP 13.4(b)(1) and (b)(4). Division III’s opinion is in direct conflict with *Kumar* and involves an issue of substantial public interest.

While *Kumar* articulated a *de minimis* “undue hardship” standard, Division III adopted the directly conflicting “significant difficulty or expense” definition from WAC 82-56-020, a regulation that applies only to RCW 1.16.050(3). That statute allows state employees to request leave for up to two unpaid holidays of their choosing for reasons of faith or conscience. The lower court’s ruling would expand this stringent undue hardship test far beyond the regulation’s scope, so it would apply not just to state employees’ two-day unpaid leave requests, but to all manner of religious accommodation requests by employees of all public and private employers. The decision will impose enormous, far-reaching and unintended burdens for

every Washington employer, including healthcare providers who are facing unsustainable finances, labor shortages, and increased demand for services. It will significantly increase the financial and administrative burdens on hospitals and clinics, unduly adding to the already-overburdened healthcare system's challenges providing healthcare to Washingtonians.

WAC 82-56-020 lists a number of financial factors that state employers should consider in determining whether to approve unpaid leave requests. The factors do not account for the unique needs of healthcare employers, which must consider not only financial burdens but also the need to provide patient access to healthcare.

**B. Division III's Opinion Will Have Numerous Negative Impacts on Washington's Hospitals and Providers.**

1. The Heightened "Undue Hardship" Standard Will Exacerbate Serious Staffing Issues.

Hospitals increasingly face financial crises and staffing shortages, which have only worsened since the outbreak of

COVID-19. For some hospitals, these shortages haven't changed since the height of the pandemic.<sup>2</sup> Staffing shortages have forced many facilities to rely on alternative, more expensive workers such as travel nurses, who earn significantly more than resident nurses.<sup>3</sup> Washington's healthcare systems lost more than \$1.6 billion during the first nine months of 2022, and spent over a *billion dollars* on traveling nurses compared to the same period last year.<sup>4</sup> Fifty percent of acute care hospitals will be out of cash by the end of 2023 if trends continue. As a result, hospitals have started cutting services.<sup>5</sup>

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<sup>2</sup> Clayton Franke, *Hospital CEOs Talk Staffing Shortages: Reality for Swamped Acute Care Units 'Hasn't Changed' Since Last Winter's COVID Spike*, Daily World (Nov. 3, 2022, 1:30 AM), <https://www.thedailyworld.com/news/hospital-ceos-talk-staffing-shortages/>.

<sup>3</sup> Eduardo Peñalver & Kristen Swanson, *How to Heal WA's Acute Nursing Shortage*, Seattle Times (Nov. 11, 2022, 1:19 PM), <https://www.seattletimes.com/opinion/how-to-heal-was-acute-nursing-shortage/>.

<sup>4</sup> Elise Takahama, *WA Hospitals Start Cutting Services as Huge Financial Losses Continue*, Seattle Times (Dec. 13, 2022, 2:14 PM), <https://www.seattletimes.com/seattle-news/health/wa-hospitals-start-cutting-services-as-huge-financial-losses-continue/>.

<sup>5</sup> *Id.*

Meanwhile, hospitals continue to face upticks in COVID-19, RSV and influenza patients.<sup>6</sup> This “tridemic” is particularly concerning to children’s hospitals.<sup>7</sup> In November 2022, Seattle Children’s emergency room was at 100% capacity 24 hours a day and occasionally increased to 200%-300% capacity.<sup>8</sup> At Tacoma’s Mary Bridge Children’s Hospital, some children seeking emergency care face 12-hour waits. More than 60% of children’s emergency room visits are for respiratory-related issues.<sup>9</sup> As described by a Seattle Children’s Hospital director, “we are in crisis mode.”<sup>10</sup>

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<sup>6</sup> Fenit Nirappil & Jacqueline Dupree, *COVID-19 Hospitalizations Rising Post-Thanksgiving After an Autumn Lull*, Spokesman-Review (Dec. 4, 2022, 8:22 PM), <https://www.spokesman.com/stories/2022/dec/04/covid-19-hospitalizations-rising-post-thanksgiving/>.

<sup>7</sup> Kate Walters, *Washington's Children's Hospitals 'In Crisis Mode' Amid Surge Of Respiratory Viruses*, KUOW.org (Nov. 14, 2022, 5:03 PM), <https://www.kuow.org/stories/washington-s-children-s-hospitals-in-crisis-mode-amid-surge-of-respiratory-viruses>. RSV most seriously impacts older adults and young children.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Small, rural critical access hospitals face impossible staffing shortages, nurse pay increases, insurer payments that don't keep up with costs, and a reluctance to reduce care capacity for their communities. As a result, these hospitals must attempt to cover increased labor expenses by reducing the number of non-clinical full-time employees, while simultaneously adding to their workload.

Under the lower court's heightened "undue hardship" standard, staffing shortages will place further stress on an already overburdened healthcare system.

One example can be seen in medical clinics. Their services are vital to the healthcare system, providing dialysis, imaging, primary care, and other non-hospital-based services that directly reduce hospital ER visits. Small medical clinics typically have few staff. The ability of staff to cover for each other is the critical issue for determining time off, including religious leave. If the more onerous "undue hardship" test is applied, this process

would be upended and clinics would be forced to close or cancel patient appointments. This in turn would further strain already over-capacity emergency departments, as patients who cannot be treated in a clinic seek care in emergency settings.

2. Review Is Especially Significant Given the Increase in Religious Accommodation Requests Related to Vaccine Mandates and the Impact to Patients and Healthcare Co-Workers.

While WAC 82-56-020 is limited to requests for unpaid holiday leave, Division III's expanded application will now impose a new burden in other accommodation contexts. Hospitals and clinics must comply with vaccine mandates,<sup>11</sup> which prompted an unprecedented increase in religious accommodation requests.

Some critical access hospitals received COVID-19 vaccine religious exemption requests from more than 20% of

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<sup>11</sup> Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555 (Nov. 5, 2021), <https://www.federalregister.gov/documents/2021/11/05/2021-23831/medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-vaccination>.



their staff. One reported that in other years, only 3% of its staff sought religious accommodations. Another public hospital district received religious accommodation requests from nearly 30% of its employees during the pandemic, while in the decade before it received *none*. If the *de minimis* undue burden standard is replaced by Division III's far more onerous standard, hospitals will be experience many more unvaccinated workers and staffing shortages.

Division III's heightened test would apply to religious accommodation requests unrelated to leave, including vaccination and masking requirements. It will hamper healthcare employers' need to account for the impacts of employees' religious accommodation requests on third parties such as patients and co-workers, which risks devastating results.

Healthcare employers are already tasked with balancing two conflicting public policies: the obligation to ensure employees are vaccinated and take other actions to protect

themselves and others, and the obligation to provide reasonable accommodation for employees' religious beliefs. Even under *Kumar*'s "undue hardship" standard, reconciliation of these competing obligations has been challenging. Division III's far more stringent "undue hardship" standard puts providers and patients in an even more precarious position.

Healthcare workers have long been required (either by employer policy or law<sup>12</sup>) to get vaccinated given their "risk for exposure to serious, and sometimes deadly, diseases" and because they "work directly with patients or handle material that could spread infection."<sup>13</sup> The common recommended or required vaccines include influenza, MMR (measles, mumps, and rubella), and hepatitis B vaccines.<sup>14</sup> COVID-19's

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<sup>12</sup> See Governor Inslee's Proclamation 21-14.5 (COVID-19 Vaccination Requirement).

<sup>13</sup> *Recommended Vaccines for Healthcare Workers*, Centers for Disease Control (May 2, 2016), <https://www.cdc.gov/vaccines/adults/rec-vac/hcw.html>.

<sup>14</sup> *Id.*; *Seasonal Flu: Employer Guidance: Reducing Healthcare Workers' Exposure to Seasonal Flu Virus*, U.S. Department of Labor Occupational Safety and Health Administration, <https://www.osha.gov/seasonal-flu/healthcare-employers#:~:text=Basic%20Precautions%20for%20All%20Work%20Activities&text=The%20CDC%20strongly%20recommends%20that,encourage%20them%20to%20get%20vaccinated> (last visited: Dec. 16, 2022) (the Centers for Disease Control and Prevention

unprecedented circumstances made healthcare worker vaccinations even more imperative. In July 2022, Washington joined other states<sup>15</sup> in mandating that healthcare workers be vaccinated against COVID-19.<sup>16</sup> Under this mandate, healthcare workers were “not required to get vaccinated against COVID-19” if doing so would “conflict[] with their sincerely held religious beliefs, practice, or observance,” and the request could be reasonably accommodated without undue hardship (*i.e.* more than a *de minimis* cost).

Vaccine mandates were workable under the *Kumar*’s standard for hospitals and clinics because employers could consider the health and safety of patients, employees, and the community in evaluating religious accommodation requests.

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(“CDC”) “strongly recommends” that healthcare employers “provide the seasonal flu vaccine” to their employees “and encourage them to get vaccinated).

<sup>15</sup> *Vaccine Requirements for Healthcare Workers During the Coronavirus (COVID-19) Pandemic, 2021-2022*, Ballotpedia.org, [https://ballotpedia.org/Vaccine\\_requirements\\_for\\_healthcare\\_workers\\_during\\_the\\_coronavirus\\_\(COVID-19\)\\_pandemic,\\_2021-2022](https://ballotpedia.org/Vaccine_requirements_for_healthcare_workers_during_the_coronavirus_(COVID-19)_pandemic,_2021-2022) (last visited: Dec 16, 2022).

<sup>16</sup> See Governor Inslee’s Proclamation 21-14.5 (COVID-19 Vaccination Requirement).

Now, the Division III opinion threatens to drastically increase the burden and exposure on healthcare employers in navigating religious accommodation requests while protecting patients' needs. It will require analysis of financial impacts to determine if a last-minute religious accommodation leave request by, for example, a pediatric ICU nurse (similar to that made in this case), presents a "significant difficulty or expense" regardless of the impact on patient access from reducing an ICU's capacity during the tridemic. This presents an imminent threat to the ability of providers to function.

3. The Lower Court's Decision Will Create Irreconcilable Conflict Between Collective Bargaining Agreements and Religious Accommodations.

Most Washington hospitals are unionized, and the lower court's decision threatens to pit their contractual commitments, such as the terms of a collective bargaining agreement ("CBA"), against conflicting obligations to provide reasonable accommodations for its employees' religious beliefs. If

healthcare employers must accommodate more religious requests because they cannot meet Division III's heightened "undue hardship" standard, they may be forced to breach CBA seniority rights of other employees given the critical necessity of adequate staffing to meet patient demand. This presents a real risk of increased litigation, expense, staffing shortages and reduced capacity.

4. The Lower Court's "Undue Hardship" Test Adds Significant Complexity and Administrative Burden to an Already Distressed Healthcare System.

If employers are forced to use Division III's "undue hardship" definition in assessing religious accommodation requests, individual physician offices, small medical clinics and overstretched hospitals will need to undertake a far more complex ten-factor analysis for each request, with uncertain results. The administrative "hand-holding" required by the lower court before an undue hardship could apply is simply not possible for Washington's severely-understaffed healthcare systems. Nor

is the test sensible: Would closing a dialysis center for a day, or cancelling oncology patient appointments, or extending emergency room wait times by five hours be a “significant difficulty or expense”? Would forcing a respiratory therapist to “voluntarily” work on her first day off in two weeks be “undue hardship” to the employer? These are the real-world questions for which the lower court provides no answer.

#### **IV. CONCLUSION**

Healthcare facilities are overburdened and struggling to meet the public’s high demand for healthcare. The lower court’s ruling will make the situation worse, affecting not only healthcare employers, but the public at large. The recent proliferation of serious illnesses not only increases the number of patients who need medical attention, but also affects the number of illness-free staff who can provide needed care. The lower court’s opinion creates a major shift in how religious accommodation requests would need to be addressed and will

exacerbate the staffing issues that continue to threaten the ability of providers to function and adequately address public need. *Amici* urges the Court to accept review and ensure that an appropriate balance of competing interests is preserved.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of December 2022.

This document contains 2,499 words, in compliance with RAP 18.17(c)(9).

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## CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2022, the foregoing document was electronically filed with the Supreme Court of the State of Washington's CM/ECF system, which will send notification of such filing to all attorneys of record.

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### Comments:

Motion for Leave to file Amicus Curiae Memorandum and Memorandum of Amici Curiae (WSHA, WSMA, AMA) in support of the State's Petition for Review.

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